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*Cape of Good Hope. Supreme Court. 625*

# "CAPE TIMES" LAW REPORTS

OF ALL CASES DECIDED

## IN THE SUPREME COURT

OF THE

## CAPE OF GOOD HOPE,

DURING THE YEAR 1907

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

S. H. ROWSON, B.A., LL.B.,

ADVOCATE OF THE SUPREME COURT.

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**DE VILLIERS, RIGHT HON. SIR J. H., P.C., K.C.M.G., LL.D. (Chief Justice).**

**BUCHANAN, HON. SIR E. J., Knt., LL.D. (Senior Puisne Judge).**

**MAASDORP, HON. C. J. (Second Puisne Judge).**

**HOPLEY, HON. W. M. (Third Puisne Judge).**

**LAURENCE, HON. P. M. (Judge President of High Court). February 11th to  
May 15th.**

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**SAMPSON, THE HON. VICTOR, K.C., LL.B.**

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# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ALLEN V. COLONIAL  
GOVERNMENT.

1906.  
May 8th.  
" 9th.  
" 10th.  
" 11th.  
Nov. 28th.  
" 29th.  
" 30th.  
1907.  
Jan. 12th.

*Via vicinalis*—Deflection of public  
road—Right of access to—  
Station yard.

*In 1857 the Government expropriated certain land for railway purposes, and in the course of their operations deflected a certain road, which by immemorial prescription had become a public road, so as to cause it to run over a portion of the land expropriated, which had been partially fenced in for the purposes of a "goods' yard." The public continued to use without protest the road thus deflected. The original road had previously passed near to certain two lots of land, the property of the plaintiff's predecessors in title and had been generally used as a via vicinalis. In 1884 and 1902 respectively these two lots of land were transferred to the plaintiff and were described as "bounded by the railway*

*land." This property extended up to the said fence, but some railway property intervened between it and the deflected road. Plaintiff now claimed the removal of the fence that he might have access to the public road.*

*Held, that as the plaintiff's property did not abut on the deflected public road, and that as the intervening fence had stood for considerably more than 20 years before he had purchased the property, he was not entitled to succeed.*

*Semble, where a road which lies between fences is proclaimed or dedicated as a public road, it may be presumed that the drains alongside the road and inside the fences, form part of the road. But where a road is claimed by user, only the part used becomes a road.*

This was an action brought by Joseph George Silbey Allen, a hotel-keeper, of Paarl, against the Colonial Government, for a declaration of rights in regard to a road in front of his property.

The plaintiff's declaration was as follows:

1. The plaintiff is the registered owner of certain two pieces of land, situate at the Paarl, just behind the railway station, by two transfers, dated 24th October, 1884, and 25th January, 1902, which pieces of land were bought by him from Tobias Johannes Louw. The two pieces of land adjoin each other, and their frontages are upon the Paarl Station as in the same line,

2. The main road to the Paarl runs some distance from the plaintiff's land to the west of it. On the north plaintiff's land is bounded by land owned by the insolvent estate of one De Villiers. To the east of the land there is land upon which are situate the Paarl Station, certain railway buildings, and the railway itself, and the public road between the station and plaintiff's land.

3. The station, some of the buildings, and the railway were constructed by a private company in pursuance of Act 20 of 1857, and the undertaking was acquired by the Colonial Government in 1872, in pursuance of Act 15 of 1872. The land on which the station and railway were constructed was registered in the name of Adrian Jacobus Louw, sen., prior to 1857, and remained so registered till 1877, when it was transferred to Tobias Johannes Louw, in whose name it now stands registered, and there is no certificate of expropriation or any reference to expropriation in or on the transfers of the land.

4. Prior to 1857 and from time immemorial, and for a period beyond that of prescription, a public road, which the public had always used as of right for vehicular and foot traffic, ran from the Upper Paarl, past what is now the plaintiff's property, and between it and the present station, thence over the land in paragraph 3 mentioned, near where subsequently a goods shed, used in connection with the railway station, was constructed, and thence over the Berg River towards Drakenstein. When the railway was constructed after the Act No. 20 of 1857 was passed, the road so far as it crossed the land near the goods shed was deflected more to the south, and the road so deflected continued to be used by the public as of right and in manner aforesaid as a public road, and was so used by plaintiff's predecessors in title and for access to and from the pieces of land now owned by plaintiff.

5. In 1862 De Villiers constructed a road from the public road almost adjoining and to the north of plaintiff's land up to and into the main road, but he left a strip of his land between his road and plaintiff's land so as to prevent legal access from the land now owned by plaintiff and other property between it and the main road into the road so constructed by him. Thereafter the public made use of this road coming from or going to the public road, and the public road so deflected continued thereafter, up to the grievances hereinafter complained of, to be used as such by the public as of right and in the manner aforesaid up to where De Villiers' road joined it, whence the public used either De Villiers' road or the old public road.

6. In or about 1883 the plaintiff constructed an hotel on the piece of land bought by him fronting on the station, between which and plaintiff's land there was and is only the public road, and the plaintiff, his servants, and guests have until the grievances hereinafter complained of had free and uninterrupted access, as they were legally entitled to, from his hotel and land on and into the public road and vice versa.

7. Subsequently, to wit, in 1904, the plaintiff constructed another and better hotel upon the piece of land which is nearest to the land of De Villiers.

8. Prior to 1862 the only access to the station from the land now owned by plaintiff other than the said public road was by a detour of great length, which detour was shortened by De Villiers' road in 1862. From 1883, when plaintiff bought, until 1902, the only means the plaintiff had of going from his property to the main road or the Paarl was by means of the public road, and since 1902 he may do so by other roads marked on a plan, but not made up or constructed.

9. In January, 1906, the defendant by his servants and agents wrongfully and unlawfully began to construct a fence on the line between plaintiff's property and the said public road, and in front of his said hotels, so as to prevent the plaintiff from having access in and on to the said public road, and which would also prevent the plaintiff or any of the public from having access from the said public road to his hotels, and the defendant claimed, and claims the right to shut off the plaintiff from any access to the said public road, and the plaintiff has in consequence suffered damages in his business and otherwise.

10. On the 22nd January, 1906, this Honourable Court granted a rule nisi to operate as an interdict restraining the defendant from erecting a fence in front of the plaintiff's two hotels and between them and the said road, pending an action to be brought.

11. The plaintiff claims the right of access from his said property into the said road, and claims that the same is a public road, and that the defendant is not entitled by a fence or other means to prevent him from obtaining such access, all of which defendant denies.

Wherefore plaintiff claims: (a) A declaration that the said road is a public road; (b) that plaintiff is entitled to access from his property on and in to the said public road; (c) a declaration that the defendant is not entitled to erect a fence or other obstruction up against his said property or on the said road so as to prevent access from the plaintiff's property and hotels on and in to the said road; (d) an interdict restraining defendant from erecting any



such fence or other obstruction; (e) damages in the sum of £500; (f) alternative relief and costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the declaration.

2. He admits that the main road referred to in paragraph 2 runs some distance to the west of the plaintiff's land. The land is bounded on the north by land belonging to the Paarl Municipality, and on the east by land belonging to the Colonial Government, upon which are situated the Paarl Railway station and other railways buildings and the line of railway. The defendant craves leave to refer to the title deeds and diagrams of the plaintiff's property when produced at the trial for a clearer description of the boundaries thereof. Save as aforesaid, he denies the allegations contained in the said paragraph.

3. He admits paragraph 3, but says that the Colonial Government is the successor in title to the railway company which expropriated in the year 1859, or thereabouts, the land hereinafter referred to, and independently of the said expropriation the Colonial Government has by continuous adverse occupation and user as of right by itself and its predecessors in title acquired prescriptive right to the ownership of all the land upon which the station, the station yard more specifically referred to in the succeeding paragraph, the railway line and other appurtenances are situated.

4. The portion of the land between the eastern boundary of the plaintiff's land and the railway station and line has ever since the construction of the said line in the year 1863 or thereabouts been continuously, exclusively, and as of right occupied and used by the Colonial Government, and its predecessor in title, as a station yard, and has been under the exclusive control of the Government and its predecessor during the said period. The said portion has been from the aforesaid date fenced along the whole extent of the plaintiff's boundary and protected by gates. The defendant admits that those of the public who had legitimate business at the station have for a considerable period of time had access to the said yard for the furtherance of the said business, but such access has always been by the leave and licence of the Government and its predecessor respectively, and not as of right, and the station yard has at no time become a public road or thoroughfare. Save as aforesaid, he denies paragraphs 4 and 5.

5. In or about 1884 the plaintiff constructed an hotel on the land first bought by him, which hotel was fronted towards the railway station. At the prayer of the plaintiff and as an act of grace and favour, and in order to allow

him a more convenient access to the hotel from the station, the defendant conceded him the privilege of a gate in the fence referred to in the last paragraph and pending the construction of the gate made a provisional opening opposite to the hotel in the fence. A gate was erected, but the fence provisionally removed was not re-erected, and from that date until January, 1906, the defendant has permitted free access to the plaintiff, his servants and guests, to the station through the gate and opening.

6. In 1904 the plaintiff constructed a new hotel to the north of the old hotel, and upon the piece of land bought by him in 1883. Save as aforesaid, the defendant denies paragraphs 6 and 7.

7. During the construction of the hotel the plaintiff wrongfully and unlawfully pulled down the fence theretofore existing as alleged in paragraph 4 hereof along part of the boundary between the land owned by him and the station yard, but in reply to the protests of the defendant promised and undertook to re-erect the fence forthwith. Upon the plaintiff's neglect to perform his promise and undertaking the defendant and his servants began to re-construct the said fence as they lawfully might along the whole line of the boundary between the plaintiff's land and the station yard. Save as aforesaid he denies paragraphs 8 and 9 of the declaration.

8. The defendant admits that a rule *nisi* was granted as stated in paragraph 10, but denies that its terms were as therein stated and craves leave to refer to the record thereof when produced at the trial.

9. He admits that he denies the plaintiff's claims as set out in paragraph 11. Wherefore he prays that the plaintiff's claim may be dismissed, with costs.

Sir H. Juta, K.C. (with him Mr. Benjamin), for plaintiff; Mr. Schreiner, K.C. (with him Mr. H. Jones), for defendant.

Walter Murray, Registry Surveyor in the Deeds Office, produced the title deeds of A. J. Louw, and in the course of his evidence said there was no certificate of expropriation filed in the papers.

Frank Molteno, a Government surveyor, said that he visited the Paarl recently, and four old inhabitants pointed to him where the old road ran. There was a worn-out portion near De Villiers's homestead. Above the metalled road to Drakenstein the ground was very sandy and overgrown with fir trees, and the only road was that running by the station. At one time the railway had been separated from Allen's property by a wire fence, which was now in a dilapidated condition. The fence the Railway Department was interdicted from proceeding with was of iron

palings, about 5 ft. in height, and, if completed, cut the plaintiff off completely.

Cross-examined by Mr. Schreiner: If diagram followed diagram, and showed no signs of a public road, it was presumptive evidence that there never had been a public road.

Johannes Stephanus Homan, retired farmer and a J.P., living at Frenchhoek, stated that in August he would be 82 years of age. The farm he lived upon he bought from his father at the age of 23. As there was no church at Frenchhoek he had occasion to make the journey frequently to the Paarl by a road that went between Allen's property and the station. He had never been stopped on that road.

Isaac Johannes Roux, who said that he was born on the farm Picardy 71 years ago, gave evidence in support of the plaintiff's contention.

Thomas Mossop, a wool washer, of the Paarl, stated that he had been carrying on his business on the farm Zoutenval since 1877, when the railway had already been constructed. The only road he used to get to the Upper Paarl was that opposite the plaintiff's property. It was only at the beginning of this year that he heard of any objection to the thoroughfare being used by the public.

Cross-examined by Mr. Jones: He had often travelled at night, and never found the railway gates closed. The road in front of Allen's property was not the only one to the Paarl.

Robert Freyter, a partner of the previous witness, said that he resided at the Paarl from 1877 to 1899. He had often used the road, which was the subject of so much dispute, without let or hindrance. He might have seen the gate opposite the goods shed closed on one occasion.

Cross-examined by Mr. Jones: He had never travelled from the homestead to the Paarl by the "sand road."

Daniel Jacobus Homan said that he had often travelled over the road in question. It was not in so good a condition as another road, but it was a short cut. At times he had ridden over it on his horse; twenty years ago he had seen ox wagons passing over it.

J. Krige said that many years ago he had taken bricks over the road which the Government had recently tried to block up.

Cross-examined by Mr. Jones: There were a good many roads where the station at present stands. He was never stopped on any road; the people all knew him there.

Paul Roux (69 years of age), born at Groote Drakenstein, said that up to eleven years ago he lived at Klein Drakenstein. Since then he had lived at Paarl. He remembered the iron road making its appearance at Paarl.

In the old days, when he wanted to reach the Paarl, he went *via* Cecilia's Drift. Before the station was built, the road running past it was not used, because the lower road was a better one for transit. In the days long ago he had complained of the action of the Railway Company in leaving the road at the level crossing in a bad condition. Meeting with no redress, he complained to the Municipality, and was told that the Municipality had no time to deal with such matters. At length he remedied the grievance by filling up the hollow. There were gates at the crossing, and also near the goods shed. He had complained about the gate at the latter place, and in response to his agitation, the gate was removed.

Cross-examined by Mr. Jones: He complained about the gate about 2½ years after the railway had been constructed. He complained to Mr. Marais, M.L.A.

Jacob de Villiers (61 years of age) stated he had lived at the Paarl all his life, and that the farm Zoetenval was formerly owned by his father. He corroborated the other witnesses as to the public use of the road opposite the plaintiff's property. He never found the gates at the station closed. The fence which it was proposed to erect would cut off the plaintiff completely.

Cross-examined by Mr. Jones: He thought there was a public interest in the matter. The public would not allow the road to be closed.

Joseph G. S. Allen, plaintiff, stated that when he bought his property there was an old dilapidated fence, and he wrote requesting the removal of the fence. The fence was taken down, and subsequently re-erected. Where the shop now stands he had carried on the business of a hotelkeeper for many years. Many passengers by rail and road visited the house, and the road in front of the shop was used by day and night. On the suggestion of a railway official, named Brady, he closed openings in his fence. This was done to prevent cattle straying on to the road or railway. As the property was fixed now, he could not reach the station except with great difficulty, and by sufferance of neighbouring landowners. The post office stands on plots that he had bought in 1884 and 1901. Early in 1904, owing to threats of withdrawal of licence witness commenced to build his new hotel, the frontage of which was on the road in dispute. When the first floor of the new building had been reached he received an intimation from Messrs. Patterson and Shannon, of the Railway Department, to the effect that certain building material lying in front of the building would have to be removed, and a fence erected. In the course of a conversation with Mr. Patterson, the latter said; "Do you know what I'll



do with you?" I said, "No," said the witness. "I'll put a 6 ft. iron fence in front of your property, and box you in," said Mr. Patterson. "Will you?" said the witness; "you can't do it, because it is a public road." "Do you dare me?" queried Mr. Patterson. I said, "Yes, if you are going to talk that way. I came down to meet you as a gentleman, but I find I am mistaken." "What I'll do," said Mr. Patterson, "is to put a six foot fence in iron in front of your place, run in a few lines, and put trucks in front of your door." I then left, concluded the witness.

Shortly afterwards plaintiff received a letter threatening that if certain work were not carried out forthwith the department would do it at plaintiff's expense. Further acrimonious letters followed, the department contending that the plaintiff had no right to use the road, as it belonged to the department. The erection of the fence would mean his ruin, and the depreciation of the value of the hotel buildings by 66.16 per cent. The amount claimed for damages, £500, had been incurred in "running in and out of Paarl village and other trouble."

Cross-examined by Mr. Schreiner: A railway official named Parker had told him that he ought to be horsewhipped for not having sufficient accommodation for the travelling public.

Did he say it seriously?—Yes; he said it in the presence of others.

Did you think he would do it?—I hardly thought that he would be able to.

Did you think he would take it in hand personally, or have it done officially?—I don't know.

In a letter of yours you say that politics are at the bottom of the action of the Railway Department; you say you have always taken a very great interest in politics in the Progressive cause, and that the trouble is due to the opposite party. What official do you think in the Railway Department was at the bottom of it?—Mr. Parker, the station-master.

Do you think that Mr. Parker is organising an attack upon you because you are a Progressive?—I don't think Mr. Parker has any love for me.

You say that Mr. Parker has attacked you, and set all manner of machinery in motion to attack you because you are a Progressive?—I think he has sent letters to the department to hamper me, before I was heard by the officials.

Do you know that you have been told over and over again that you can have access if you pay for the gates, and an annual nominal rent?—No.

Didn't you write to the Commissioner a letter at the last General Election to this effect?—I had a letter from Dr. Jameson, telling me to work my hardest for the cause we all have at heart . . . and being a member of the working

committee of the newly-formed branch of the South African Imperial Union at the Paarl . . . I appeal to you to help me.

Now, that is hardly the letter of a man who had good legal grounds for coming to this court, where political considerations hold not the slightest sway?—I don't know.

You have tried to hamper a political Minister, and make him give you a consideration which you knew in law you had no title to?—I don't admit it.

And the Commissioner very properly replied through his private secretary (Mr. Berrange) that your note would receive his attention. Yet you wrote back thanking him for the letter—there was very little to thank him for—and you went on to say that although the Railway Department had altered its ideas they still hampered you, and that the Government had no exclusive right to the road. How do you explain that?—I just wrote to thank him.

Continuing, witness denied that the Railway Department had offered to let him have access if he paid for the gates and a small annual rental. He had received a telegram from Dr. Smartt to the effect that he could not see his way to depart from the offer made by Mr. Dalton, whereby plaintiff would be provided with access on paying for the gates and a moderate annual rental. In 1884, when writing to the department, he had spoken of his right as a concession. That he had done so because he did not want to quarrel with the Government. In 1904 he had pulled the fence down.

Was it because of the Imperial Union that in 1904 you thought you had grown fat enough to kick, because you had friends at Court?—I have had nothing from the Imperial Union so far.

Continuing, witness said that the late Inspector Dorman had had, at his request, a sluic constructed. Plaintiff would not swear that there had been a sluic at the spot in question before Inspector Dorman had one cut.

He never lent a penny to anyone in the Railway Department. He knew Mr. Brady as the Railway Engineer, but the acquaintance was a very slight one. Witness's idea was to come to terms with the Government without any quarreling, and that was why he went over Mr. Brady's head to have an interview with the General Manager. By virtue of a verbal promise, he had a permanent right to a gate, although subsequently he wrote to Mr. Elliot asking for permission, provisionally, to use the gate. Mr. Patterson deliberately threatened to box him in, but he was not in a bad temper when he made the threat. He did not know that it was a political threat in view of his zeal in the cause.

Goliath, a coloured farm labourer, born at Paarl, and who said that he

knew he was about sixty years of age, gave evidence to the locality of Paarl and the roads prior to and after the advent of the railway.

Cross-examined by Mr. Jones: He could not say if he was born in 1846, or whether he had first used the road in dispute when about fifteen years of age. He was at that time old enough to drive a pair of horses.

Sir H. Juta closed his case.

Harry Elliot, resident engineer, Western System, Cape Government Railways, and also a Government land surveyor, put in a plan prepared by himself from certain data and information received. He could produce an old iron standard, found near the road in question, bearing the inscription: "C.R., 1861, A.F. Co." The standard was of an antique pattern, and as far as he knew, the Cape Government had never used standards of that type. South of Allen's property some of the standard could be found still. Many railway stations in the country were on ground for which the Government held no title.

Cross-examined by Sir H. Juta: In a few minute details the plans he had obtained from the Railway Department, Deeds Office, and an expropriation document did not agree with regard to a road running from De Villiers' place to the station.

James Bisset, civil engineer, who came out to the Colony in connection with the Cape Town-Wellington Railway, identified a plan of the Paarl station, dated 1859, which he certified as correct, and other plans, including the expropriation plan, which witness had also certified for the information of the Surveyor-General. The general plan agreed with the expropriation plan.

Cross-examined: He did not prepare the plan put in (the draughtsman who was responsible for it was dead), but he verified it before construction was completed. He was not in charge of the construction; he was only chief assistant at headquarters. He would not put his knowledge of roads on the half day spent on the spot against that of old inhabitants. He simply made a flying visit. He was about 23 or 24 years of age at the time. Construction could not have been carried on if roads had been left open.

James Fleming, second draughtsman, Surveyor-General's Department, put in certain plans, subject to the ruling of the Court.

William Edward Green, 44, said that when quite a lad he was a clerk at Paarl station. He was about 13 years of age when he commenced work at the station. John William Rogerson was the stationmaster in those days. Continuing, witness asserted that the station gates were always closed at night long before nine.

Cross-examined, witness admitted that it was many years ago since he was "coaching" clerk at Paarl, and his memory might be a bit hazy.

Edward Steytler, of the Surveyor-General's Department, produced the grant of the farm Picardy and subsequent documents.

Thomas Metcalfe, stationmaster at the Paarl in 1876, stated that the gates were always closed at night whilst he was in charge of the station.

John Lawrence Vivien, formerly foreman porter at the Paarl under Mr. Lewis, stated that during his time the railway gates were locked every night. During the day the gates were more or less open. When the trains were due a man was sent down to the gates as a matter of caution. The main gate was never locked during witness's time. There was no reason to close the gates on Sunday, as there were no trains, through the objection of the Stellenbosch farmers, who were far too religious.

James Forrester, formerly in the service of the old company, and stationmaster at the Paarl from 1881 to 1884, said the northern gate leading from Paarl he never closed, but the other gate at the goods station was always closed. As a matter of grace he had opened it occasionally. The wagons often occupied the alleged thoroughfare.

Cross-examined by Mr. Benjamin: He often trusted it to the porter to lock the southern gate. He could not account for the evidence on the other side that the gates were left open, it must have been neglect on the part of the porter.

John Peter Powell, who entered the railway service in 1862, supported the case for the defence. Whilst he was permanent-way inspector he was never interfered with by the municipality with regard to the condition of the station yard.

Frederick Henry Kannemeyer, a coloured ganger, who entered the railway service 31 years ago, and who had been on the Paarl section of the permanent way all that period, gave evidence of a similar nature.

Jno. Johnson, a coloured ganger of 17 years standing, also testified to having seen a storm-water drain within the station fence many years ago.

Walter Masterman, who succeeded Inspector Powell as permanent-way inspector at the Paarl on December 6, 1904, said that he had measured the drain in question in order to cut out a new one when he put in a new siding.

Allan Grant Dalton, Engineer-in-Chief of the C.G.R., stated he wrote a letter to the plaintiff on the 20th December, asking him to make formal application in order that the necessary steps might be taken in accordance with the agreement come to that by a recognition of

the railway right he was to have access to the station yard upon the lines indicated in the letter.

Cross-examined by Sir H. Juta: He had many such interviews as that with Allen. He remembered the arrangement distinctly, and he was not relying entirely on the letter to aid his memory. The plaintiff clearly had a different view of what took place at the meeting, as he wrote denying the agreement. There was no misunderstanding between them.

William Janisch, clerk to the General Manager of Railways, stated he remembered a meeting in Mr. Allan Grant Dalton's office. Witness took a note immediately after the meeting of what took place between the plaintiff and Mr. Dalton. The plaintiff accepted the Government's offer, and said he would formally accept the same in writing.

Cross-examined by Sir H. Juta: Mr. Allen's contention at the outset was that the road was a public one, and the public had every right to use it. When Allen shortly afterwards wrote through his solicitors that he did not accept anything, but said at the interview that he would consider the offer, no reply was sent to the plaintiff pointing out that he had already accepted. On July 11 the department wrote regretting that the offer had been declined, and re-opened it for a fortnight. The department did not in the correspondence remind the plaintiff that he had accepted the offer.

The Hon. E. Powell, who was present at the interview, recollected Mr. Dalton saying if Allen paid a nominal sum per annum and acknowledged the right of the Government, he would meet the plaintiff by allowing access on the property, and building some gates in the fence. Allen accepted the offer unreservedly and was so delighted that he invited witness to have some refreshment.

Sir P. Faure gave evidence as to how the roads were used by the public as far back as 1872.

James Patterson, Assistant Traffic Manager of the Western System of the Cape Government Railways, stated he was at Frenchhoek and the Paarl on the 27th May, 1904, and had a conversation with the plaintiff, who was busy constructing his new hotel. The fence was taken down by the plaintiff opposite the hotel for the purpose of depositing the building material. The plaintiff promised to, and did, remove the material, but he got very angry when he was asked to replace the fence, and he refused to do it. There was no political antagonism in the matter. Witness knew nothing of this, nor did he threaten to put a six-foot iron fence in front of his place.

James William Parker, stationmaster at the Paarl, stated that when he came to the Paarl in 1866 there was a storm-water drain in the piece of ground be-

tween the railway station and the plaintiff's hotel. There was no truth in the charge against witness that because he was a political opponent he tried to close Mr. Allen in.

Cross-examined by Sir H. Juta: Witness objected to the plaintiff using the wood of the fence to cart his cement over, and to his giving a dirty appearance to the railway station.

William Bishop, employed in the office of the Engineer of the C.G.R., stated that he assisted Mr. Elliot in making a plan of the ground on which he gave evidence.

James Shannon, District Engineer of District 1, extending from Cape Town to Wellington and the adjoining branches, stated that since 1904 he had to deal with the matter between the plaintiff and the Government. Between the plaintiff's old hotel and the station there was a sluit. The sluit was more than six inches deep, although not so deep as formerly. As far as the fence was concerned, witness had it in his power to erect another.

F. Drosslar, assistant permanent way inspector of the Wellington section of the C.G.R., stated that he had lived at Groot Drakenstein for 29 years, and he was familiar with the roads. There was very little traffic, as far as he had known, on the way through the station yard.

Cross-examined by Sir H. Juta: It was after May last that he was asked to give evidence. There was no traffic through the yard, except of those travelling to the station.

Frederick Wilhelm Schwinker, a farmer of 75 years of age, stated that he went to Groot Drakenstein about 44 years ago, and farmed for about 15 years. When he travelled to the Paarl he never went through the railway yard. As far as he knew, apart from people going to the station, the railway yard was not used for traffic.

Cross-examined by Sir H. Juta: Witness drove a light cart, but for a heavy bullock wagon the road past the station was the best. He was not constantly there, and people might have travelled through the railway yard for all he knew.

Vincent Begley, who was stationmaster at the Paarl in 1884, said Allen's old building had just been completed when he came there. At that time, the railway fence ran from gate to gate. During his time the gate towards the Paarl and the gate on the south side were closed at night. When he found the south gate open he locked it. The north gate was closed, but not locked.

The gates were locked at night to prevent people passing through. The gates were closed on Sunday, but not locked until the evening.

David R. Ward, who lived at the Paarl from 1881 to 1890, stated that

people who had business with the old distillery would pass through the station way. Before he started business he was not aware of any traffic through the station.

Cross-examined by Sir H. Juta: In 1882 witness built up a good business. If the farmers of Klein Drakenstein and Wemmer's Hock had business direct with him, they would come through the station yard. Witness had gone through the same way early in the morning and late at night, and found the gates unlocked.

Re-examined by Mr. Schreiner: The gates might have been closed and reopened in the morning.

Charles John Pritchard, Government Land Surveyor, stated that in June, 1904, he made a survey of the Paarl Station. Mr. Elliot's plan correctly depicted the survey made by witness. The plaintiff pointed out his beacons, and witness had been more liberal to him than the beacons would show.

Mr. Schreiner closed his case.

Sir Henry Juta, in argument, said that the owner of land adjoining a public road was entitled to access to that road. He quoted *Ramus v. Sutherland Local Board* (67 L.T., 169), *Marshall v. Ulster Navigation Company* (25 L.T., 793), *Encyclopædia of the Laws of England* (vol. 6, p. 186), and *Davies v. Stevens* (7 C. and P., 570).

If the Government claimed a prescriptive right to keep the plaintiff off the public road, it would have to show that for 30 years it had prevented the plaintiff from going on to the road as a matter of right. A fence would not be sufficient obstruction. A fence was not put up to vindicate a right; it was merely put up for convenience. Counsel further quoted Act 8 of 1843, sections 9 and 10; *Peacock v. Hodges* (1876, Buch., 85), and *Itex v. United Kingdom Electric Telegraph Company* (6 L.T., N.S., 378).

Mr. Schreiner said the plaintiff had failed to prove any registered right of way. His property was described in the title deed as bounded by railway property. A *via publica* did not become a public road till it was declared to be so. A *via vicinalis* became a public road by uninterrupted use for 30 years, and very strong evidence was required to prove that. He quoted *Peacock and Hodges* (1876, Buch., 85), *Van Schalkwyk v. Du Plessis* (17 S.C., 454), *Maasdorp's Institutes* (pp. 181 and 182), *Voet* (43, 7, 1), *Ludolf v. Wegner* (6 J., 193), *Asman v. Rautman* (12 J., 279), *Error of Ayliff v. Hildebrand* (7 E.D.C., 172), and *Elman v. Worth* (16 S.C., 173).

Ownership of the land was, he said, obtained by Act of Parliament, not by transfer. He cited *Grimbeck v. Colonial Government* (17 S.C., 200). The plain-

tiff would have to prove immemorial user of the road before the land was expropriated, in order to succeed. The road could not become a public road merely because the public in general had travelled along it.

The plaintiff's case depended upon this road being a public road. This road was never used as a public road. It might have been used by a few farmers for special purposes to reach the distillery, but that did not make it a public road. The distinction between this road and Retief's road was that Retief's road was shown on the old diagrams (e.g., on the Laborie title in 1691) as a public road, while this road was not. The mere user of this road did not prove immemorial user, adverse user as of right, which presumed a grant by the owner. There was a difference between prescription and immemorial user. Immemorial user might be inferred from the fact that the road had been used for the period of prescription, but it need not necessarily be inferred. He cited *Peacock v. Hodges* and *Ludolf v. Wegner*.

Sir H. Juta, in reply, said that the railway authorities had evidently acted in a very high-handed way. They had no right to take any of Louw's land under compulsory expropriation, whether there was a road or not. He cited Ordinance 8 of 1843, *Slabbert v. Bell* (4 S.C., 3), *Logan v. Colonial Government* (18 S.C., 125, and 20 S.C., 343), and Act 19 of 1874 (section 3). If there had been a public road before the railway was built, the railway had no right to close it up.

*Cur. Adv. Vult.*

*Postea* (January 12th, 1907).

Maasdorp, J.: The plaintiff in this case claims to be entitled to access to and to the use of a public road passing through the station yard of the defendant, and complains that he is prevented from using it by the conduct of the defendant in placing a fence between his property and the road. It is alleged in the declaration that before the year 1857 a public road was in existence, which passed what is now the plaintiff's property, and when, in terms of Act 20 of 1857, the railway in question was constructed, it was deflected to the spot where it now lies across the defendant's property. The plaintiff contends that whatever rights in the old road belonged to the previous owners of his land now belong to him in respect of the deviated road which has been substituted for the old road. It will be necessary in the first place to decide if the old road was a public road, next, if the new road took its place, subject to all its burdens, and then whether the plaintiff is entitled to access thereto, and use thereof, at the place and



in the manner claimed by him. For many years before 1857 the Paarl was an old-establish township, and the district of Drakenstein was a thickly populated locality, comprising numerous farms. The communication between Drakenstein and the Paarl, its nearest market town, was frequent, and the vehicular and other traffic was constant. It is natural to expect under the circumstances to find that a public road of some description was in existence for the use of the inhabitants. Such road might be one proclaimed by competent authority, or created by grant or reservation, or acquired as a *via vicinalis* by immemorial user. There is no proof that roads of the two first descriptions existed, and if, therefore, there were a public road it could only be of the last description. This proposition was freely admitted on behalf of the defendant, and it is said that the evidence no doubt proves the existence of a public road of the character of a *via vicinalis* from Drakenstein to Paarl, but in a very different direction from that claimed by the plaintiff. It appears from the evidence that a public road, about which there is no dispute, runs from Klein Drakenstein to where it crosses the Berg River at Cecilia's Drift, from there two roads diverge, running to different parts of the Paarl. One goes in a northerly direction past Retief's, and this is said by the defendant, upon the evidence of his witnesses, to be undoubtedly a public road connecting Drakenstein with the Paarl. About this road there is no question, and it is clear, to my mind, that it has all along been the one most frequented by the inhabitants of Drakenstein, running as it does through the busier and more densely-built part of the Paarl. But it must be remembered that the Paarl covers in its length a large extent of country, and it would be reasonable to expect that more than one road would be found necessary to serve the convenience of the residents of Drakenstein in travelling to different parts of the Paarl. The plaintiff contends that upon the evidence it was proved that such was actually the case, and that it was in that way that the old road in dispute came into existence as a public road by immemorial user. The witnesses for the defendant seemed to admit that a second public road existed leading from Drakenstein to the main road at the Paarl, but they say that such public road was the one passing by No. 84 crossing, and running direct to the main road along a sandy track. The direct evidence as to the use of these roads before the construction of the railway in 1857 seems almost wholly to be on the side of the plaintiff. The result of the evidence, as a whole, seems to be that before 1857 the old disputed road was in constant use by the public, and was then used con-

currently with the more frequented road past Retief's residence, according as people found it easier than the latter road for heavy wagons, or, as was said by Paul Roux, they had business at that end of the Paarl. This evidence seems to me to be confirmed partially by the old plans put in by witnesses for the defence, upon which is shown a track corresponding with the road past the house of De Villiers. The question arises whether that road was already in existence before the year 1857, when the railway was constructed, as a public road in the nature of a *via vicinalis* acquired by immemorial user. If that question is answered in the affirmative, then it would follow that in 1857 the railway company had no legal power under their statutory rights to close the road and deprive the public of the use thereof without providing them with another road equally convenient for all purposes. If the road was not a public road in 1857, then it seems to me the contention on behalf of the defendant is sound, that the use by the public of a road leading into a railway yard at the invitation of the railway company, for purposes of traffic on the line, and business at the station, cannot be regarded as a user, which will ultimately, in course of time, ripen into a prescriptive right to the use of the road. But if the road was then already a public road, the question would not be one of acquiring a right, but of losing a right by acquiescence or non-user. It was provided by section 30, of Act 19 of 1861, which was passed when this railway was in the course of construction that: "If the railway crosses any public road on a level, the company shall erect and at all times maintain good and sufficient gates across such roads on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates." I do not think it could be in all cases demanded that the road should remain precisely in the same spot, or that the Courts would assist anyone who unreasonably objects to its being shifted to a place in the immediate neighbourhood where it is to all intents and purposes equally convenient to the public. An analogous case is given in the "Hollandre Consultation," vol. 5, Consult. 50, where a person who acquired a right-of-way was held to be entitled to fix the position of the road with reasonable regard to all the circumstances, but if thereafter the owner of the servient tenement should require the ground for building or agriculture he could shift the road to a spot equally convenient to the dominant tenement. I do not say that the rule is entirely applicable to a *via vicinalis*, but I think that even in the case of a *via vicinalis* parties might reasonably be expected to act in the spirit of the rule, and upon the evidence I am of opinion that that

was done in this case. Upon the question whether this road was a public road, in the nature of a *via vicinalis* when the land was expropriated by the company in about the year 1857, I find the evidence of Johannes Hauman has a most important bearing. No evidence carries us back further than his. He is 82 years of age, and he knew the road from his childhood, as far as his memory carries him back, and he says when he first knew it it was a public road used by everyone as of right. This may be said to carry us back, roughly speaking, to more than twenty years before 1857, or about 25 years before the construction of the line actually obstructed the road. The road was then in constant use by the public, and considering the comparative antiquity of the inhabited localities between which it communicated, I think it may reasonably be concluded upon the evidence that this public road was in existence a considerable number of years before that time. However, as far back as the memory of man goes this was a public road, and there is no evidence that the memory of man runs to the contrary thereof. I therefore come to the conclusion that the old road in question was a *via vicinalis*, by immemorial use, when the railway was built. When the road was obstructed by the railway the company allowed a road across their line at No. 84 crossing, and the public instead of objecting to the obstruction, commenced to use the new road by that crossing, and came into the old road again beyond the station, in the same way as they used the new road made by De Villiers when he closed the old road running by his house. In my opinion this new road to all intents and purposes took the place of the old road, was used by the public as of right, and they were never obstructed by the railway company. Isaac Roux said in evidence: "After they built the goods shed we went alongside the goods shed. After this alteration the people used the road, that is, the new road, as before, because there was no other road to the Paarl." With regard to the conflict of evidence as to the obstruction of the road by closing the gates of the railway yard, it is enough to say that in my opinion there is no evidence that any traveller was ever hindered from going along the road by these gates, nor was anything ever done by the company to make any one believe that he was allowed to use the road merely by their sufferance, or leave, and licence. The bare fact that gates were placed across the road is in itself no denial of right, for Voet (8, 3, 4) says that a gate may be placed across a servitude road, provided it does not hinder the free passage of the dominant owner. After the land was expropriated by the company, they enclosed their yard with a fence, and through this enclosed yard the road ran. There is no proof that this road oc-

cupied the whole yard up to the fence; on the contrary, there is evidence that a strip of land along the fence, where an open drain ran, was not and could not be used as a road. Where a road is proclaimed or dedicated, which lies between fences, it may, under certain circumstances, be presumed that the drains alongside the road, and inside the fences, form part of the road. But where a road is claimed by user, only the part used becomes a road, especially where it appears that the drains remained under the management and control of the owner of the land. In the case of a *via vicinalis*, I think, all persons who have land abutting on the road, or who have a right of abutment, are entitled to use the road, but in this case the land of the plaintiff lies outside the fence, it does not abut on the road, and the plaintiff could not reach the road in the direction claimed by him without passing over the land of the defendant. It must be pointed out that no representation was made to the plaintiff when he purchased in 1884 and 1902, that his land adjoined the road, but it was described as being bounded on that side by railway property. Even if the road did run up to the fence, which stands on the boundary of the plaintiff's land, I do not think he would be entitled to claim the removal of a fence which was put up at the time the road was made, that is to say, more than twenty years before the plaintiff bought the land, and much more than thirty years before he demanded the removal of the fence. This is a very different case from those cited at the bar, where a Town Council was interdicted from putting up a barrier where there had been none before. I come to the conclusion that the plaintiff is not entitled to access to the road in the manner claimed by him. It may be said that in view of the case it was unnecessary to go at such length into the character of the road, but that part of my finding would be of importance in case it should be held that that view is wrong. If it is found to be an intolerable nuisance to have a public road through a railway yard that might be rectified by necessary legislation or otherwise, safeguarding at the same time the rights of the travelling public. I may also say that I find as a fact, upon a point which may in another view of the case affect the question of damages, although it has not been set up as a defence, that it has been proved that the plaintiff, with full knowledge of his position, and in order to settle a doubtful lawsuit, agreed with the defendant to give up his claim in consideration of certain modes of access to the road which were offered to him by the defendant. A road of necessity has not been claimed in this case, although a part of the declaration and a good deal of the evidence was only rele-

vant to such an issue, but if such a claim had been made and evidence had been adduced to establish it, then, in my opinion, the terms offered by the defendant, which formed part of the agreement mentioned, were reasonable and sufficient to meet such claim. I find that the road in question is a public road, the property of the plaintiff does not abut on to the road; the fence is constructed some distance from the road on the land of defendant, and not, as alleged in the declaration, on the line between the plaintiff's property and the road; and the plaintiff is not entitled to access to the road through the defendant's fence, or across his land. Judgment is given for the defendant, with costs.

Mr. Schreiner, K.C. (for defendants), drew his lordship's attention to the fact that costs had been incurred by reason of certain proceedings for an interdict anterior to the trial, and asked whether these costs would be included.

Maasdorp, J.: I think all those costs follow.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Reid and Nephew.]

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1907.  
{ Jan. 12th.

Mr. Sutton moved for the admission of Cyril Espinell Espin as an attorney. Counsel stated that applicant was an attorney of the Transvaal Court.

Application granted, oaths to be taken before the Registrar of the E.D. Court.

Mr. Lewis moved for the admission of Thomas E. de M. Herbert as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Bredasdorp.

### PROVISIONAL ROLL.

COHEN V. DA COSTA.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BESTALL V. DU PLESSIS.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SOMERSET WEST STRAND MUNICIPALITY  
V. ALLISON.

Mr. Sutton moved for provisional sentence on certain judgments of the Resident Magistrate's Court, Stellenbosch, and for certain property situate in the division of Stellenbosch to be declared executable.

Order granted.

ESTATE SCHOEMAN V. NOURSE.

Mr. Louwrens was for the plaintiff; Sir H. Juta, K.C., was for defendant.

Mr. Louwrens applied for this matter to stand over until the 14th February, to enable plaintiff to file answering affidavits.

Sir H. Juta consented, subject to the interdict against the movables on the farm in question being removed. He said that the case set up by the defendant was that the money was always at the disposal of the plaintiff, arrangements had been made with the bank, the bank's guarantee had been sent to the plaintiff's agent, and for some reason or other, owing apparently to the fact that transfer could not be passed to the defendant, the money was not taken. Then, apparently, the original plaintiff (the seller) died, and his agent, not being aware of all the facts, without demanding the money, and without any intimation to the defendant, attached all the stock on the farm. His client was prepared to pay, and had tendered the money into court.

Mr. Louwrens consented to the removal of the interdict.

The matter was ordered to stand over until the 14th February, and the interdict was discharged.

LAWRENCE AND CO. V. MISNUM.

Mr. Gutsche moved for judgment on a mortgage bond for £350, with interest at 6 per cent. from January 1, 1905, and that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of interest.

Order granted.

ESTATE KEULDER V. ESTATE KEULDER  
AND ANOTHER.

This was an application for provisional sentence on a mortgage bond for £300 with interest from December 23,

1897. The bond had become due by reason of non-payment of interest. Counsel also moved to have the property declared executable.

Mr. Benjamin for plaintiff; Mr. Gardiner for defendant.

Mr. Gardiner said there was an agreement of the 20th July, 1898, by which the insolvent was to pay a certain sum to the defendant estate. It seemed clear in the affidavit that the trustee recognised the agreement being a good one. The defendant took that bond over not as an investment, but in consequence of the agreement, to sell which he entered into on the previous day. The defendant handed the bond over to the estate, and if he had taken it as an investment he would have retained the bond himself. It was a *bona fide* case of the bond having been discharged in part payment, and therefore that portion of his liability was liquidated by the discharge of the bond when the bond was handed over by the insolvent it was clear no insolvency was contemplated. The trustees could not recover the purchase price, which had already been paid. As a matter of fact, they did adopt the sale.

Mr. Benjamin contended that the trustees were in the same position as the insolvent. They were entitled to insist upon the bond. He submitted that the bond for £300 had never been extinguished.

Maasdorp, J.: It seems in this case that the insolvent's mother, who was the executrix in her husband's estate, wished in 1898 to sell certain properties belonging to the estate of her four sons, but it was found there was a bond existing on these properties, and that that bond would hinder the sale. It was agreed that this bond should be taken up by one of the heirs. That was done by the insolvent. The contract of sale was then concluded, and under that contract a portion of the properties was sold to the insolvent for £1,000, the mother retaining a life usufruct over that property. Upon the death of the mother the purchasers were entitled to obtain transfer, and upon the death of the mother the executors accepted this bond of £300 in part payment of the £1,000. That is clearly proved by the fact that upon their liquidation account it was made out by the insolvent himself, together with his brother, who was co-executor. The necessary entries are made to show that they accepted £300 as a set-off. The £300 was accepted as paid. There was then a settlement between the parties to the extent of £300. The bond was, therefore, accepted by the executors at that time. There can be no further claim by the insolvent against the executors after that agreement, but there seems to have been a mistaken notion, which seems to have started this case,

although Mr. Benjamin has properly not raised that point now, that because the bond has not been cancelled in the Registrar of Deeds Office, therefore such payment cannot be regarded as valid. As between the parties the payment was valid, and the bond became the property of the executors of the insolvent's father's estate, to whom it was delivered. It would further appear that not only did the trustees in the insolvent estate regard that transaction as a good one, but they actually adopted the sale. They set about selling the property, and when they failed to do so at a public auction there was a private sale of this property concluded. Then it appeared upon their asking for transfer from the executors that some difficulty existed as to certain conditions which existed as to the consent of the heirs being granted in this case. Now, whatever these difficulties may be the trustees now stand in the position of the insolvent, and they must assert their rights against any parties who hinder them from obtaining transfer, and who have any right to hinder that transfer, and if any parties have a right which must be considered in this case, then the trustees must deal with these parties. But I find it has been proved provisionally, a finding which may perhaps be set aside if the parties go into the principal case, but my finding is that there was a payment actually made and accepted by the executors in the insolvent's father's estate upon the death of the mother, and that the trustees are not entitled to claim provisional sentence upon the bond now. Provisional sentence will be refused, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinne. Defendant's Attorneys: Not on the record.]

#### HOLMES V. KONIG.

Mr. Toms moved for provisional sentence on a mortgage bond for £300, with interest from December 5, 1906, and that the property and rents be declared executable. The bond became due by reason of notice being given.

Order granted.

#### MARTIN V. INPENDER AND ANOTHER.

Mr. Swift moved for provisional sentence on a promissory note for £60, with interest from October 6, and costs.

Order granted.

#### GARLICK V. JACOBSON.

Dr. Greer moved for judgment under Rule 329d on a balance of a first bond for £465 5s., and for provisional sentence for £856 5s. 9d., balance on the



second bond, with interest, and that the property specially hypothecated be declared executable, with costs.  
Order granted.

**BLUMBERG AND SON V. VAN DER WALT.**

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £150, with interest and costs. The bond was due by reason of notice under terms of the agreement. Counsel also moved to have the property declared executable.

Order granted.

**BAILEY V. DAVIS.**

Dr. Greer moved for a degree of civil imprisonment against the defendant on an unsatisfied judgment of the Resident Magistrate's Court, Wynberg, for £3, together with £1 10s., the taxed costs.

Order granted.

**BAUM V. ASARO AND ANOTHER.**

Mr. Gardiner moved for provisional sentence on an acknowledgment of debt for a balance of £456 19s. 10d. for value received.

Order granted.

**JOURDAN V. COHEN.**

Mr. Roux moved for provisional sentence on a mortgage bond for £700, with interest, less £16 paid on account, and that the rents be attached and the property declared executable. The bond became due by reason of non-payment of interest.

The defendant said he arrived in Cape Town only on the previous day, and that negotiations were pending for a settlement.

The matter was ordered to be mentioned again.

Subsequently Mr. Roux said negotiations had fallen through, and plaintiffs pressed for judgment.

Order granted.

**KRITZINGER V. KRITZINGER AND ANOTHER.**

Mr. Sutton moved for provisional sentence on a promissory note for £250 for value received.

Order granted.

**MARAIS V. KETS.**

Mr. Gutsche moved for provisional sentence on a promissory note for £500,

with interest at the rate of 10 per cent. and costs.

Order granted.

**COSMELLI, MEYER AND CO. V. TAYLOR AND MYLES.**

Mr. Payne moved for final adjudication of the defendants' private estate as insolvent.

Order granted.

**GARLICK AND OTHERS V. BRAUDE.**

Mr. Douglas Buchanan applied for the final adjudication of the defendant's estate as insolvent.

Order granted.

**PRINCE, VINTCENT AND CO. V. KAHN.**

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**HERMANN AND CANARD V. AMERICAN HAT CO.**

Mr. Gutsche moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

**VAN DER BYL AND CO. V. CHRISTIANSEN**

Mr. Van der Byl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**PITKETHLEY V. PIKETHLEY.**

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**WIENER AND CO. V. CASSIM.**

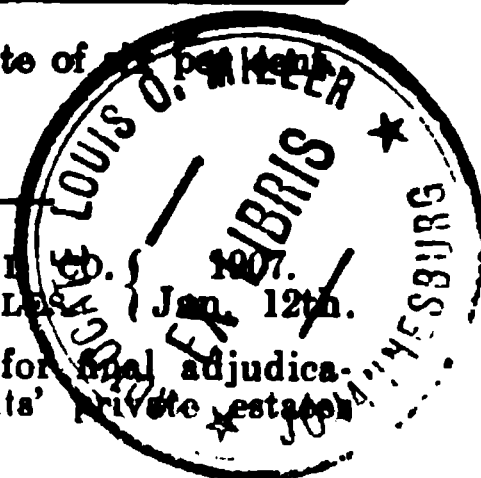
Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ZEEDERBERG AND DUNCAN V. ZWART AND CO.**

Mr. W. Porter Buchanan moved for the final adjudication of the private estate of the partners and the partnership estate of R. J. Swart as insolvent.

Order granted.



**FLETCHER'S WHOLESALE V. STEINBERG.**

Mr. Payne moved for the final sequestration of the defendant's estate as insolvent.

Order granted.

**ESTATE HIGGS V. BUCK.**

Mr. Inchbold moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ALLIE V. AMIN.**

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ESTATE JONES V. WOOLFF.**

Mr. Douglas Buchanan moved for judgment for £5,000 on a mortgage bond, and that the property specially hypothecated be declared executable, and that the rents be attached, with costs. The bond became due by reason of non-payment of interest.

Order granted.

**TREGIDGA V. VISSER AND AUSCHUTZ.**

Mr. Toms, for the plaintiff, moved for provisional sentence on three mortgage bonds for £650, £2,000, and £125, balance on the third bond, and that the property and rents thereof be declared executable. The bonds became due by reason of non-payment of interest.

Order granted.

**PERSHOUSE V. VISSER AND AUSCHUTZ.**

Mr. Watermeyer moved for provisional sentence on a mortgage bond, against the first defendant, for £1,200, with interest, and that the property be declared executable. As against the second defendant, counsel moved for a postponement until March 12.

Application granted.

**OHLSSON'S BREWERIES V. ANDREWS AND ANOTHER.**

Mr. Gutsche moved for provisional sentence on two promissory notes for £11 15s. and £12, for judgment against the second defendant, Ginnes, and as against Andrews for a postponement until February 1.

Order granted.

**MANS V. VAN DER BEEVER.** { 1907.  
Jan. 12th.

Mr. Toms moved for judgment on a promissory note for £268.

Order granted.

**DOLD AND VAN BREDA V. KATZ.**

Mr. Lewis moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £32 8s. 2d., balance of account for professional services, disbursements, etc.

Defendant appeared and offered to pay £2 a month. He said he was engaged to work on commission for a speculator in cattle. He had recently been in Kimberley buying cattle for his principal. He had no property; he had given his goods to Mr. Steytler.

Decree granted, execution to be suspended pending payment of £2 per month, first payment on the 1st February, with leave to plaintiff to apply for an increased order when so advised.

**VALUE SUPPLY CO. (IN LIQUIDATION) V. STEWART.**

Mr. P. S. T. Jones moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for a balance of £24 13s. 7d. Defendant, he said, had, through a certain individual, offered to pay £1 a month.

Decree granted.

**HOOGENDOORN V. GOODALL.**

Mr. Upington moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £75, together with £48 14s. 1d. costs.

Defendant said that he was absolutely destitute of means. Witness was an undertaker and had a salary of £8 a month. He was unable to make an offer at present, but he might be able to do so if business improved. Some time ago he prepared schedules in anticipation of surrendering his estate, and brought up the furniture amongst the assets. The furniture belonged to his wife. He was now employed as manager for the United Funeral Furnishing Co. He was willing to give up the furniture provided his wife were willing to waive her claim to it.

The matter was ordered to stand over, with a view to the parties arriving at an arrangement.

**SMITH AND CO. V. SASSO AND CO.**

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted, subject to plaintiff filing notice of set-down.

ILLIQUID ROLL.

BAUMANN V. KAPELUS. { 1907.  
Jan. 12th.

Mr. Molteno moved for judgment under rule 319, in default of plea in terms of declaration for \$50 5s., less £19, plaintiff tendering delivery of certain four donkeys, and for £3.

Order granted.

BULBRING AND CO. V. JACOBSON

Mr. Sutton moved for judgment under Rule 329d for £101 15s. 1d., goods sold and delivered, with interest and charges, on an unpaid draft.

Order granted.

DELPONTE V. ANDERSON.

Mr. Inchbold moved for judgment under Rule 329d for £48 16s. 9d., balance of rent due, with interest *a tempore morae*, and costs.

Order granted.

WIENER AND CO. V. ROODE.

Mr. Palmer moved for judgment under Rule 329d for £50 0s. 6d., balance of account, with interest *a tempore morae*, and costs.

Order granted.

VAN DER BYL AND CO. V. MILNER  
BENEVOLENT SOCIETY.

Mr. Van der Byl moved for judgment under Rule 329d for £237 7s. 10d., balance of account for goods sold and delivered.

Order granted.

CASTLE WINE AND BRANDY CO. V.  
MARSH.

Dr. Greer moved for judgment under Rule 329d for £37 8s., for goods sold and delivered, and £35 9s. 3d., moneys disbursed, with interest *a tempore morae*, and costs. Counsel said that service had been given at the hotel where defendant formerly resided.

Order granted.

GREEFF V PIKETHLEY.

Mr. Upington moved for judgment under Rule 329d for £100, rent due for the months August-November, under a lease of certain premises at Salt River, less an allowance of £9 10s.

Defendant said that the debt was not owing by himself but by another man, who had gone into insolvency. He was

not a party to the lease. Witness signed the lease, but the other man did not sign it.

Mr. Upington said that the "other man," who was defendant's brother, had had his estate sequestered at the instance of the present defendant.

Judgment was given for plaintiff, His Lordship informing defendant that, if so advised, he could move the Court to have the case reopened.

TANCRED V. FARMER.

Mr. Russell moved for judgment under Rule 329d for an order for transfer of certain property from defendant to plaintiff.

Order granted.

STANDARD BANK V. VAILE.

Mr. Palmer moved for judgment under Rule 329d for £3,662 19s., with interest, amount of overdraft and costs.

Order granted.

FAIRBRIDGE, ARDERNE AND LAWTON  
V. BLUMBERG.

Mr. Close moved for judgment under Rule 329d for £95 19s. 3d. for professional services rendered and disbursements made in the case of *Du Plessis v. Blumberg* (14 C.T.R., 138), as per taxed bill of costs, and £19 10s. 11d., being costs between attorney and client in the aforementioned case, with interest *a tempore morae* and costs.

Order granted.

PATERSON AND CO. V. GERSTNER.

Mr. Sutton moved for judgment under Rule 329d. for £49 1s. 3d., goods sold and delivered, with interest *a tempore morae* and costs. The defendant had been summoned as "R. Gerstner," but counsel read a letter from Heinrich Gerstner admitting liability, and applied for an amendment of the summons.

Summons amended and order granted.

PATERSON AND CO. V. GERSTNER.

Mr. Sutton moved for judgment under Rule 329d for £26 15s. 1d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

ESTATE BURROWES V. HERMAN.

Mr. Howes moved for judgment under Rule 329d for £40, rent of certain house.

Order granted.

**SOLOMON V. DURING.**

Mr. Lewis moved for judgment under Rule 329d for £40, less £3 paid on account, for rent.

Order granted.

**WARD V. WARD.**

This was an application to have the respondent declared of unsound mind, and for the appointment of a curator to his person and property.

Mr. Upington was for the plaintiff and Mr. Van der Byl was for the curator *ad litem*.

William John Dodds, medical superintendent of the Valkenberg Asylum, stated that in that capacity he received into his charge Arthur John Ward. He was admitted on the 20th November, 1906, by an order of the Supreme Court. Mr. Ward was of unsound mind; he was suffering from delusions of various kind, but since his detention he had improved. The form of insanity from which he suffered was a serious one, and while there might be intermissions, there might also be recurrences.

Mr. Van der Byl felt he could not oppose the application, having seen the patient.

Application granted, Mr. William Arthur Currey appointed as curator bonis, with power to sell the movable property for the maintenance of the wife and children, costs of the application to come out of the estate.

**SUPREME COURT**

[Before the Hon. Mr. Justice MAASDORP.]

**REHABILITATIONS.**

§ 1907.  
(Jan. 14th.

Mr. Toms moved for the rehabilitation of O. E. Puttergill.

Granted.

Mr. Sutton moved for the rehabilitation of Melt Marthinus Johannes van Schoor.

Granted.

Mr. Lewis moved for the discharge from insolvency of Joseph William Taylor.

Granted.

Mr. Greer moved for the rehabilitation of Harris Feldman.

Granted.

***Ex parte* CHURCHILL AND ANOTHER.**

Mr. Howes moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

***Ex parte* CORNELISSEN.**

Mr. Swift moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

***Ex parte* MASSYN.**

Mr. Van der Byl moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

***Ex parte* FERREIRA.**

Mr. De Waal moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

***Ex parte* GREENAN.**

Mr. Douglas Buchanan moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

**GENERAL MOTIONS.**

PINTO V. PINTO. § 1907.  
(Jan. 14th.

This was the return day of a rule *nisi* granted on the application of the husband, calling upon his wife to show cause why she should not restore conjugal rights.

Mr. Watermeyer was for applicant; Mr. P. S. T. Jones was for respondent.

Mr. Watermeyer said that he had now wished to apply for leave to withdraw from the action.

Mr. Jones said that his client now appeared to show cause why she should not return to the applicant. She had come from Johannesburg, where she was in service, for the purpose of showing cause, and she had necessarily to appear by counsel, and she asked for costs against plaintiff, including her expenses as a necessary witness.

[Maasdorp, J.: I have read the affidavit. It is to the effect that he is living in adultery.]

Mr. Jones said that that was so.

The application was struck off, and plaintiff ordered to pay costs, and respondent declared a necessary witness and entitled to her expenses.

*Ex parte* JOUBERT.

HEYDENRYCH V. BEDDOES.

Mr. Van der Byl said that the subject matter in both these cases was the same. He had to apply in the latter matter for a postponement until the 1st February, in terms of consent paper. In the former matter a temporary interdict had been granted restraining the manager of the Refreshment Department, C.G.R., from paying over certain moneys. Heydenrych now applied for its discharge.

Both matters were ordered to stand over until February 1, and the interdict was extended meanwhile to that date.

ESTATE BURROWES V. HERMAN.

Mr. Howes moved for a certain rule *nisi* interdicting certain property to be made absolute, with costs.

Final order granted, with costs.

PLATT V. BROWN.

Mr. Roux moved for a certain rule *nisi* authorising the cancellation of certain bond to be made absolute.

Rule absolute.

*Ex parte* ESTATE GIBSON.

Mr. Gutsche moved for a certain rule *nisi* authorising the transfer of certain property and certain deductions from a general plan to be made absolute.

Rule absolute.

LIQUIDATOR COOPER AND CO. V. COOPER.

Mr. Pyemont moved to make absolute a certain rule *nisi* restraining respondent from interfering with or retaining possession of premises 20 and 22, Castle-street, Cape Town, and the goods therein, and calling upon him to show cause why he should not hand over the said goods and premises to applicant.

Rule absolute.

*Ex parte* GOLDSMITH.

Mr. Alexander was for applicant; Dr. Greer was for respondent.

Dr. Greer applied for a postponement to enable respondent to file answering affidavits.

Mr. Alexander opposed the application. He said that the matter was urgent, as certain criminal proceedings were pending. Applicant sought an order for the restoration of a certain horse, wagon, and harness, which he said had been wrongfully removed from his pos-

session, and a rule *nisi* had been granted by the Court.

Dr. Greer said that there was a great conflict on the affidavits.

The matter was ordered to stand over till February 1st.

CASTLE WINE AND BRANDY CO V. MARSH.

Dr. Greer moved for a certain rule *nisi* to be made absolute.

Rule absolute.

*Ex parte* MAREE.

Mr. Roux moved for a certain rule *nisi* to be made absolute authorising petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights. Counsel said that publication of the rule had been given in the "Volkstem" in English. The "Volkstem" was a bi-lingual paper, and it was a point whether the rule should have been published in both English and Dutch.

Rule absolute. Mr. Roux to be counsel and Messrs. Van der Byl and De Villiers attorneys to the petitioner.

Leave was also granted to petitioner to sue her husband by edictal citation, personal service, failing which one publication in the "Volkstem" and the "Government Gazette," citation to be returnable on February 21, with leave to serve intendit with citation, and notice that application would be made on the return day to have the trial removed to the Circuit Court at Aliwal North.

Maasdorp, J., said that if publication were ordered in a Dutch newspaper it was expected that the rule would be published in Dutch.

*Ex parte* GROBBELAAR.

Mr. Howes moved for a certain rule *nisi* to be made absolute authorising petitioner to sue *in forma pauperis*.

Rule absolute. Mr. Howes to be counsel, and Messrs. Tredgold, McIntyre and Bisset attorneys to the petitioner.

*Ex parte* GROENWALD.

Mr. Louwrens moved for a certain rule *nisi* to be made absolute authorising petitioner to proceed with a certain appeal *in forma pauperis* from a decision of the R.M. of Bredasdorp.

Mr. Gardiner appeared for respondent to oppose.

Maasdorp, J., said that the matter was not urgent, and it must stand over until the 1st February.

*Ex parte* OUDTSHOORN MUNICIPALITY.

Mr. Louwrens moved for leave to petitioners to sue respondent, Booy Mooichang, by edictal citation, to recover certain arrear rates (£10 10s. 3d.) and to attach *ad fundandam jurisdictionem* certain funds in the hands of the Master. Defendant's whereabouts was at present unknown.

Leave to sue granted and funds attached, citation to be returnable on the 28th February, personal service, failing which one publication in the "Oudts hoorn Courant."

*Ex parte* LOWRY BROS.

Mr. Louwrens moved for leave to petitioners, who carry on business at Umtata, to sue one George Samuel White, by edictal citation, upon a mortgage bond for £225, and to attach a certain erf *ad fundandam jurisdictionem*. In 1899 respondent left Umtata in order to join Colonel Baden-Powell's regiment for service in the late war, and he had not since been heard of by the petitioners.

Ordered to stand over for further information as to the respondent's movements.

*Ex parte* LOURENS.

Mr. Toms moved for an order authorising the transfer of certain property in the district of Swellendam.

Maasdorp, J., said that the matter need not have come before the Court. The application had better be made to the Registrar of Deeds. A report must be obtained by petitioner from the Registrar in the ordinary way.

## JOOSTE V. VAN HEERDEN.

This was an application calling upon the respondent to show cause why he should not furnish further security for costs in an action which he has instituted against applicant. Sir H. Juta, K.C., was for applicant; Mr. Close was for respondent.

Sir H. Juta said that respondent resided beyond the jurisdiction of the Court, and he had offered security amounting to £100, but this, the applicant said, was insufficient.

Maasdorp, J., asked whether the matter was urgent?

Sir H. Juta said that he was not in a position to state, inasmuch as he did not know for what date the case had been set down.

Mr. Close said that he was not aware that the application was urgent.

Maasdorp, J.: The application will stand over until the 1st February. The parties may, in the meantime, consider

whether a matter of £100 or £200 will make any difference in regard to security.

*In re* THE COLONIAL BUILDING CORPORATION LTD. { 1907.  
Jan. 14th.  
(IN LIQUIDATION).

Mr. Douglas Buchanan presented the second and final report of the official liquidator, and applied for the usual order. Counsel said that the liquidator was in a position to make a further refund of 9d. per share on the fully-paid-up shares, making a total of 14s. per share.

Usual order granted.

*In re* THE ROYAL HOTEL CO. LTD. (IN LIQUIDATION).

Mr. Roux presented the third and final report of the official liquidators, and applied for the usual order.

Usual order granted.

*Ex parte* INSOLVENT ESTATE HAARHOFF.

Mr. Sutton moved, on behalf of the trustee in the insolvent estate, for an extension of time within which to file the liquidation account.

Extension of time granted for three months.

*Ex parte* HELFRICH.

Mr. Toms moved for an order releasing certain property at Newlands and in the division of Swellendam from mortgage bond. The petitioner desired to have all the specially hypothecated properties released, and the bond to operate as a general *kinderbewys*.

Order in terms of Master's report.

*Ex parte* INSOLVENT ESTATE FUTTER AND SONS.

Mr. Gutsche moved, on the petition of the sole trustee, for an order authorising the transfer of certain property at Butterworth belonging to the estate. Petitioner was a large creditor, and he had bought the property at public auction, the total purchase price being £3,399 and the Municipal valuation, £3,700. An overwhelming majority of the creditors consented.

Order granted as prayed.

## BYNS V. ERASMUS.

Mr. P. S. T. Jones moved for leave to sue the respondent, Louis H. A. Erasmus, of the Orange River Colony, by edictal citation, in an action proposed to be instituted by petitioner in respect of the ownership of a certain erf



to which Byns claimed a right by prescription. Leave was also sought to attach the erf *ad fundandam jurisdictionem*. Respondent was the registered holder of the land.

Maasdorp, J., said that petitioner should be very careful to see that all the ingredients of prescription were present in this case.

Leave to sue granted, citation to be returnable on the 14th February, personal service to be effected, with leave to serve intendit at the same time, and the erf to be attached.

*Ex parte* OLIVER.

Mr. Douglas Buchanan moved for the appointment of a *curator ad litem* to represent the petitioner's husband, R. J. Oliver, in lunacy proceedings.

Order granted, Advocate Lewis to be *curator ad litem*, and summons to be returnable on the 1st February.

*Ex parte* SCHOLTZ.

Mr. P. S. T. Jones moved for the appointment of a *curator ad litem* to represent petitioner's minor children in the proposed partition of certain property in the division of Aberdeen.

Maasdorp, J., said that a partition would be allowed, but the Court could not consent to the appointment of petitioner's mother as *curator ad litem*. There must be some independent person appointed as curator, subject to the approval of the Master.

At a later stage Mr. Jones applied for the appointment of Charles Wm. Logie, auctioneer and general agent, of Aberdeen, as *curator ad litem*.

Order granted appointing Mr. Logie as curator.

FLEMING V. CORBETT.

Mr. Roux moved for leave to petitioner to sue respondent, Thomas C. E. Corbett, by edictal citation, upon a mortgage bond for £225, and to attach the hypothecated property at Sterkstroom *ad fundandam jurisdictionem*. Corbett was now believed to be in Johannesburg.

Leave to sue by edict granted, and property attached, citation to be returnable on the 21st February, personal service, failing which one publication in the "Star" (Johannesburg) and the "Government Gazette."

FLEMING V. BOTHA.

Mr. Roux moved for leave to petitioner to sue one Gert Johannes Botha by edictal citation on a mortgage bond for £100 and to attach certain hypothecated

property at Indwe *ad fundandam jurisdictionem*. Respondent was now believed to be in Johannesburg.

Leave to sue by edict granted, and property attached, citation to be returnable on the 21st February, personal service, failing which one publication in the "Star" (Johannesburg) and the "Government Gazette."

*Ex parte* WALKER AND OTHERS.

Mr. Palmer moved for an order authorising the surrender of a certain insurance policy for £1,000 upon the life of the petitioner. Petitioner was married under an ante-nuptial contract, under which he settled the policy in favour of his wife, and in case she predeceased the policy was to revert to the petitioner. At her death petitioner ceded the policy to his children, but he was now unable to continue paying the premiums, and the children were prepared to consent to the surrender of the policy upon payment of their shares of the surrender value.

Order granted as prayed.

*Ex parte* MAARTENS.

Mr. Sutton moved for an order authorising the partition of certain erven at Maclear between petitioner and his minor brother, and appointing petitioner's mother as *curator ad litem* to the said minor. The Master in his report said that no necessity existed for the appointment of a curator.

Authority was given to the mother as executrix and natural guardian to effect partition and transfer, in terms of the Master's report.

*Ex parte* DREYER.

Dr. Rainsford moved, on behalf of the petitioner, for an order confirming the sale of certain farm properties in the estate of her late husband, in which minors are interested. The Master's report was favourable.

Order granted as prayed, and leave given to the applicant to invest the shares of the minors on first mortgage, subject to the approval of the Master.

*Ex parte* PHILLIPS.

Mr. J. E. R. de Villiers moved for an order authorising payment of certain money to petitioner out of the estate of her late father. Petitioner and her husband were both in poor health, and she desired, in addition to the present payment of £3 a month from the income, a sum of £12 a month, to be paid to her for a period of 12 months out of the capital. Petitioner's share under the will was burdened with a *fidei commissum*.

sum in favour of her children. The executors, while saying that they did not object to paying out a sum not exceeding £12 a month, pointed out that the difficulty was where the money was to come from. Mr. De Villiers said he supposed the executors would have to mortgage the property.

Maasdorp, J., said that, inasmuch as a definite consent had not been obtained from the executors, he could not order them to pay out the money. He would, however, grant authority to them to pay out the money.

Mr. De Villiers said that the executors mentioned a sum not exceeding £12 a month. He took it that that was in addition to the present payment of £3 from the income.

Maasdorp, J., said that that must be arranged between the petitioner and the executors.

*Postea* (January 15th).

Mr. J. E. R. de Villiers again mentioned this matter, which was an application for payment of certain funds from the estate of petitioner's father to enable her to tide over temporary difficulties. When the matter came before the Court on Monday, a point arose as to whether the executors were prepared to consent to the payment of £12 a month only to the petitioner, or whether they were prepared to consent to the payment of £12 a month from the capital, in addition to the amount of £3 which she has hitherto been receiving by way of her share of the income from her father's estate. Counsel read a letter from one of the executors consenting to the payment of £12 a month from the capital for a period of twelve months—in addition to the sum which has hitherto been paid.

Leave granted to the executors to pay to petitioner a sum of £12 a month from the capital, for a period of twelve months.

Mr. De Villiers asked the Court whether leave would be granted to the executors to mortgage the property so as to provide for this amount, thus avoiding the necessity of a possible further application.

Maasdorp, J.: The executors are not at present before the Court, and you have no power from them to make such an application. You have absolutely no right to make such an application on behalf of the executors.

Mr. De Villiers applied for authority to pay the costs of the application out of the petitioner's share of the estate.

Authority was granted accordingly.

*In re* THE EAST LONDON DAILY NEWS PRINTING AND PUBLISHING CO., LTD. (IN LIQUIDATION).

Dr. Greer moved for confirmation of the first report of the official liquida-

tors, and for sanction to the liquidators to exercise the necessary powers under section 149 of the Companies Act, and especially to enable them to accept the offer of Messrs. Davis and Son of £3,600 for certain of the assets and the appointment of Messrs. Sauer and Standen as legal advisers under section 151.

Sanction was granted in terms of paragraphs 8 and 9 of the report.

*Ex parte* ESTATESCHEEPERS. { 1907.  
Jan. 14th.

Mr. Benjamin moved on behalf of the executor dative for leave to sell certain landed property in the division of Oudtshoorn, in which a minor is interested.

Order granted as prayed.

*Ex parte* JOHNSTONE.

Mr. J. E. R. de Villiers moved for leave to petitioner to sue her husband, John Johnstone, *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce.

Petitioner appeared in person, and stated that she was without means with which to institute an action.

Mr. De Villiers said that he was prepared to certify *probabilis causa*.

Rule *nisi* granted, returnable on the 1st February.

*In re* "THE OWL." LTD. (IN LIQUIDATION).

Mr. Benjamin presented the first and final report of the liquidator and applied for the usual order.

Usual order granted.

*Ex parte* INSOLVENT ESTATE COOSNER.

Mr. Pyemont moved for an order authorising the transfer of a portion of the property to one of the co-trustees in the insolvency. The Registrar of Deeds refused to register the transfer without an order of Court.

Authority granted as prayed.

*Ex parte* SNYMAN AND ANOTHER.

Mr. J. E. R. de Villiers moved for an order authorising the registration of a certain ante-nuptial contract excluding community of property. The petitioners were married in Holland a few months ago, and they desired to have the gross of the contract registered in this colony.

Order granted as prayed.



*Ex parte* THE INDWE MUTUAL BUILD-  
ING SOCIETY.

Usual order granted.

Mr. Watermeyer moved for a certain rule *nisi* to be made absolute, calling upon one Gert Johannes Botha to show cause why petitioners should not be authorised to sell certain property. Counsel said that respondent's whereabouts had not been discovered, and publication had been made in the "Frontier Times," but, owing to the holidays, it was impossible to publish before the 11th inst., so that the requisite 48 hours' notice had not been given.

Mr. Schreiner, K.C. (with him Mr. W. Porter Buchanan) moved for confirmation of certain recommendations in the first report of the official liquidators. He said that the report had lain for inspection and no objection had been raised. Certain of the assets had been realised in this colony and in Natal. There would be nothing for distribution to the concurrent creditors. There was a sum of £9,800 available for distribution to the debenture holders and sanction was sought to distribute this amount accordingly. The authority of the Court was also asked to the payment of a sum of £220 9s. 3d., by way of remuneration to the liquidators in this colony.

Mr. Watermeyer asked his lordship to extend the return day of the rule *nisi* and to allow the publication to stand.

Maasdorp. J.: The publication is futile; it is so much waste paper. You have not carried out the order, and to carry it out, there must be fresh publication. The return day will be extended to the 14th February, publication to be effected as ordered.

**Native custom — Succession to immovable property.**

Mr. Douglas Buchanan moved for an order for the registration of certain property in the district of Glen Grey in the name of the petitioner. Petitioner said that his father, Ngele Pato, was a native belonging to the Tembu tribe, and by birth a chief, and had seven wives, all of whom he married according to native law and custom. The said Ngele Pato had one son named Mile by Moyini, the great wife of the house. According to native law and custom the said Mile, who died while still a minor in or about the year 1885, was the sole heir of his father. Petitioner was the only son of the said Ngele Pato by Mohenti, the little wife of the house, and petitioner, according to native law and custom, was the guardian of the said late Mile, and in his capacity as such guardian he succeeded to all the property belonging to the estate of the said late Ngele Pato at the time of his (petitioner's) ward's decease. At the time of the death of Ngele Pato he was the owner of a certain piece of land measuring 1,407 morgen, situate in the division of Queen's Town, on the Bengu Stream and Indwe River, in the Tambokie Location. Petitioner prayed for a rule nisi to issue, calling upon all persons having, or pretending to have, any right or title to the aforesaid ground, to show cause why the Registrar of Deeds should not, in terms of the Titles Registration and Derelict Lands Act, be ordered to

Mr. Watermeyer moved for fresh directions as to the return day of citation in divorce proceedings instituted by petitioner against her husband. Counsel stated that publication had been made as ordered in a New Zealand newspaper, but it was impossible within the time fixed for the return of citation to make due publication in the "Government Gazette." He therefore asked the Court to sanction short publication in the "Gazette," and cited *Boisson v. Boisson* (15 C.T. Reps., 33).

[Maasdorp, J.: I think the better course would be this, if respondent appears on the 1st February, you will be prepared to go on, but in case of default, another day may be fixed, but the full month must be allowed.]

**Mr. Watermeyer:** Would your lordship then extend the return day to the 16th February?

Maasdoorp, J.: Upon default of appearance, the order will take that form, a further publication to be made of one month. In the meantime you may publish in the "Gazette." Leave will be granted, in default of appearance, to publish in the "Gazette," and the return day extended to the 16th February.

enregister the said ground as the property of petitioner. Counsel said that communications had been had with the Resident Magistrate of Lady Frere, who said that there was no native law or custom dealing with immovable property, and that native law and custom dealt only with movables. The opinion of Colonel Stanford, of the Native Affairs Department, had also been taken, and he said that no such distinction was made by native law and custom as was alluded to by the Magistrate.

Maasdorp, J., asked counsel whether the property was situate within the Colony proper or in the Transkeian Territories?

Mr. Buchanan said that the property was in the Colony.

Maasdorp, J., said that a question arose, then, as to whether the matter would be dealt with in terms of the Succession Act or by native law and custom. The matter would stand over for further information. The Court could not make an order upon Colonel Stanford, as was suggested, for a further report on the matter, inasmuch as he was not before the Court, but if a further report could be obtained from Colonel Stanford, well and good.

#### *In re* THE EQUITABLE FIRE ASSURANCE AND TRUST CO. (IN LIQUIDATION).

Mr. Douglas Buchanan moved for confirmation of the first and final report of the liquidators. He applied for an order (a) confirming the report, (b) authorising the liquidators to pay a dividend of 14s. 3d., and to appropriate the balance of £153 4s. 7d., as remuneration, etc., in accordance with resolution, (c) authorising the destruction of the books, (d) and finally dissolving the company.

Maasdorp, J.: You cannot apply for a dissolution until the dividends have been paid. You must move again for a dissolution when everything has been settled. The Court will now make an order in terms of prayer (a) and (b).

#### *In re* THE RECREATION SYNDICATE LTD. (IN LIQUIDATION).

Mr. Gutsche moved for confirmation of the official liquidator's second and final report. Counsel said that there was a balance of £280 12s. 6d., after payment of costs, for distribution amongst the creditors. He asked for authority to distribute the balance *pro rata* among the creditors, to pay £37 14s. 8d., wages to a servant (Parker), and remuneration to the liquidators on the basis of the rate allowed in insolvencies.

Maasdorp, J., said that unless counsel could give him some authority for dis-

solving the company at the present stage he should not order a dissolution.

Mr. Gutsche: I am not asking for a dissolution of the company.

Maasdorp, J.: You don't, but the liquidators do. An order will be granted authorising the distribution of the assets, payment of Parker's wages, and remuneration to the official liquidators on insolvency scale. The matter of destruction of the company's books and dissolution must stand over.

#### *In re* THE ORANGE RIVER IRRIGATION, LTD. (IN LIQUIDATION).

Mr. Sutton moved for confirmation of the official liquidator's report.

Mr. Pyemont appeared for the Eastern Province Guardian, Loan, and Investment Co. (the second mortgagees), and said that he desired to bring certain facts to the notice of the Court. The liquidation was ordered on the 20th October, 1904, and the first report was not presented until the month of December, 1906. In the meantime, no steps were taken to recover the amounts due by contributories, many of whom lived in the Colony, and should have paid long ago. He did not oppose the confirmation of the report, but wished to call the Court's attention to the delay that had occurred and the non-taking of steps in fixing the list of contributories.

Mr. Sutton called the attention of the Court to certain paragraphs in the report explaining the delay in presenting the report. Counsel applied for the sanction of the Court to the sale of the landed property, and for the list of contributories to be settled. In reference to the name of Twycross and Co., the liquidator recommended that their case should stand over for further information. Messrs. Twycross said that their shares were fully paid, and, as the share register was in England, it was impossible at present to enter into that matter.

Leave granted to sell the landed property either by public auction or privately, and list of contributories settled in form attached, with the exception of the name of Twycross and Co., whose matter stands over.

# SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

## GENERAL MOTIONS.

FLEMING V. CORBETT. § 1907.  
FLEMING V. BUTHA. (Jan. 15th.

Mr. Roux moved for an extension of the return day of citation in these matters, in order to allow for due publication in the "Gazette."

The return day was extended until the 28th February.

*In re* DUSSEAU AND CO. (IN LIQUIDATION).

Mr. Douglas Buchanan again mentioned this matter, which was an application for confirmation of the final report of liquidators. Counsel said that copies of the "Cape Times" and "Government Gazette" containing the rule had now been filed. He applied for confirmation of the report and authority to the liquidator to distribute the assets in accordance with the account. The liquidator also asked for an order declaring the company dissolved and directing the books to be destroyed, or otherwise dealt with. Counsel said that on Monday his lordship said that no order would be made with regard to the dissolving of companies when their affairs had not been completely wound up. Apparently the custom had been to ask for all these directions together, and there was some doubt as to what the form of procedure ought to be hereafter. No definite rules, he was informed, had been framed on the subject.

[Maasdorp, J.: The proper course, it seems to me, is to distribute the assets and dispose of everything in your hands, and then ask for dissolution of the company.]

Mr. Buchanan: There will be no need, I take it, for the accounts to lie for inspection again.

Maasdorp, J.: No; you may ask for a dissolution when the assets have been distributed in accordance with the account. The Court will confirm the report and authorise the distribution of the assets, in accordance with the account. Whatever may have been the rule, there will be no difficulty in coming to the Court afterwards to apply for a dissolution of the company. If hereafter it is proved that the rule has been different from what I have laid down, then what I have done will not alter the practice, but until I am quite clear on the practice I shall make the same order as yesterday. It will not interfere with the practice.

*Ex parte* KAFFRARIAN STEAM MILL CO., LTD.

Mr. Gardiner moved on the petition of the chairman of the Kaffrarian Steam Mill Co., Ltd., carrying on business at King William's Town and Molteno, for an order directing the Registrar of Deeds to register a certain supplementary deed to enable the company to continue business.

Maasdorp, J., said he had looked into the papers, and there appeared to be a difficulty, and it was this that the powers of the company had lapsed, and the point was whether the resolution could, after that, be passed for a further extension of time.

Mr. Gardiner said that the company was in a difficult position. It was not dead; it had not been dissolved. In a certain sense it was still in existence, because, although it was under the Act of 1862, part 5, of the Act 25, 1892, applied to the company. In 1896 it was resolved that the company should be continued for a further period of ten years—i.e., until the end of June, 1906. A meeting of the company was held in March last, while the company's period was still running, at which a resolution was passed to all intents and purposes identical with the one subsequently passed in November, so that there was at any rate a signification of the company's wish to continue. The notice calling the first meeting was, however, informal, inasmuch as it did not set forth sufficiently the objects of the meeting. Counsel submitted that no harm would be done if a rule nisi issued calling upon all concerned, whether shareholders or creditors of the company, to show cause why the company should not continue, bearing in mind that while the company was in existence in March a resolution was passed to continue. Counsel added that the position of the company was most anomalous, and that he had been unable to find any authority for this application.

Maasdorp, J., said that he would take time to look into the matter. He pointed out that, in the meantime, if the company were in such a position that it was in the interests of all that it should carry on, it might be advisable to consider whether to approach the Court in some other form. In any case, the matter could not be disposed of before the February term.

*Postea* (February 4th).

Maasdorp, J.: It appears that the company in question was registered as a limited liability company under the Act 23, 1861, on July 1, 1886. Power was reserved to the company to extend the duration of the company for 10 years after the expiration of the first 13 years to which the duration of the company was limited by the deed of set-

tlement. In 1896 at a meeting of the period of duration was duly extended to 1906. Again, in March, 1906, a meeting was called, and it was unanimously resolved to extend the company for an unlimited period. It afterwards transpired that there had been some irregularity in the calling of this meeting in that 14 days' notice had not been given, as required by the 65th article of the deed of settlement. Only 12 days' notice having been given, the result was that the meeting was illegal, and these proceedings were invalid. The directors then set about to rectify this mistake by calling a special general meeting, and giving the necessary notice, but when that meeting was held it was found that the 10 years to which the life of the company had been extended had already expired. Consequently, another difficulty arose. Application was made by the shareholders to register the resolution of this subsequent meeting, which amounted really to a confirmation of the resolution of the meeting in March, 1906, but in face of these irregularities the Registrar of Deeds did not feel himself competent to register this resolution as a supplementary deed. The question now arises whether the Court can grant relief to the parties by authorising the Registrar of Deeds to register this supplementary deed. It seems to me that under the Act 23, of 1861, the court has such a general supervision of companies that in certain matters where the Act does not prohibit it in terms, or indirectly, the court might grant relief. In this trust deed, in Article 65, powers are given to the shareholders at a meeting duly convened to alter and amend the deed of settlement in any respect. It was at such a meeting that the first resolution was passed extending the life of the company, and it was at that meeting that the irregularity took place. Now, upon further information that has been afforded to the court, it appears that up to date everything has been done unanimously by the shareholders that were present at any one of these meetings, and there has been no dissentient voice heard from any of the shareholders. I feel, therefore, that the court may assist this company, in allowing them, notwithstanding the irregularity in this particular case, to have their trust deed registered. The Court will have mainly to regard the interests of both shareholders and creditors, and it is quite clear it would certainly not be to the detriment of the creditors that this company, which appears to be a sound company, should continue to carry on its business. The shareholders seem to me to be very fully protected, and it seems to me that if at any time within a reasonable period any shareholder should still wish to raise objections to what has been done, nothing that the Court now does will prevent him from taking

advantage of any rights he may possess. The Court will now authorise the Registrar of Deeds to register the resolution passed at the meeting as a supplementary deed of settlement.

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SIMPSON AND MARWICK V. } 1907.  
SWINTON. } Jan. 15th.

This was an application of the appointment of a *commission de bene esse* to examine plaintiffs and their witnesses in Edinburgh, Scotland.

Mr. P. S. T. Jones (for applicants) said he understood that a consent paper had been filed by the respondent, and all that remained now was to select a name.

Order granted appointing Mr. Robert Scott Brown as Commissioner, failing Mr. Scott Brown, Mr. Kenneth Sanderson to act as commissioner.

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BEATTIE V. BEATTIE.

This was an application upon notice to respondent to show cause why he should not be ordered to pay £75 to enable applicant to institute proceedings against him for judicial separation on the ground of cruelty, and £15 *per mensem* as maintenance of the child, and costs.

Dr. Greer was for applicant; Mr. Close was for respondent.

Mr. Close said that he should have to apply for a postponement to enable his client to file an answering affidavit.

Maasdorp, J., said that he would hear the application before considering the question of postponement.

Dr. Greer submitted that, although there was considerable conflict of testimony on the affidavits, applicant had clearly made out a case for relief. Applicant alleged that owing to her husband's violence she had had to hastily quit the house and go to a maternity home. Counsel traversed the allegation made by respondent that Mrs. Beattie had been addicted to drink, and that she was *non compos mentis*.

Maasdorp, J.: I do not think it is necessary to hear Mr. Close in this case. The applicant alleges that she has good grounds for an action for judicial separation, and the ground she has given in her petition is cruelty practised upon her by her husband. If she has such an action she can in the ordinary course proceed with it; there is nothing to prevent her from instituting her action. But she applies to the Court now for assistance to obtain from her husband pecuniary help to bring her action. In that case it is necessary for her to establish some *prima facie* case upon which the Court might ascertain whether she has reasonable ground for such an action. She has made her affidavit, set-

tung forth those acts of cruelty, which consist of extreme violence. There is not a single member of the family or any other person who has corroborated her in her statements. On the other hand, every member of the family has testified to the kindly manner in which the plaintiff has treated his wife. The Court does not now decide whether the plaintiff's allegations are true, or whether the defendant's allegations are true. The Court only now has to ascertain whether, under the circumstances, there is any probability of the defendant being able to establish her case. Unless she puts something more before the Court than she has done, unless she can produce corroborative evidence, it will be impossible for her to withstand the overwhelming evidence given against her. I do not think it likely, though, as I say, I do not decide the point, that all the members of the family should have seen the mother treated in the cruel manner she alleges without coming forward to her assistance now. It is said that it is difficult to explain why she should have made these allegations. The only reason that appears on the affidavits is this; this lady is, apparently, destitute of self-control, and there are some reasons for holding that at times she is not responsible for her actions. That is alleged, and it is not found now that it is true, but for the purposes of this application it is accepted as the explanation in so far as to hold that she is not entitled to this unusual assistance of Court to bring her action. She can bring her action in the ordinary way when she is in a position to do so. The application is refused.

#### BURCHELL V. BURCHELL AND OTHERS.

This was an application upon notice to the respondents to show cause why applicant should not be allowed to intervene as defendant in an action brought by the first-named respondent (J. E. L. Burchell), against the estate of the late J. M. W. C. Burchell, to have a certain will set aside as null and void, and why applicant should not be allowed funds from the estate for the purpose of defending the action.

It appeared that the executor had obtained an order requiring the company administering the estate to pay over £350 to enable him to defend the suit (16 C.T.R., 1009), but that he had since withdrawn from the action. The present applicant, who benefits under the will, however, desired to defend the will, but was unable to provide the necessary funds, and she asked for funds from the estate.

Mr. Upington was for applicant; Mr. Schreiner, K.C. (with him Mr. W. Porter Buchanan), appeared for J. E. L. Burchell (plaintiff in the suit); there was no appearance for Mrs. Watson and

Ignatius T. P. Burchell, executrix and executor respectively of the estate.

Mr. Upington said that the only explanation as to the conduct of the executor in withdrawing from the suit was that the matter was injuring his wife's health. He submitted that that was not a sufficient reason for not doing justice to the estate.

Mr. Schreiner said that the executor had also stated that his wife would give evidence in favour of the plaintiff's case, and under all the circumstances he did not feel justified in opposing the claim.

Counsel having been heard in argument on the facts,

Maasdorp, J.: An action was instituted by the plaintiff in this case against the executors of his father's estate to have a certain will set aside as null and void. One of the executors entered an appearance to defend the action, and he desired to utilise the funds belonging to the estate for the purpose of costs. It appears that the management of the estate was at the time in the hands of a company at Port Elizabeth, and, upon the co-executrix refusing to give her consent to that company supplying the executor with funds, he found it necessary to come to the Court to compel the company, notwithstanding the opposition of the co-executrix, to supply him with such funds. The Court then decided that the executors in the estate, in their discretion, had a right to avail themselves of the funds of the estate for the purpose of litigation, if they were advised to do so, and that, notwithstanding the opposition of the executrix, the executor was entitled to obtain such funds and use them for the purpose of costs. The Court then ordered that the company should be authorised to let him have a sum of £350 for the purpose of the suit. After obtaining that order, the executor has reconsidered his position, and although the attitude which he now takes up is not so clear that I am in a position exactly to say what it is, he certainly is not prepared to make any active opposition to the claim of the plaintiff. The present applicant, who is interested as heir or legatee under the will of the plaintiff's father, now comes forward and alleges that she wishes to undertake the defence of the action, in default of the executor doing so. Now, there would be no difficulty in allowing her to intervene to defend the suit, but she applies for assistance in funds from the executors out of the property of the estate. Now, there is absolutely no precedent for such an application. It would be, indeed, a great deal for the Court to take upon itself to order an executor, who thinks it inadvisable to spend moneys upon an action, to provide funds for somebody else who wishes to incur the costs of such a suit. Not only is there no pre-



codent, but, upon the information that the Court has been supplied with, it would seem that the executor, who at one time believed that he had a good ground of defence, because of the view he took of the manner in which the will had been executed, upon reconsidering the matter, has come to the conclusion that he is unable to assert distinctly what he formerly believed was the case. He seems to have taken up the position formerly that the will was in all respects properly executed, and he now is unable to state positively that one circumstance did exist which was necessary for the validity of the will, and that is, the authentication of the signature of the testator in every respect. He seems, upon reconsideration, to feel that he is unable to establish that view. Consequently, as the affidavits now stand, there is not even a strong case made out by the applicant that the executor is failing in his duty in undertaking the defence of an action, which he ought, under all the circumstances, to take up. The application will be refused.

Mr. Schreiner (in answer to the Court) said that he did not press for costs.

Mr. Upington said he took it that the prayer for intervention would not conclude the matter, and that, possibly, later on the applicant might intervene.

[Maasdorp, J.: The set-down for the 6th February must stand. The case must go as far as it can. Of course, the Court will always be willing to consider any difficulty when it may arise. Leave will be granted to the applicant to intervene.]

Mr. Schreiner: We simply go on to the 6th February in the usual course.

[Maasdorp, J.: Oh, yes, that is taken for granted. The case will stand for the 6th February.]

#### BOLUS V. FARQUHARSON.

This was an application brought by Herbert Walter Bolus calling upon respondent (Robert Charles Farquharson) to show cause why bar should not be removed in an action instituted by respondent, and why applicant should not be given leave to plead.

The parties, it appeared, had carried on business in partnership at Queen's Town, and a deed of dissolution had been entered into. Disputes had arisen and a claim had been brought by Mr. Farquharson against his late partner. Defendant had failed to plead within the period fixed by the Rules of Court, and had been barred. The case had been set down for February 8.

Mr. Schreiner, K.C. (with him Mr. Gardiner), was for applicant; Mr. Upington was for respondent.

Mr. Schreiner said that defendant had a sound defence to the claim, which was absolutely repudiated. There had been some delay in pleading on account of the holidays intervening.

Mr. Upington said that a due degree of indulgence had been shown by the plaintiff before defendant was barred.

Maasdorp, J., said that leave would be granted to applicant to purge default and to plead, but he must pay costs.

Mr. Schreiner urged that applicant should only be ordered to pay wasted costs, and that costs of the application should be costs in the cause.

Maasdorp, J.: It seems to me that in a case of this kind it is not at all unusual for the applicant to pay costs, when the Court comes to the conclusion that the costs have been incurred through delay on the part of the applicant, which is not sufficiently explained on the affidavits. To my mind the delay in this case is not sufficiently explained. A casual observation that the holidays may have dislocated business a bit is not a sufficient explanation, because the delay continued for a considerable time after the immediate holidays, which do sometimes interfere with business. Not only so, but the delay has continued till now. Even now the applicant is not ready to file his plea. The costs have simply been caused in this case by the delay of the applicant, and, as such delay has not been properly accounted for, the applicant must pay costs. Leave granted to purge default and plead, plea to be filed by Monday next, the 21st inst. Applicant must pay costs of this application and costs of bar.

## SUPREME COURT

(IN CHAMBERS.)

[Before the Hon. Mr. Justice MAASDORP.]

PHILLIPS AND CO. V. } 1907.  
MULLER. } Jan. 24th.

Commission *de bene esse*—Variation of written contract.

This was an application on notice calling on respondents, J. F. Phillips and Co., of the Paarl, who are plaintiffs in an action against Carl Louis Richard Muller, for recovery of £5,925, to show

cause why leave should not be granted to examine on commission in German West Africa, Captain Von Houwald, of the German forces, and other witnesses.

From the affidavits and pleadings it appeared that R. Muller was sued by Phillips and Co., of Paarl, in an action for the recovery of the prices of certain 52 ox wagons and 600 wheels made for defendant. Plaintiffs contended that the whole contract between the parties was contained in certain two letters, while defendant said that it was a condition of the contract that the wagons should be in accordance with the requirements of the German Government. Defendant admitted that he received the wagons and wheels, but said that they were to a certain extent condemned by officers in the service of the German Government, and claimed about £1,200 in reconvention. Defendant further said that it was a condition of the contract that he should pay plaintiffs when the German Government paid him. Plaintiffs denied these conditions, and said that the articles were to be delivered free on board at Cape Town, and that defendant accepted them. Plaintiffs and defendant had had other large dealings, and no such arrangement as alleged had been made in them. The case was set down for February 19.

Mr. Close for applicant; Mr. McGregor for respondents.

Mr. Close put in an answering affidavit tendering to pay, without prejudice to the defence raised in the plea, the amount of the plaintiffs' claim, less the amount of defendant's counter-claim, together with interest and costs to date.

Counsel submitted that his client was entitled to the order prayed for. There was a *bona fide* defence that the agreement contained conditions that the goods should be subject to the approval of the German Government, and had to be paid for on defendant receiving payment from the German Government.

Maasdorp, J., inquired whether the agreement as it appeared upon the documents was complete, and whether what defendant alleged would vary the contract.

Mr. Close said that his whole case was that the documents did not contain all the conditions of the contract. If he admitted that the documents contained the contract, then he could not vary it, but he did not admit that the documents set out all the conditions of the agreement. He referred to the case of *Hall v. Kearns* (10 Juta, 152), and said that in this case also did the manufacturer know for what purpose the articles were required. His client also alleged a specific warranty.

[Maasdorp, J.: Suppose the Government did not accept, then what would happen?]

Mr. Close said that he was not prepared to say, but he would say that his client alleged that payment had to be made when the Government accepted the wagons and wheels and paid for them. The documents said nothing about payment, and he would be entitled to lead evidence to say what the condition as to payment was.

[Maasdorp, J., asked whether if the documents said nothing about the payment it was not understood that it meant cash.]

Mr. Close said that was a rebuttable presumption, and his client would be entitled to lead evidence to rebut. All he had to do now was to make a *prima facie* case that the evidence sought to be taken on commission was material. He was in the hands of the Court, and because the Court might say that people were being kept out of their money his client offered to pay £4,725 with interest and costs to date.

Mr. McGregor said that the tender made this morning met one of the difficulties of the case. There remained the claim in reconvention. If plaintiffs were correct in their contention then it might be quite unnecessary to have this evidence sought to be taken on commission. If defendant was right then the Court could at the trial postpone the case for the evidence as to the state of the wagons. If applicant now succeeded the whole matter might be hung up, and there was the danger that the Court might afterwards find that the evidence was irrelevant. Why not let defendant first prove his contention and then decide about the commission. The witnesses defendant wished to examine on commission were not necessary to prove the conditions of the contract as alleged by defendant. He referred to the analogy of agency and to what the White Book said about letters of request to have German and Spanish subjects examined in their own country. The issue of letters of request was a most formidable proceeding requiring the intervention of Secretaries of State.

Mr. Close said that there had been repeated commissions to foreign countries, and he was instructed that evidence could be taken before district judges in German South-West Africa.

Maasdorp, J., said that this Court could give authority to examine but could not order the district judges to examine. A case came before the Court yesterday in which a request was made by the German authorities for assistance in a similar manner.

Mr. McGregor cited the case of *Schlitzer v. Schlitzer* (6 E.D.C., 190). It was clear law that the issue in respect of which the evidence was required was one which the Court had to try.

Maasdorp, J., said it seemed to him that if it were quite clear

that the whole of the conditions of the contract were reduced to writing, and that this written contract appeared upon the pleadings, then the Court could not allow evidence to be adduced to vary such contract. But on the face of the pleadings, it was not clear that the documents attached to the declaration did constitute the complete written contract. It was quite possible to find that the letters might be supplemented by verbal agreement as alleged by the defendant. If that were so, the defendant would be entitled to place the verbal conditions before the Court; but even supposing that the contract was as written then the evidence sought to be produced by the defendant would not be at variance. The articles did not appear to be so accurately described that the fact that they had to be approved by the German authorities would be inconsistent with the description in the letter. The affidavits largely disputed the alleged facts, and almost the whole of the affidavits by the respondents contradicted the facts alleged by the applicant. The Court could not now go into the facts, and the only question was whether the evidence as far as the case had gone was relevant. It might be that the Court would decide that the documents set out all the conditions, and that the evidence now sought to be obtained was irrelevant, but that would be a point to be decided at the trial. The defendant was, in the opinion of the Court, entitled to the commission, and the Court would order that upon the payment of the sum of £4,725 4s. 2d., together with interest *a tempore morae*, and costs to date, leave be granted to have the witnesses in question examined upon commission, by commissioners to be appointed by the Court having competent jurisdiction in German West Africa. The question of costs would stand over.

[Applicants' Attorneys: Moore and Son; Respondent's Attorneys: Walker and Jacobsohn.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1907.  
Feb. 1st.

Mr. Schreiner, K.C., moved for the admission of Robert Frederic Philipson Philipson Stow as an advocate.

Application granted and oath administered.

Mr. Schreiner, K.C., moved for the admission of Abram Johannes Marais as an advocate.

Application granted and oath administered.

Dr. Greer moved for the admission of Benjamin Strobos as an attorney and notary.

Application granted and oaths administered.

Mr. McGregor moved for the admission of Jacobus Johannes Scholtz as an attorney and notary.

Application granted and oaths administered.

Mr. Gardiner moved for the admission of Albert Louis Abrahamson as an attorney and notary.

Application granted and oaths administered.

Mr. Sutton moved for the admission of Robert May as an attorney and notary.

Application granted and oaths administered.

Mr. De Waal moved for the admission of Victor Kotze as a notary.

Application granted and oaths administered.

VAN NIEKERK V. LE RICHE. { 1907.  
Feb. 1st.

Promissory note payable in foreign money—Rate of exchange—Tender.

*The defendant, being sued for the balance of certain promissory notes for different amounts "payable in German money," tendered the amount, less the exchange which was in favour of English money. The previous part payment had been accepted in English money.*

*Held, that the tender was sufficient.*

Mr. Pohl moved for provisional sentence for balance of three promissory notes for £318 10s., £975, and £370 10s., payable in German money at the Standard Bank, Kimberley.

From an affidavit read by Mr. Benjamin (who appeared for the defendant) it appeared that the latter bought from plaintiff certain wagons, oxen, and gear, the purchase price of which was £1,664. The notes said that payment was to be in German money, and defendant had paid £1,605 15s., which he said was the equivalent to £1,664 in English money. The transaction took place on the border of German South-West Africa. Defendant claimed that he was entitled to deduct 3s. 6d. exchange on every £5 for paying in English money. An affi-



davit was also read to the effect that on the 11th May, 1906, the current rate of exchange was that £4 16s. 6d. in English money was equivalent to £5 in German money.

Mr. Pohl read an answering affidavit by the plaintiff, who said that the arrangement was that he would take twenty marks as the equivalent of an English £1, if defendant paid in cash, but that if defendant gave bills he must pay 20s. in the £.

[De Villiers, C.J.: Strictly speaking, under the bills the defendant must tender the coin in marks.]

Mr. Pohl: And they must tender us marks to the value of £1,664 English money.

[De Villiers, C.J.: At the rate of a mark for every 1s.]

Mr. Pohl: A mark is less than 1s.

Mr. Benjamin submitted that the plaintiff was entitled, if he accepted the money as he did, to the equivalent of English money, that equivalent being that 3s. 6d. came off each £5 of English money. The plaintiff could not come now and set up another agreement and he was not, therefore, entitled to provisional sentence.

Mr. Pohl submitted that the plaintiff was entitled to have the rate of exchange added and not subtracted, as the defendant urged.

*Cur. Adv. Vult.*

*Postea* (February 7th).

De Villiers, C.J., said that the plaintiff sued for the balance due on certain three promissory notes for £318 10s., £975, and £370 10s., payable in German money at the Standard Bank, Kimberley. The defendant would have been justified in tendering such balance in German money, in which case the plaintiff would have had to pay the current rate of exchange which was in favour of English money. The plaintiff, however, was satisfied to receive the balance, as he had received previous payments in English money, but he objected to any deduction of the rate of exchange. If this objection was valid there could have been no object in making the notes payable in German money. The intention of the parties appears to me to have been that if payment were made in English money, exchange should be deducted. Judgment will be given for the plaintiff for interest in terms of the tender, with costs to date of tender, costs subsequent to date of tender to be paid by the plaintiff.

#### ESTATE VAN RYN V RIFKIN.

Mr. Inchbold moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### *In re* SEELIGER AND SCHACH.

Mr. Russell moved for a provisional order of sequestration to be superseded. Provisional order discharged.

#### SMUTS AND KOCK V. DE GOEDE.

Mr. Lewis moved for a provisional order of sequestration to be discharged. Provisional order discharged.

#### ESTATE MILLS V. BEYER.

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### GAWRANSKY V. SPUNT.

Mr. J. E. R. de Villiers moved for confirmation of a certain writ of arrest.

Defendant, who was in custody, admitted the debt.

Judgment granted, and defendant discharged from arrest.

Mr. De Villiers also moved upon notice for the attachment of certain sum of £5 in the hands of the Union-Castle Steamship Company, and a certain sum due to the defendant by the said company as refund of passage ticket by the Goth from Cape Town to London. Defendant was arrested on board, after having bought his ticket and deposited £5, which the company required in case of his exclusion under the Aliens' Expulsion Act.

Order granted attaching such money as may be in the hands of the Union-Castle Company, and due to the defendant.

#### HORNE V. RUTHEL.

Mr. M. Bisset moved for provisional sentence for £750 on a mortgage bond, with interest from 1st January, 1906: counsel also applied for the property hypothecated and rent accruing to be declared executable.

Order granted.

#### CRAWFORD V. BARRON.

Dr. Greer moved for provisional sentence on a promissory note for £300, with interest from the 1st January, 1906, and costs.

Order granted.

#### WYLLIE AND SONS V. VAN DER LINDEN.

Mr. Russell moved for provisional sentence on an acknowledgment of debt for £54 4s., with interest, acknowledgment

due by reason of non-payment of first instalment.

Order granted.

#### STANDARD BANK V. ESTATE VAN RYN.

Mr. P. S. T. Jones moved for the final adjudication of the defendant estate as insolvent.

Order granted.

#### JOSEPH AND CO. V. ROUX.

Mr. M. Bisset moved for provisional sentence on a judgment of the Resident Magistrate's Court, Calitzdorp, for £80 on a bond and £18 due on a promissory note, less £21 odd recovered by execution. Counsel also applied for the landed property described in the summons to be declared executable to the judgment.

Order granted.

#### REID AND CO. V. MCGREGOR.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### GRACIE V. MOUTON.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £300, with interest from July 1, 1906, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### ONRUST RIVER CO. V. ALLENGENSKY.

Mr. Roux moved for provisional sentence on certain three conditions of sale for £90, with interest from January 9, 1904, and costs, the plaintiff company undertaking to convey the lots on payment of the money.

Order granted.

#### O'CALLAGHAN V. JACOBS.

Mr. Inchbold moved for provisional sentence on a judgment of the Resident Magistrate's Court, Wynberg, for £20 17s. 6d., and £2 17s. 10d., taxed costs, and for certain property, registered in the name of defendant in Kimberley to be declared executable.

Provisional sentence granted, subject to a properly certified copy of the Magistrate's judgment being filed with the Registrar.

#### ILLIQUID ROLL.

FRASER AND SONS, LTD., V. COHEN. 1907. Feb. 1st.

Mr. Swift moved, under Rule 329d, for an order requiring defendant to deliver up to plaintiff's certain goods, or, alternatively, for payment of £167 15s., with costs.

Order granted.

Mr. Swift said that his clients desired that the Court should direct defendant to give immediate delivery.

[De Villiers, C.J.: He must do it immediately, failing which he must pay the money.]

#### PALMER V. THE OWL SYNDICATE.

Mr. Douglas Buchanan moved, on behalf of the defendant, in the action (Thos. Palmer), for judgment to be signed against the respondents (the Owl Syndicate) for not proceeding with their action within the time fixed by Rules of Court.

Order granted.

#### INSOLVENT ESTATE WOLSTENHOLME V ROUX.

Mr. Benjamin said that he was instructed to appear for the plaintiff estate as respondent in a motion which appeared in the list brought by Roux, calling upon the estate to show cause why he should not be allowed to purge default. He was not instructed to ask for judgment in the present action.

Mr. Gardiner said that he appeared for the applicant Roux in the motion.

De Villiers, C.J., said that he would hear the motion.

Mr. Gardiner moved, on behalf of defendant, for leave to purge default, and file a plea, or claim in re-convention. Counsel read an affidavit in support of the application, setting out the causes of delay in filing plea.

Mr. Benjamin said that he did not oppose the application, but his client wished to put the defendant to terms as to when he would go to trial, and as to security for costs. There was also an allegation that defendant was about to remove out of the jurisdiction, and go to German South-West Africa.

De Villiers, C.J., said that he would grant leave to applicant to purge default, and extend the time to plead to February 12, costs to be costs in the cause. Plaintiff not having taken judgment against the defendant, it was impossible at the present stage to make any order as to security for costs.

#### ESTATE SCHERMBRUCKER V. DUNCAN.

Mr. Sutton moved for judgment under Rule 329d for £28, rent due.

Order granted.

PURCELL, YALLOP AND EVERETT V.  
THOMSON.

Mr. Inchbold moved for judgment under Rule 329d for £52 16s. 7d., the balance of account due for goods sold, with interest, *a tempore morae*, and costs.

Order granted.

OLIVER V. OLIVER.

This was the return day of a summons calling upon respondent to show cause why he should not be declared of unsound mind, and a curator appointed to take care of his person and administer his estate, with power, if necessary, to sell the immovable property for the purpose of maintaining respondent and his wife.

Mr. Douglas Buchanan appeared for the applicant.

Mr. Lewis appeared as *curator ad litem*.

Evidence was given that the respondent was detained in the Valkenberg Asylum, being of unsound mind, and suffering from many delusions. He was the owner of property at Observatory, which was bonded to the amount of £500. The applicant desired that the Colonial Orphan Chamber should be appointed curator of the property. Mrs. Oliver was following the nursing profession.

Mr. Lewis said that he did not oppose the application, but respondent's brother had pointed out that if the property was sold, and the proceeds were applied to the maintenance of respondent and his wife, the estate might dwindle away until there was eventually no alternative but to send the respondent to Robben Island.

Mr. Buchanan (in answer to the Court) said that respondent was detained under a Judge's order.

De Villiers, C.J., said that in that case it would not be necessary to appoint a curator to the respondent's person.

Order granted, declaring respondent of unsound mind, and appointing the Colonial Orphan Chamber as *curator bonis*, with power to sell the landed property, and to pay out of the proceeds such sums of money as are required for the maintenance of the lunatic, and with further power to pay over to applicant such sum as is not required for such maintenance, costs of this action to come out of the estate.

*In re* BUFFALO SUPPLY AND COLD  
STORAGE CO.

Mr. Douglas Buchanan, with leave of the Court, moved, as a matter of ur-

gency, for authority to Messrs. Hamilton Maxwell Fleming and John Powell, as liquidators of the Buffalo Supply and Cold Storage, to accept a certain offer, the effect of which, he said, would be to shorten the liquidation by about 15 or 20 months. The petition set out that the petitioners resided at Cape Town and East London respectively. Some time ago they instituted certain proceedings in the High Court of Justice, King's Bench Division, against one Moritz Bergl. Thereafter the said Bergl made a proposal for a compromise. Subsequently petitioners obtained judgment in the King's Bench Division against the said Bergl. In terms of clause (b) Bergl was ordered to pay petitioners £7,500 in monthly instalments of £200 each. In terms of clause (c), it was ordered that the payment of the said sum of £7,500 should be secured by a covering bond to be passed in this colony by Bergl in favour of the petitioners specially hypothecating his property in Kimberley used as a butchering business, carried on under the style of Sussman and Cohen. Petitioners were only able to obtain a second mortgage, as there already existed a prior mortgage of £4,000 on the said property. Bergl had paid off £2,200 under the said judgment, leaving a sum of £5,300 still owing. The said covering bond was about to be passed, but a cablegram had been received by petitioners attorneys from their solicitors in London in these terms: "Bergl has offered to sell the Kimberley business for £8,000." This cablegram also contained an offer to pay £3,000 to £4,000 if petitioners would allow discount of 6 per cent. Petitioners went on to say that it would appear that Bergl had received an offer of £8,000 for the business, and now proposed, in lieu of hypothecating the property for payment of the balance, that petitioners should allow him to sell the property for £8,000, against his paying them from £3,000 to £4,000 on account against the balance of his indebtedness, and that in view of the fact that the balance was only payable by monthly instalments of £200, they should allow a discount of 6 per cent. Petitioners' attorneys had, subject to the consent of the Court, accepted the offer of £3,500 at the very least, but had advised their solicitors in England to endeavour to get £4,000 if possible. Petitioners added that it would be to the advantage and benefit of the company to have immediate payment of £3,000 to £4,000. They asked for an order authorising acceptance of the proposal in terms of the cablegram sent by their Cape Town attorneys. Counsel added that Mr. Fleming's firm were creditors to the amount of about £2,500 out of total liabilities by the company of about £30,000.

De Villiers, C.J.: What amount was finally agreed upon, £3,500 or £4,000?

Mr. Buchanan said that he was not at present advised.

Order granted as prayed.

#### DE KLERK V. DE KLERK.

This was an action brought by Petronella Margaretta de Klerk, of Natal, against Theunis Christian de Klerk, for a decree of restitution of conjugal rights, failing which a decree of divorce.

Dr. Greer was for applicant; defendant did not appear.

Mr. Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, gave formal evidence as to the marriage.

Dr. Greer read the evidence of the plaintiff, taken on commission at Melmoth, Natal, from which it appeared that the parties were married at Humansdorp in 1891, and that in 1894 defendant deserted the plaintiff and had not since returned to her or contributed to her support.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 31st March, failing which rule to issue calling upon defendant to show cause on the first day of next term why a decree of divorce should not be granted, with costs, rule to be served in the same manner as directed in regard to citation.

#### JERVOISE V. JERVOISE.

This was an action brought by Elizabeth Gertrude Jervoise, of Cape Town, against her husband for restitution of conjugal rights, failing which a decree of divorce.

Mr. Struben appeared for plaintiff; defendant did not appear.

W. T. Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, gave evidence as to the registration of the marriage, which took place on the 2nd April, 1898, at Port Elizabeth.

Plaintiff (Elizabeth Gertrude Jervoise) said that her husband left Port Elizabeth about August, 1898, and proceeded up-country, and she had gone to England, with his consent. She returned to the Colony in 1901, and she heard that her husband was in Bechuanaland. She had heard that her husband was suing her for restitution of conjugal rights. She proceeded to Francistown, where the action was heard, and the case was dismissed. Defendant refused to receive witness, and she returned to Cape Town. She had had communications with him since, but he had not offered to receive her, and had contributed nothing to-

wards her support. Defendant was at present about town.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 15th February, failing which rule to issue calling upon defendant to show cause on the last day of term why a decree of divorce should not be granted, with costs, and why defendant should not be declared to have forfeited the benefits under the marriage.

#### REHABILITATIONS.

Mr. Pohl applied for the discharge of John William Hanson from insolvency. The estate was surrendered in 1886. There was no certificate from the Master.

De Villiers, C.J., said that the section upon which applicant relied did not dispense with the Master's certificate. The matter must stand over pending production of Master's certificate.

Mr. Roux applied for the discharge of Susanna Laesia Coetzee from insolvency.

Granted.

Mr. Toms applied for the discharge of Hendrik Jacobus du Toit from insolvency.

Granted.

Mr. Watermeyer applied for the rehabilitation of Louis Jacobus Hattingh.

Granted.

#### GENERAL MOTIONS.

LE PORT V. LE PORT. { 1907.  
Feb. 1st.

Mr. Sutton moved for a decree of divorce in default of defendant's compliance with an order of restitution, and with custody to plaintiff of the child of the marriage.

Decree granted as prayed.

#### FOORD V. FOORD.

Mr. P. S. T. Jones moved for a decree of divorce in default of defendant's compliance with an order of restitution, plaintiff to have custody of the child of the marriage.

Decree granted as prayed.

#### *Ex parte* LAUBSCHER.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

JOHNSTONE V. JOHNSTONE.

Mr. Russell moved for a certain rule to be made absolute authorising petitioner to sue *in forma pauperis*.

Rule absolute, Mr. J. E. R. de Villiers to be counsel, and Mr. Heydenrych to be attorney of the petitioner.

GRANT V. GRANT.

Mr. Toms moved for a certain rule to be made absolute authorising petitioner to sue *in forma pauperis* and by edictal citation, with notice to respondent that the case would be removed to the Circuit Court, Burghersdorp.

Rule absolute, Mr. Kannemeyer to be attorney to the petitioner, with leave to serve intendit with citation, citation returnable at the next Circuit Court at Burghersdorp.

MARCUS V. MARCUS.

Mr. Lewis moved for leave to petitioner to sue her husband by edictal citation for a decree of divorce. The matter had been standing over for further information on the question of jurisdiction, and counsel now read an affidavit by petitioner's brother. Defendant was last heard of at Johannesburg.

Leave to sue by edictal citation granted, citation returnable on the first day of next term, citation and other processes to be served upon defendant personally, failing which one publication in Johannesburg “Star,” with leave to serve intendit with citation.

*Ex parte* CRAVEN.

Mr. Sutton moved for a certain rule to be made absolute authorising cancellation of a mortgage bond.

Rule absolute.

FERNWOOD SYNDICATE V. MARKS.

Dr. Rainsford moved for a certain rule *nisi* to be made absolute restraining respondent from selling any further lots of land forming part of petitioner's property, known as the Fernwood Estate, and requiring him to deliver up certain documents.

Rule absolute, with costs.

*Ex parte* DUNDAS.

Mr. M. Bisset moved for an order upon the respondent Beukes to execute the necessary documents, and pass transfer of a certain farm known as the Ky Ky.

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Rule granted, returnable on the last day of term, calling upon respondent to show cause why an order shall not be granted as prayed, rule to be served personally, failing which one publication in a Vryburg newspaper.

DRIESSON V. DRIESSON.

Mr. Roux moved on the petition of Cornelis Driesson, of Kuil's River, for an order upon his wife, requiring her to deliver up his child, who was detained by respondent in Cape Town. Respondent, the petitioner said, had deserted him, and had been living in adultery. The child was removed from his custody, while he was absent from home.

Rule granted, returnable this day week, restraining respondent in the meantime from parting with the child, and calling upon respondent to show cause why an order shall not be made as prayed.

*Ex parte* GIBBS.

Mr. Benjamin moved for a certain rule *nisi* to be made absolute, authorising cancellation of a certain mortgage bond.

Rule absolute.

*Ex parte* VAN STRAATEN AND OTHERS

Mr. Toms moved for an order authorising the transfer of certain landed property in the division of Cradock.

Order in terms of Master's report.

ENSLIN V. SWANEPOEL.

Mr. Toms moved for leave to petitioner to sue the respondent (Cornelia H. C. Swanepoel) by edictal citation upon a mortgage bond, and for the attachment of certain property specially mortgaged in the town of Aberdeen *ad fundandam jurisdictionem*. Respondent was last heard of at Vrede, Orange River Colony.

Order granted, attaching the property and authorising the petitioner to sue respondent by edictal citation, citation returnable on the 12th March, personal service, failing which one publication in the “Friend” (Bloemfontein).

*Ex parte* JOELSON.

Mr. Alexander moved on the petition of Johanna Joelson as co-executrix of the estate of her late husband for an order authorising transfer to her of certain landed property in the division of Hopetown, upon payment of £350 by petitioner. It was stated that the purchase would be for the benefit of the heirs.

Order granted as prayed.



*Ex parte* MULLER AND WIFE.

Dr. Greer moved for an order authorising registration of a certain antenuptial contract entered into between the petitioners in Bloemfontein, Orange River Colony, before a notary.

Order granted as prayed.

*Ex parte* PRETORIUS.

Mr. Pohl moved for the removal of petitioner's name from the roll of advocates. Petitioner had been articulated to an attorney at Steynsburg, and, owing to an inadvertence, he had failed to apply hitherto for the removal of his name from the roll of advocates.

Order granted as prayed.

## GAGELA V. GANCA.

Mr. Gardiner moved for an extension of time within which applicant may prosecute an appeal from a judgment of the Circuit Court held at Cala, Transkei.

De Villiers, C.J., said that the matter should be mentioned to a full Court of Appeal. The application would be set down for the 11th inst.

SMITH V. CERES MUNICIPALITY. ( 1907.  
Feb. 1st.

## Municipal regulations—Payment of Municipal funds.

*A Municipal regulation provided that "where any expenditure of the Municipal funds exceeding £50 shall be brought before any meeting of Commissioners, the question shall not then be decided finally but shall be brought in review at the next meeting of the Commissioners." A loan of £1,500 was authorized at a public meeting of resident householders for the purpose of carrying out a definite scheme to supply the town with water. In carrying out the details of that scheme it became necessary for the Commissioners from time to time to authorize the payments of amounts exceeding £50.*

*Held, that the Municipal regulation in question did not apply to payments forming*

*part of expenditure which had already been lawfully authorized.*

This was an application to make absolute a certain rule nisi interdicting the respondent Municipality from proceeding with the laying of a certain water-pipe.

It appeared that the matter in dispute in this case was a pipe that the Council had commenced to lay in connection with the water scheme for the Municipality of Ceres. Mr. Percy Ashenden went to the Municipality in 1903 and made a report on the work which had been carried out up to that time, and he recommended the laying of a branch circulating main down Millstreet across the Dwaars River, which would have the effect of improving the supply to Ward No. 2. Some opposition was now manifested by the householders in Ward No. 1, on the ground that the pipe would reduce the pressure in that ward.

On the 23rd August, 1903, a meeting of ratepayers and householders was held, at which it was resolved "that the Municipality be authorised to approach the Government for a loan of £1,500 to cover present liabilities and cost of proposed additions to the original scheme." The Council, by the casting vote of the chairman, had resolved to take steps to have this pipe laid, and after the work had been commenced, Mr. Smith (the present applicant) obtained, on an *ex parte* application, an interdict temporarily restraining the Council from proceeding with the work. He based his application on the ground that the Council were not authorised under such circumstances to undertake an expenditure exceeding £50, unless the matter were brought in review or sanctioned by a meeting of the resident householders, and that no such review had taken place and the expenditure had not been authorised.

Mr. Roux was for applicant; Mr. Benjamin was for respondents.

Mr. Benjamin appeared to show cause why the rule should not be made absolute, and read affidavits in support of his clients' position.

Mr. Roux read answering affidavits, and said that the meeting in August, 1903, authorised the Council to approach the Government for a loan for certain improvements, but there was nothing said as to which improvements. Then the Government sent down their engineer (Mr. Burrowes), who advised that there was no necessity for laying this further pipe. The Council got the money, and the applicant said that the Council were never authorised by the ratepayers or by a clear majority in the Council to lay this particular pipe: (a) The applicant said that

at a further meeting of the ratepayers in 1905 or 1906 it was resolved by a large majority not to lay this pipe.

[De Villiers, C.J.: The illegality you rely upon is that the chairman gave his casting vote, and that the proper course was to bring the matter in review, or, failing that, to bring it before a public meeting.]

Mr. Roux said that a public meeting was called at the request of the applicant, and that meeting was attended by all the Councillors. A large majority of those present decided against the pipe. Counsel added that the position of the Council was that there were three members belonging to one ward and three from the other, and the chairman was a representative of Ward No. 2. He it was who gave his casting vote to authorise this expenditure exceeding £50.

Mr. Benjamin submitted that this particular scheme was authorised by the meeting held in 1903.

De Villiers, C.J.: The rule is this case was granted on the supposition that the resolution arrived at at the meeting of the municipality when the chairman gave his casting vote was an illegal resolution in terms of the 5th municipal regulation. The illegality would exist if this were a case in which the subject matter involves taxation or expenditure of the municipal funds to an extent exceeding £50. It was said the fact was not brought prominently before the public before the day of the meeting of the Council, but, in point of fact on the 21st August, 1903, there had been a public meeting of resident householders, at which it was decided "that this meeting of resident householders authorise the municipality to approach the Government for an additional loan of £1,500 to cover the present liabilities, and the cost of proposed additions to the original scheme." This resolution is proposed by Mr. Baumann. Mr. Baumann has now made an affidavit to the effect that at that meeting where the resolution was passed, the report of Mr. Ashenden was submitted, and that report recommended the pipe, which was the subject of the resolution passed by the casting vote of the chairman of the municipality. There had already been a resolution of householders authorising the raising of a loan of £1,500, and the question of this pipe was a mere detail, which, in my opinion, did not require the further sanction of the resident householders. I am confirmed in this view by the terms of the 7th regulation, which provides that "in every case where any expenditure of the municipal funds exceeding £50 sterling shall be brought before any meeting, the question shall not then be decided finally, but shall be brought in review at the next meeting of the said Commis-

sioners, and, in the event of a final decision not being arrived at, then a meeting of the resident householders shall be called at a notice of seven days, to determine the same by a majority of the resident householders then present." This resolution, in my opinion, applies to fresh expenditure, but not to such expenditure as has already been authorised. I do not consider that in carrying out the details of that expenditure it is necessary to bring every item in review, and, if there is no final decision, to have a meeting of resident householders. If that were to be the case no public work would be carried out, it seems to me. A few ratepayers might so obstruct the work that no public work would ever be done. I am satisfied in the present case that the £1,500 originally authorised covered the amount, and that, when further details had to be decided from time to time at meetings of the municipality, the original resolution of the ratepayers would cover it, and that in the present case the resolution in regard to the pipe was not such a matter as involved any taxation or expenditure exceeding £50 in terms of either the 5th or the 7th regulation. That being so, it is clear that the rule *nisi* ought not to have been granted and that it ought to be discharged with costs.

Mr. Roux urged that there was such a doubt as to the legality of the Council's action that the applicant had been justified in bringing the matter into Court, and that he should not, therefore, be mulcted.

De Villiers, C.J.: I think you took the risk by trying to prevent this work. I suppose the work had already been begun; the money had been obtained and the work was stopped. The Court granted a rule to prevent any injustice. You have failed in that rule, and I think you must pay costs.

[Applicant's Attorneys: Wahl, Fuller and De Klerk. Respondent's Attorneys: Michau and De Villiers.]

#### *Ex parte* DU PLESSIS.

Mr. P. S. T. Jones moved for leave to David Jacobus du Plessis, as executor in the estate of the late Christoffel Andries Petrus Kotze, to mortgage certain estate property in the division of Somerset East. From the petition, it appeared that Du Plessis instituted an action against one Leonard Wm. van Os, of Pearston, and obtained judgment in August, 1905, for £600, with interest (15 C.T.R., 691). Defendant paid no part of the said sum or of the costs, but surrendered his estate as insolvent, and petitioner proved against the insolvent estate for the amount of the judgment and interest,



and taxed costs as between party and party. On the claim for £600, with interest, a dividend of £3 10s. had been awarded from the insolvent estate. The taxed bill of costs between party and party amounted to £448 6s. 8d., on which a dividend of £2 4s. 9d. had been awarded from the insolvent estate. The bill of costs as between attorney and client amounted to £207 9s. 3d., and petitioner was, therefore, liable for £650 0s. 4d., together with the disbursements in the matter. He sought leave from the Court to mortgage the farm Kranvogelkuil, division of Somerset East, for the purpose of paying the said costs, which, together with the disbursements, amounted to £680 3s. 9d., and for payment of which there were no funds available in the said estate.

[De Villiers, C.J.: I cannot understand such an action being brought against an insolvent estate.]

Mr. Jones said that Van Os, after judgment had been given against him, surrendered his estate. The action was for transfer of certain land, or, in the alternative, for the payment of certain money. The order of the Court was judgment for the plaintiff for £600, with interest, failing such payment, then transfer of certain ground. Defendant had not paid this sum of £600.

[De Villiers, C.J.: But has the property been transferred?]

That does not appear from the petition, but it shows that there was a dispute over some land.

[De Villiers, C.J.: It seems a pity that this executor should have wasted the assets of the estate in a futile law suit.]

Of course, as it turns out, it was futile.

[De Villiers, C.J.: Now, he wants to mortgage the land in order to pay the costs. It seems that the costs between attorney and client were £207.]

It would appear that there was a transfer of the land. The defendant tendered one half of the seven morgen.

[De Villiers, C.J.: On whose advice was the action brought?]

That I cannot say; I was not in the original action myself. It appears also that the erven do form part of the estate now.

[De Villiers, C.J.: I should like to refer this matter to the Master. It is not a case where minors are concerned, but I wish to be satisfied that, as executor, he had good cause to bring this action.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### APPEALS.

DU PREEZ V. BENADE. ) 1907.  
( Feb. 4th.

This was an appeal from the Court of the Resident Magistrate of Worcester, in a case in which the present appellant sued for the sum of £13 15s. 8d., for goods sold and delivered. The defendant first denied the claim, but eventually admitted it, and he brought in a counter claim for £17 15s. 8d. The Magistrate found for the plaintiff on the claim for £13 15s. 8d., and for the defendant on his claim in reconvention for £17 15s. 8d. The plaintiff now appealed against the Magistrate's judgment in reconvention.

De Villiers, C.J., said he had read the evidence, and counsel need not read the record.

Mr. J. E. R. de Villiers appeared for the appellant (plaintiff in the Court below); Mr. Gardiner was for respondent.

Mr. De Villiers said it was a question whether the Magistrate had found correctly on the evidence, especially on the documentary evidence on the counter-claim. There were only two items which he (counsel) proposed to press. One was the item of £20 for a set of show blinds. That, plaintiff said, should be only £13. The other item was that the defendant gave plaintiff credit in his account for goods, to the amount of £7 8s. 9d. That, plaintiff said, ought to be £12 8s. 9d. The counter-claim would amount then to only £5 15s. 8d., but plaintiff did not admit this sum. That was simply a question of oral evidence; there was simply the oath of one party against the other on that point. Counsel went on to refer to points in the evidence, and submitted that the documents strongly supported the plaintiff's contention. The Magistrate stated in his reasons that in regard to the one item in dispute the balance of evidence was in support of the defendant denied this, and there was contended that the Magistrate was not justified in that conclusion.

Mr. Gardiner said that the defendant's case in regard to the show blinds was that the plaintiff (defendant in reconvention) did not supply the material, as agreed, and that the extra sum was to cover the material supplied by the de-

fendant. The other item of £5 was stated to be in respect of cash lent, but the defendant denied this, and there was no evidence, except the plaintiff's statement in support of it.

De Villiers, C.J.: In this case there is no doubt as to the claim in convention, the amount is admitted. A dispute arises now in regard to the correctness of the decision of the Magistrate in giving judgment for the whole amount of the defendant's claim in reconvention. There are two items in dispute in this claim in reconvention. The first is in reference to a show window, whether the defendant was to supply the material himself or not. In the first account rendered by the defendant—the document marked "K"—the total amount alleged to be due in respect of the show window is £13, and there is no claim there made, at all events, for £7 for material supplied; and upon the basis of only £13 being due, a settlement is arrived at, and £10 7s. 3d. was paid to the defendant. That took place in March, 1905, and now after a settlement has been made, the defendant rakes up an old transaction and claims £7. The documentary evidence is entirely in favour of the plaintiff as to the obligation having been on the defendant to supply the materials, and, consequently, the defendant had no right afterwards when he was sued for another debt to claim this £7. To that extent the Magistrate, in my opinion, has clearly erred. Then in regard to the £5, the Magistrate seems to have taken it for granted that the books did not show this amount. Now, the entry of £5 appears at the due date, and in regular order in the books. So far as the plaintiffs' books are concerned, the amount seems to have been perfectly in order. Then, when we refer to this account "K," we find that there is an amount of £12 8s. 8d., which was deducted from the £22 16s. alleged to have been owing to the defendant, and that £12 8s. 8d. will be exactly the amount if the books were correct in stating that £5 had been advanced by the plaintiff. Upon the evidence, I am clearly of opinion that the Magistrate erred in regard to this £5 also, and the consequence is that instead of giving judgment on the claim in reconvention for £17 15s. 8d., the Magistrate ought to have given judgment on the claim in reconvention for £5 15s. 8d. The appeal will, therefore, be allowed, and judgment entered for the plaintiff in convention for £13 15s. 8d., with costs in convention in the court below, and for plaintiff in reconvention for £5 15s. 8d., with costs in reconvention in the court below; but respondent must pay the costs of the appeal.

ADAMS V. MOCKE.

[For head-note see Vol. XVI., page 652.]

This was an appeal from a judgment of the Acting Resident Magistrate of Fraserburg, in an action brought by appellant against respondent for delivery of a certain horse, or its value, £20.

From the record it appeared that a certain horse belonging to appellant had been used for post-cart work. It was sent out with a driver from Beaufort West to Loxton, and the driver returned without the horse, but a mule was occupying its place. It was explained that the horse became ill at Loxton, that it was left there to be cared for, and a mule was brought back in its place, and this mule was substituted for another mule at Slangfontein. When the driver returned to Beaufort he was sent back to get the horse. He exchanged the second mule for the first mule at Slangfontein. The man at Loxton, Mr. Esterhuizen, set up the position that he exchanged the first mule for the horse, and that he had since exchanged this horse with respondent for another one.

Mr. Louwrens was for appellant, Jacob Daniel G. Adams, contractor, Beaufort West; Mr. J. E. R. de Villiers was for respondent, Christian David Mocke, junior, of Fraserburg district.

Mr. Louwrens said that the matter was before His Lordship in July last, (16, C.T.R., 652) when there was only evidence given on behalf of the plaintiff in the case (the present appellant), and the Court then ordered that the case be sent back to the Magistrate to hear evidence on behalf of the defendant. The Magistrate had since gone into it, and had given judgment against the plaintiff, who had again appealed.

De Villiers, C.J., said counsel need not read the evidence, as he (the learned Judge) had already done so.

After hearing counsel for the respondent, the Court allowed the appeal.

De Villiers, C.J.: It is unnecessary to repeat the facts of this case, which have been fully stated on a previous occasion, when the matter was before the Court. (16, C.T.R., 652). The plaintiff was the owner of a postcart and horses, and employed a coloured driver to drive the postcart between Beaufort West and Loxton. On one of the journeys a horse broke down, and the driver went to a man named Esterhuizen and induced him to give him a mule. He left this broken-down horse with Esterhuizen. There is a dispute between the post-cart driver and Esterhuizen as to whether there was an exchange or not. The postcart driver denies it, and I am not satisfied there was an exchange; but, in any case, it is perfectly clear that the driver had no authority from his master to exchange

his horse for a mule. Well, this mule, which he got from Esterhuizen, mule, which he got from Esterhuizen, also broke down, and then another mule is obtained, but the plaintiff took the earliest opportunity of returning Esterhuizen's mule to Esterhuizen, and of asking for his horse. Whereupon Esterhuizen says: "Oh, no; it was an exchange, and I have exchanged that horse for another horse with the present defendant." Thereupon the plaintiff says: "Very well, I am the owner of this horse. I have done nothing to lose the ownership of the horse, and therefore I am now entitled to claim it back from the man in whose possession it is." Now, these are the simple facts, and the Court has previously laid it down that the defendant can only succeed if he shows that the plaintiff had parted with this animal, and had allowed Esterhuizen to remain in possession of it under such circumstances as might reasonably lead the defendant to believe that Esterhuizen was the true owner, and not the plaintiff. Well, nothing has been elicited in the fresh evidence which in any way improves the position of the defendant. The plaintiff has done nothing whatever to lead anyone to suppose that Esterhuizen was the owner. The Magistrate suggests that Esterhuizen must be regarded as a kind of dealer in horses, but the reason why the suggestion is made is because he was a mason, and a mason often requires horses for his business, which ought to have been known to the plaintiff, but that is somewhat inconsequential reasoning. Esterhuizen cannot, in my opinion, be regarded as a dealer in horses, so as to make out the kind of negligence suggested by counsel for the respondent in the plaintiff allowing Esterhuizen to remain in possession of the horse. No evidence whatever has been given in this case, in my opinion, to justify the conclusion to which the Magistrate has come, and the result, therefore, is that the appeal must be allowed and judgment entered for the plaintiff as claimed, with costs in this Court and the Court below.

[Appellant's Attorneys: Tredgold, McIntyre, and Bisset; Respondent's: Walker and Jacobsohn.]

#### WOOD V. SMITH.

This was an appeal from a decision of the Assistant Resident Magistrate of Kokstad in an action in which the appellant was sued for the sum of £99 on a cheque.

In the Magistrate's Court, appellant was sued for £99, being the amount of a certain cheque, dated the 31st August, 1906, and drawn by the defendant in favour of the plaintiff, the cheque hav-

ing been dishonoured. The plea was that the defendant denied liability to the plaintiff in respect of the cheque, and he pleaded specially that on the 29th August plaintiff agreed to sell to the defendant 110 full mouthed ewes, delivery to be made to the defendant at his residence on or before the 1st September. These were not delivered until the 8th September, when plaintiff delivered 103 sheep, some of which were broken mouthed. In consequence of the number and condition not being according to the contract, the defendant refused to accept them, and stopped the cheque.

De Villiers, C.J., said he had read the record.

Mr. Upington was for the appellant; Mr. Gardiner for the respondent.

After hearing Mr. Upington in argument on the facts, and without calling on Mr. Gardiner, the Court dismissed the appeal.

De Villiers, C.J.: I see no reason for disturbing the judgment of the Magistrate. The best proof that this sale did take place is the fact that a cheque for the amount was given by the defendant. He afterwards seemed to have thought fit to depart from his bargain and stopped payment of the cheque, and to my mind he did so on wholly inadequate grounds. He says now that what he thought he was buying were breeding sheep, but if the evidence is correct, as to the value of breeding sheep at that time, it is wholly impossible to believe that the plaintiff would have sold these sheep for 18s. a-piece instead of for from 28s. to 29s. The defendant had an opportunity before he gave the cheque or before he concluded the bargain, of inspecting the sheep. He really did not take the trouble to inspect them. He took the plaintiff at his word, but afterwards he tried to depart from his bargain and refused to pay the money. In my opinion there was ample evidence to support the decision of the Magistrate, and there is certainly not sufficient evidence to justify this court now, upon a pure question of credibility, in altering that decision. The appeal must be dismissed, with costs.

WILKINSON V. MULLER. { 1907.  
Feb. 4th.

Jurisdiction — Interpleader —  
Ownership—Validity of marriage.

*The respondent, having obtained judgment in a R.M. Court against A., who was married after antenuptial contract to the appellant, execution was levied on certain*

donkeys in the possession of A., which were claimed by the appellant. The respondent excepted to the jurisdiction of the Magistrate on the ground that the decision of the question of ownership involved a further question as to the validity of the marriage; and the exception was allowed.

Held on appeal, that as the question whether the donkeys were the property of the appellant could be decided without any inquiry into the validity of the marriage, the exception ought to have been disallowed.

This was an appeal from a decision of the Resident Magistrate of Seymour.

It appeared that there was a dispute about the ownership of certain donkeys, a wagon, and harness, which had been attached on the suit of Muller, the present respondent. The goods were attached in the possession of one Wilkinson. Then it was claimed by Wilkinson's wife. In the middle of the hearing of the case, before the claimant had finished her case, exception was taken to the Magistrate's jurisdiction to hear the interpleader, because he would have to adjudicate on the validity of a certain ante-nuptial contract. The Magistrate upheld the exception and dismissed the case, holding that in order to decide the ownership of the property he would have to decide the validity of the ante-nuptial contract.

Mr. J. E. R. De Villiers for appellant; Respondent in default.

In argument counsel said the interpleader was not really an action at all; it was an inquiry which the Magistrate had to make in regard to a process of his own court. Counsel contended that there was nothing to limit the Magistrate's jurisdiction to decide the ownership of the property.

De Villiers, C.J.: There is a somewhat strange complication in this case, seeing that the execution creditor objected to the Magistrate deciding as to the validity of an attachment made under a writ of execution. If the Magistrate had no jurisdiction to decide the question raised in this interpleader case, then it is difficult to see how the attachment obtained by the respondent could stand. The Magistrate held that in some way or another the validity of the marriage was raised by the objection, but the question whether the donkeys belonged to Mr. or to Mrs. Wilkinson could be decided quite independently of the validity of the marriage, or even of the ante-

nuptial contract. That was a question which, in my opinion, the Magistrate had ample jurisdiction to decide upon, and clearly the Magistrate ought not to have allowed the exception which is taken by the execution creditor himself to the Magistrate deciding the interpleader issue as to the validity of the particular attachment. The appeal must be allowed, with costs in this Court, and the case remitted to the Magistrate to be tried on its merits.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. JAPTHA AND { 1907.  
ANOTHER. } Feb. 4th.

Act 43 of 1885—Unsigned remittal form.

*Where a remittal form, unsigned by the Attorney-General, had been directed to a Magistrate, who thereupon tried and sentenced two prisoners under Act 43 of 1885, the Court set aside all the proceedings subsequent to the committal for trial.*

Hopley, J.: A case came before me during the vacation, as Judge of the week, that of *Rex v. Solomon Japtha and John Smith*, who were charged with housebreaking and theft, which the Magistrate of Cape Town tried under Act 43 of 1885. He found the prisoners guilty—they pleaded guilty on the remittal—and sentenced them each to nine months' imprisonment, with hard labour. On looking through the proceedings, I found there was no remittal at all. There is a remittal form which (by inadvertence, no doubt in the Attorney-General's office) has not been signed by the Attorney-General, so that there never was a proper order to the Magistrate to try this case under Act 43 of 1885, or to try it at all, and although no doubt careless inadvertence, in the Attorney-General's office, it was also equally careless on the part of the Magistrate not to notice that the form was not properly signed. The result of the whole of this is, as has been held before, I think, in the case of the *Queen v. Macatces* (7, High Court, 242), that the proceedings are invalid after the com-



mittal for trial, and that all proceedings after the committal for trial in the first instance must be set aside. Of course, it will be open for the Crown to remit properly and have the case properly dealt with. I understand that in the present instance, no harm has been inflicted on these prisoners, because they are undergoing another sentence, either prior to the one now set aside, or to run after it, and the sentence can be so adjusted that they will not get more than they would have got if the proceedings had been in order from the start. The conviction and the proceedings, after the committal for trial, are quashed, and the case sent back to the Attorney-General's office to be further dealt with on that basis.

#### JIZWA V. METH.

Magistrate's Court summons —  
Cause of action—Sale and  
purchase—Agency.

This was an appeal from the Court of the Resident Magistrate, Tabankulu. The plaintiff sued in the court for the sum of £47 5s., the price of 63 bags of mealies. Judgment was given for the plaintiff with costs.

The material portion of the summons set out that in or about the end of August, 1905, at Tabankulu, the plaintiff contracted and agreed with the defendant to advance certain 63 bags of mealies, which the defendant undertook and agreed to transport to Tembuland and sell them at the best price there, and, as soon thereafter as possible, to pay to the plaintiff £47 5s., being the value of the mealies at 15s. a bag. The defendant was to retain the balance of the proceeds in consideration of his services. The defendant accepted delivery of the mealies in good order, and thereafter proceeded to Tembuland. The defendant failed and neglected to pay the plaintiff the sum of £47 5s., being the value of the mealies, or to account to the plaintiff in any way whatsoever. The defendant appeared through Mr. Attorney Berrange, who applied for a postponement on the ground that certain witnesses were not present. Mr. Pearson objected to the postponement on the ground that plenty of time had elapsed to have the witnesses present. Mr. Berrange pointed out that one of his witnesses was in gaol. A postponement was agreed to *sine die*, provided Mr. Berrange would accept notice of set down. Upon resuming, the defendant conducted his own case, and he stated that he never bought the mealies. People refused to buy the mealies because they were infected with weevils. He left them at a kraal, and reported this to the plaintiff. The plaintiff said he was to wait until they

would see if people would buy them. Defendant returned to see the mealies, and found they had gone bad. The Magistrate in his reasons, said that the plaintiff sued the defendant for £47 5s., being the value of 63 bags of mealies at 15s. a bag. In August, 1905, the plaintiff delivered to defendant the mealies to sell on his behalf, and plaintiff's contention was that the defendant was to bring him 15s. for every bag sold. The defendant was to keep everything above that for his trouble. The defendant stated that his instructions were to sell at not less than £1 a bag. He admitted he was to keep everything he got over 20s. The Court did not believe that the plaintiff gave such instructions. It was in evidence that mealies were bought at 20s. or thereabouts at the time at Umtata. The defendant proceeded with the mealies, and, not getting 20s., he off-loaded them. He said he could not sell them at that price. Considering the length of time that would be occupied in travelling to Umtata and back, it would appear that the defendant had not taken much pains to sell. Later, the defendant took loads for other people, and endeavoured to sell the other mealies. Subsequently he took loads to East London, and stated on his way to East London he discovered that the mealies were bad. Plaintiff denied that a letter to this effect reached him. The plaintiff said he told his boys to look up the defendant, and to tell him to sell the mealies if they were good they could take them over and sell them; and if bad to leave them where they were. It seemed probable that plaintiff did receive that letter. The defendant gave another version of this, stating that the boys instructed the head of the kraal to sell them as they could not move them, and he then left with the plaintiff's boys. The plaintiff said the defendant avoided meeting him. The defendant did not exercise due diligence to dispose of the mealies, and he took the risk of the mealies going bad and becoming valueless. Had he used due diligence he would have disposed of them, and having failed otherwise to account for them he was responsible to the plaintiff for their value at the rate agreed upon.

Mr. Benjamin for appellant; Mr. W. P. Buchanan for respondent.

Mr. Benjamin pointed out that the Magistrate in his reasons said that the defendant took upon himself the risk of the mealies going bad, whereas there was not a tittle of evidence anywhere to that effect.

[Hopley, J.: On what ground, Mr. Buchanan, do you support this judgment?]

Mr. Buchanan: I submit on the facts that the judgment is the only one that could be given.

[Hopley, J.: Perhaps you will convince me. First of all, the man brings his action for mealies sold. His evidence does not seem to me to support that. He does not bring his action for negligence of an agent, which he tries to make out.]

Mr. Buchanan submitted in a matter in the Magistrate's Court, as long as the case was substantially put to the defendant that was all that was required. The plaintiff said he claimed the sum of £47 5s., but he did not say that he was claiming this as the purchase price of certain mealies, which he sold to the defendant.

[Hopley, J.: What do you say he is claiming it as?]

He says: "You are my agent and you have got to account to me for it, and you have not accounted to me for it." Counsel submitted there was clear evidence of his negligence here. The summons was not at all based on the question of a sale by the plaintiff to the defendant. The summons showed the defendant what case he had exactly to meet, and he had met it substantially. He had given as much evidence as he could if the summons had been otherwise worded, and it was clear that the defendant had the gist of the case before him.

Hopley, J.: In this case the plaintiff sued the defendant on a summons which alleged that in August, 1905, plaintiff agreed with the defendant to advance him certain set of 63 bags of mealies, which mealies the defendant undertook and agreed to transport to Tembuland, to sell the same at the best price there obtainable, and as soon thereafter as possible to pay the plaintiff the sum of £47 5s., being the value of the mealies at 15s. a bag, the defendant to retain the balance of the proceeds of the mealies in consideration of his services therein. The words in the paragraph "to advance certain mealies" are admitted to mean to entrust the defendant with certain 63 bags of mealies for sale, etc. Then the next paragraph of the summons goes on: "The defendant duly accepted the delivery of the mealies in good and sound order, and thereupon proceeded to Tembuland." Then the third paragraph of the summons: "The defendant has neglected to pay to the plaintiff the sum of £47 5s., or to account to the plaintiff in any way whatsoever for the amount of the said mealies, though often requested to do so." When I said at the beginning of the case something about no exception being taken to the summons, what I meant was that the summons does not allege that the mealies were sold, so that the time for accounting for the £47 5s. had not arisen, and the cause of action, it seems to me, is not shewn in the summons to

have accrued. There is no allegation that the mealies were sold, or that the time for accounting for the £47 5s. had ever arrived. The summons goes further: "That the plaintiff failed to account for the mealies in any way whatsoever." And that seems to me, on the evidence, to be the only thing that we can go into at all in this matter, because when we come to the evidence we find that the plaintiff candidly admits that he did not sell these mealies to the defendant at any time, that he looked upon the defendant as an agent, and that the utmost that passed between them was: "You go and sell these mealies for me in Tembuland, and account to me for 15s. a bag, and you can have anything over that you sell them for." It is pretty clear something was said as to selling the mealies at or about £1, whether the defendant was limited to £1 or whether it was understood between them nothing less than 5s. would pay him. It is clear that the defendant came back and said he could not get the price of £1 a bag, and he thought he could hold on for a higher price. The plaintiff did not object to what he had done, and among the things he had done he reported that he off-loaded them at a hut near Umtata. If that were a dangerous proceeding, and likely to bring weevils into the mealies, the plaintiff, still the owner at that time, ought then to have objected. The plaintiff did not make any objection. All he said was, "I do not want to hurry you as long as I get my 15s." At that time he did not think the procedure negligent or improper. He did not say: "I have got nothing to do with the mealies, because they are yours," nor did he say, "Remember, you are taking them over at 15s. a bag, and entirely at your risk." All the owner did say was: "I do not want to hurry you as long as I get my money in the long run." It is said that I must look upon the summons, though not so worded, as in effect one that claimed for damages for improper treatment of these mealies. Though one is very apt to be not too exacting about the precise form of a summons in the Magistrate's Court, as long as the proper meaning of the summons can be discovered, yet the summons should be so drawn that a defendant must know the cause of action against him, and I must say that in the present case I cannot see anything in the summons which would cause the defendant to know that he was being summoned by the plaintiff as his agent for negligence in treatment of the property entrusted to him as agent. The summons does not certainly bear that appearance, and if it had the defendant might have defended himself in many ways as to the treatment

of the mealies and weevils, and the plaintiff might have been cross-examined on such points. If an agent is negligent and loss can be traced to his negligence, then the agent is responsible, but before he can be held responsible it ought to be clearly stated in the summons that such is the case. In the present case, for instance, he would probably ask as to the history of these mealies, and the likelihood of pit mealies being affected with weevils as against other mealies, and these things would have to be considered, and also whether the mealies would more quickly have gone bad in a hut or in the plaintiff's own store. All these matters would have arisen if it had been an action properly shaped for negligence, and the Magistrate's mind would have been directed to a different state of affairs to the one on which he gave judgment. It seems to me that the plaintiff never ceased to be the owner of these mealies. They perished from weevils, and it has not been proved to my mind that the agent was responsible for the weevils getting into the mealies. In these circumstances the ordinary rule of law, *res perit domino*, must apply, and the loss, if there be any, must be borne by the plaintiff himself; consequently the Magistrate was wrong, and in my opinion the appeal should be allowed, with costs in both Courts.

Mr. Buchanan: Will your lordship enter absolution from the instance.

Hopley, J.: Very well. Absolution from the instance, with costs in both Courts.

BAILIE V. MUIR. { 1907.  
Feb. 4th.  
.. 12th.

Medical fees—District surgeon—Public Health Act—Insolvency of patient—Promise to pay—Consideration.

*M., a medical practitioner and District Surgeon of S., rendered an account to B. for medical attendance. Thereafter B.'s estate was sequestrated. B.'s wife, married out of community, having promised to pay the debt, M. did not prove on the estate. She did not pay, and subsequently B., before any release from insolvency, promised to pay in full. M. thereafter sued B. in the Magistrate's Court on this promise.*

*Held on appeal, that M.'s remedy having been barred by*

*B.'s insolvency as against B., and a complete delegation of the obligation having been made whereby his wife alone was responsible to M., there was no longer any obligation on the part of B. to M., that therefore the promise by B. to pay the debt was a nudum pactum, and that M.'s action against him on that count must fail.*

*After his insolvency, B., who was still carrying on farming operations either for his wife or on his own behalf, asked M. to examine medically certain native servants on his farm whom he suspected of having contracted venereal disease. M. did so examine them, found that B.'s suspicions were well founded, and charged B. a certain fee for his services.*

*Held, that as B. had not followed the procedure prescribed by the Public Health Acts for obtaining the services of the District Surgeon, he had engaged M. in his capacity of a private practitioner and was liable to him for the fee charged.*

The plaintiff, the present respondent, was a medical practitioner and the assistant district surgeon of Sterkstroom. He sued the defendant for £11 14s. 6d. for medical services rendered, incurred before the insolvency of the appellant, and for £2 after the sequestration of the estate.

The summons set out that on May 1, 1906, the plaintiff, at the special instance and request of defendant, proceeded to the farm Alexandra, and there medically examined certain servants of the defendant, by reason whereof the defendant was indebted to him in the sum of £2. That at divers times between October 28, 1904, and August 18, 1905, the defendant became indebted to the plaintiff for medical attendance, medicines, and appliances, amounting in all to £11 14s. 6d. That thereafter, in the month of October, 1905, the defendant's estate was sequestrated. The plaintiff had not proved the debt of £11 14s. 6d. against the defendant's insolvent estate, but the same remained owing to him, and that thereafter on the 28th July, 1906, the defendant promised and



undertook to pay the said debt of £11 14s. 6d. to the plaintiff in full, but he had not paid the same according to the accounts annexed, which the plaintiff prayed might be considered as inserted. The defendant admitted the correctness of the account, with the exception of the item of £2. The debt was contracted before the sequestration of his estate, and defendant was still an unrehabilitated insolvent.

The Magistrate, in his reasons for judgment, said the defendant, an undischarged insolvent, was sued by the plaintiff, a duly licensed medical practitioner, for the sum of £13 14s. 6d., being £11 14s. 6d. for medical attendance and medicines supplied to the defendant, and the members of his family, prior to the insolvency, and £2 for one visit to defendant's farm, subsequent to the insolvency. As regards the item of £2, there was no dispute that the service was rendered. All that this Court had to decide was whether the defendant was liable. It appeared from the evidence that on the 30th April, 1906, the defendant personally asked the plaintiff to visit his farm to examine some natives, whom he suspected of having a contagious disease, and the following day his wife, acting as his agent, repeated the request. The plaintiff then went out, and examined the natives, and found them to be suffering from a contagious disease. The defence to this claim was three-fold: (1) That the natives themselves and not the defendant were liable; (2) that the plaintiff said the Government would be liable under the C.D. Act of 1885; (3) that defendant received no consideration. The first defence was disposed of by the fact that the defendant had no express mandate from the natives to secure the services of the plaintiff, as he himself admitted, and he could not be regarded as having had an implied mandate. The evidence on the second ground of defence was contradictory, and on the whole the weight of probability was with the plaintiff. The third defence was that the defendant received no consideration. The definition of "consideration" by Holland certainly showed that defendant did receive consideration. There was labour sustained by the plaintiff at the special instance and request of the defendant. For these reasons on the item (2), judgment would be for the plaintiff, as prayed. The second item raised a question of greater difficulty. The defendant's estate was sequestrated on the 30th October, 1905, and on that date he was indebted to the plaintiff in the above amount. He found that defendant on the 28th July last, nine months after his insolvency, transmuted the *naturalis obligatio*, under which he lay to plaintiff into a *civilis obligatio* by the fact of *constitutum*. The obligation, therefore, dated from the last-mentioned date, and having been incurred subsequent to in-

solveny was binding on defendant, and he could be sued upon it. On this item there would be judgment for the plaintiff as prayed.

Mr. McGregor for appellant; Mr. Benjamin for respondent.

Mr. McGregor submitted that a man could not be sued while his estate was sequestrated for a debt contracted prior to sequestration. He quoted the cases *Twentyman v. Carlis* (6 H.C., 13), *McFarlane v. Brunette* (B.S.C., 272), and *Norden v. Magadas* (1 M., 45). In all those cases the debt had been incurred after the date of insolvency. The policy of the law was against arrangements between an insolvent debtor and creditor to pay a debt in full. He cited *ex parte Barrow* (50 L.J. Ch., 821) and *Leake on Contract* (4th Ed., 434).

Mr. Benjamin contended that a subsequent promise to pay did not operate as a reviver of the debt against the insolvent estate, but against the insolvent personally. The question had been considered in the cases *Dicks v. Pote* (3 E.D.C., 74) and *Quinn Bros. v. Van der Merwe* (9 J., 217).

[Hopley, J.: What is the consideration for the new promise to pay the old debt?]

Mr. Benjamin: According to the decision in *Twentyman v. Carlis* the old debt would be a sufficient consideration.

Mr. McGregor, in reply, quoted sections 123 and 127 of the Insolvent Ordinance, *Hill and Paddon v. Davidson* (5 J., 99), and *Heather and Son v. Webb* (46 L.J.N.S., 89).

*Cur. Adv. Vult.*

*Postea* (March 12th).

The appellant is a farmer living near Sterkstroom, and the respondent is a medical man practising at that place. The appeal is from a judgment of the Assistant Magistrate for Queen's Town, stationed at Sterkstroom. The claim which was made by the respondent, who was plaintiff in the Court below, was for the sum of £13 14s. 6d., made up of the sum of £11 14s. 6d. for medical attendance on the appellant and his family, and the sum of £2 for attendance on some native servants of the defendant, at his request. As to the former sum, it was for medical charges in respect of services rendered between 28th October, 1904, and 18th August, 1905, and for these an account was rendered to the defendant on 2nd October, 1905. On 30th October, 1905, however, the defendant became insolvent, and he was still an unrehabilitated insolvent at the time when the action was brought in the Court below. It appears that the plaintiff did not prove his claim on the estate at the first or second meetings of creditors, which were held before the end of 1905, and that in January, 1906,

before the third meeting, the wife of the defendant, married to him without community of property, and owning property of her own, asked the plaintiff not to prove the debt on the insolvent estate of her husband, and promised to pay the account herself. The plaintiff thereupon refrained from proving his claim, and thereafter looked to Mrs. Bailie for payment, as is proved by his various letters to her, and by the fact that he after that conversation sent in the account for his amount to her, and not to the defendant. The defendant was quite aware of this arrangement, in which it is clear that all three parties concurred. The insolvency had, of course, barred the plaintiff's remedy against the defendant, but the further effect of this delegation of the obligation has also to be considered. It appears plain enough that a delegation was duly made, that Mrs. Bailie undertook the obligation of her husband, that Dr. Muir accepted her as his debtor, and that Mr. Bailie acquiesced in this arrangement. The legal effect then would be that not only was the remedy barred by insolvency, but that the obligation itself was extinguished as far as the defendant was concerned. Mrs. Bailie became liable, and the defendant was entirely freed from the debt and discharged from any obligation, whether *naturalis* or *civilis*, arising out of it. In July, 1906, however, the defendant, being then still an unrehabilitated insolvent, made a promise to the plaintiff, about which there is some conflict of evidence, but which the Magistrate believed was to the effect that he would himself pay this amount in the following month. The words used do not seem to me inconsistent with the idea suggested by the defendant that he meant no more than that he would pay out of the assets of his wife, whose farming operations he was managing; but the Magistrate has taken them to have meant that the defendant undertook to pay the amount personally. Even so, I can find no *justa causa* for such a promise, nor any valid ground upon which the plaintiff could sue the defendant. If such promise were made, it was *nudum pactum*, and it is clear that the plaintiff himself did not think that there was an end to Mrs. Bailie's liability, or that he had reverted to his original debtor, for, after waiting for a couple of months without receiving the promised payment, he once more addressed Mrs. Bailie, asking her for a settlement. I am of opinion that in this branch of the case the Magistrate's judgment was wrong, and that the appeal, *pro tanto*, should be allowed. With regard to the item of £2, it is claimed for a liability said to have been incurred in May, 1906, during the insolvency, by the defendant himself. He

seems to have been, in spite of his insolvency, carrying on farming operations, whether for his wife or for himself does not clearly appear—and having reason to suspect the existence of a contagious disease in some of his servants, he sent for the plaintiff, who is the District Surgeon at Sterkstroom, asking him to come out to the farm and inspect the cases. Dr. Muir went out, found that there was contagious disease, and ordered the servants into the town for treatment. For this service he charged £2, an amount which is apparently the usual fee for a trip, and for services of that kind. The defendant, however, maintains that the cases fell under the class contemplated by the Public Health Acts, that the Government, and not he, is responsible for the charges, that he intended when he sent for Dr. Muir that he should come in his official capacity as District Surgeon, and that Dr. Muir must have so understood the matter. The disease discovered was certainly one of those contemplated by the Public Health Acts, and had the defendant taken the proper steps, he would, no doubt, have been able to get the authorities to move in the matter, and treat the cases at the public expense. But he neglected to do this, and elected to send for the plaintiff on his own responsibility. The Magistrate was right in holding that in so acting he had rendered himself liable to the plaintiff. As to this amount, therefore, the appeal must fail. The Magistrate gave judgment for the respondent (plaintiff in the Court below) for £13 14s. 6d., the full amount claimed. That must be changed into judgment for the plaintiff for £2, with costs in the Court below. Each party having succeeded partially in this court, there will be no order as to costs in appeal.

[Appellant's Attorneys: Michau and De Villiers. Respondent's Attorneys: Walker and Jacobsohn.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1907.  
{ Feb. 4th.

Mr. P. S. T. Jones moved for the admission of Rudolph Seydell as a sworn translator in English and German.

Application granted and oath administered.

### GOLDSMITH V. IRWIN.

Possession—Spoliation.

This was an application upon notice to the respondent (Irwin), one Reuben

Levin and one Teperson, to show cause why a certain rule should not be made absolute directing respondent to restore to applicant certain horses, wagon, and harness.

The applicant's case was that he was a produce merchant, residing in Napier-street, Cape Town, and that he had had respondent in his employ as a driver. He bought from respondent a wagon for £4 and set of harness for £2 7s. 6d. Later on the respondent purchased a mare for £18 10s., and applicant advanced him a sum of £10 on condition that unless the money were repaid within a period of ten days the mare should remain in his (Goldsmith's) possession until the money was repaid. After applicant had dispensed with Irwin's services the latter wrongfully and unlawfully and surreptitiously gained access to Goldsmith's stables and removed therefrom the said mare as well as a horse, wagon, and double set of harness, applicant's property. When seen subsequently, respondent admitted that he had had the mare put in the stable of one Teperson, and that he had sold the horse, wagon, and harness to Reuben Levin, of Woodstock.

The respondent's case was that the property which he was alleged to have illegally deprived applicant of did not belong to the applicant but to himself (Irwin). He denied that he had been employed as a driver by applicant, and said that he had delivered forage, etc., on behalf of Goldsmith, with his own wagon, horse, and harness. He denied that he had sold the petitioner the said wagon and harness, and he said that he had purchased the horse from Teperson for £27. The mare was bought by respondent and another man for £18. He approached applicant for £18 which was due to him as salary, and which Goldsmith paid to him. He denied that Goldsmith had advanced money to him. It transpired that respondent had been arrested on a charge of theft of a horse, and that the case had been postponed pending result of the civil proceedings to be instituted.

Mr. Alexander for applicant. Dr. Greer for respondent.

Mr. Alexander submitted that the parties should be put in the position in which they were before the spoliation took place, in order that the rights of the parties could be determined. He contended that on the affidavits there was nothing inconsistent with the claim set up by applicant, and that in several respects the facts deposed to on the other side supported the story of the applicant.

Dr. Greer pointed out that there was a conflict on all the material facts of the case, and urged that the Court should accept the evidence of Teperson, who had no direct interest in the matter. He submitted that the story of the ap-

plicant was not entitled to credence. As to the criminal proceedings which had been instituted, he contended that the liability, if any existed at all, was entirely a civil one, and that the party who should bring an action to determine the rights in this property was the applicant.

Maasdorp, J.: The only question that the Court has now to decide is who is entitled lawfully to the possession of these articles? The question of property cannot now be decided upon the conflicting affidavits that have been put in, and the Court has not been asked now to decide that question. It would seem that the wagon, horse, and harness were, at the time they were taken by the respondent, in the peaceful possession of the applicant. They were found to be in the possession of the applicant after the respondent had left his service. It may be said that the respondent removed the articles on the day after he left the service of applicant, and that that might be said to have been within a reasonable time, but, still, upon the question now before the Court, the fact that he did leave these articles in possession of the applicant when he left his service, supports the case of the applicant that they were left there because they belonged to the applicant. There is a conflict of evidence, but I think a great deal of light is thrown upon the case generally by the evidence with respect to one portion of it, and that is as to the purchase of the horse from Teperson. The applicant states, and he is supported by other evidence, that he purchased the horse from Teperson, and respondent says that the horse was purchased by the applicant from Teperson for him. Now, here we have important evidence in the shape of the cheque that has been put in. This cheque was made by the applicant, and paid over to Teperson, and I think that in itself establishes a very strong probability that the money was paid by the applicant for himself, and on his own account. The relationship which existed between the parties at that time was not of such a character, that I accept at present the view that the applicant would have advanced that large amount on behalf of the respondent. I take it, then, that for the present the probabilities are that that horse was paid for by the applicant, and is his property, and if I accept the evidence of the applicant in that respect I think it establishes the further probability of his evidence upon other points as to the wagon and harness, and it certainly strongly impeaches the evidence of the respondent. I, therefore, come to the conclusion that upon the affidavits I must be satisfied for the present that the horse, wagon, and harness belonged to the applicant. I merely find that at present, for the purpose of establishing the right of possession,

opportunity to be given to the parties to go into the question further, and to have it finally decided as to whom the property belongs to. As to the mare, the question seems to be rather more doubtful. There it is quite clear that the mare is the property of the respondent, and that is admitted by the applicant, but he states he holds it in pledge for a sum advanced by him on behalf of the respondent in the purchase of the mare, and he puts in an account to support his statement in that respect. All I can say as to the account is that it is certainly in a most unsatisfactory shape, and I cannot take it as a document of any importance in that respect. It appears to be a statement which the applicant may call an account of what he considers the present position of the parties. There is no evidence that there was any entry made originally in any authentic book. My finding, therefore, amounts to this, that the respondent is a spoliator, and by means of spoliation removed the property of the applicant. Levin, who has obtained possession through this spoliator, can have no right unless he establish a right in future to this property as against the applicant. The Court will order that the wagon, harness, and horse be restored by the respondent. Levin is the applicant. No order will be made as to the mare. The rule will be made absolute, with costs as to the horse, harness, and wagon.

#### JOOSTE V. VAN HEERDEN.

This was an application for an order calling upon respondent to furnish security for costs of an action which she has instituted against applicant in his capacity as executor in certain estate to recover a sum of £250 alleged to be due as her share of an inheritance.

Respondent had offered £100 as security. Applicant said that this was insufficient, and asked for £200.

Sir H. Juta, K.C., was for applicant, who resides in this colony; Mr. Close was for respondent, who resides in the Transvaal.

After hearing affidavits and counsel's argument on the facts,

Maasdorp, J.: The only point to inquire into now is what, from the nature of the case and the dispute between the parties, would in all probability be a fair margin to allow for costs. The respondent states that she is prepared to give security for £100. The applicant says that that is insufficient, and that the costs are more likely to run into very nearly £200, and, judging from the facts put before the Court on the affidavits, it strikes me that £100 will certainly be rather a low figure, and that it is more likely,

from the nature of the case, that the costs will approach £200. All the Court has now to decide is what the amount should be, because the rule of law is that security must be given for the probable amount of costs. The respondent will be ordered to give security for £200 costs, question of costs of this application to stand over.

#### GENERAL MOTIONS.

URMANN V. URMANN. } 1907.  
} Feb. 4th.

This was an application to make absolute a certain rule nisi interdicting the South African Association from parting with any property or security belonging to the respondent, and interdicting the Standard Bank from parting with any money in their possession, belonging to the respondent, and directing him to pay to the applicant £20 a month as alimony, pending an action to be brought by her for a judicial separation, and £50 towards the costs of the said action.

Mr. Lewis was for applicant; Mr. W. Porter Buchanan was for respondent.

Mr. Buchanan submitted that there was no necessity to make the rule absolute. Respondent said that he was perfectly willing to take his wife back, and live peaceably with her if only she and her relatives would permit him. He urged that in any event the Court would not go beyond the order made in the application heard in 1905 (15 C.T.R., 212), when the respondent was ordered to pay applicant £10 a month alimony *pendente lite* and £30 towards costs of action. He suggested that the sum should be not more than £7 10s. and £20.

Without calling upon Mr. Lewis,

Maasdorp, J.: Applicant alleges that she is about to institute an action for judicial separation by reason of cruelty and incompatibility of temper. She says that on various occasions she has been cruelly ill-treated by the respondent, and that by reason of incompatibility of temper it is impossible for them to live together. These statements are denied by the respondent, but he has admitted that in the past there has been trouble between himself and his wife, who went so far at one time that he actually left the house, and when the matter came into the hands of the legal advisers of the parties, they brought about a reconciliation. It has, therefore, to my mind, been proved that there is some ground upon which the action of the applicant can succeed. Whether she will ultimately be able to establish what she alleges is a question which cannot be now decided. It only remains for the Court now to decide whether she is entitled to assistance in the shape of funds from the respondent.



in this case. The parties are married in community of property, and, I think, therefore, she is entitled to a share in the estate, and she is entitled in litigation properly instituted to make use of such funds. The Court will, therefore, grant her assistance in the matter, but the order will take the shape of the order that was given in the former proceedings.

Mr. Lewis urged that the applicant should be allowed a larger amount of alimony than was granted in the previous order.

Maasdorp, J., ordered the respondent to pay the applicant £15 a month as alimony, pending the proposed action, and £30 towards the costs of the action, and interdicted the South African Association from parting with the securities, scrip, and jewellery, belonging to the respondent, costs to be costs in the cause.

#### HANNAY V. HANNAY.

This was an application calling upon respondent to show cause why he should not hand over to applicant's attorneys £150 to enable her to institute an action for divorce, £10 per mensem as alimony *pendente lite*, a certain sum towards expenses of her approaching confinement, and be directed to give her custody of the child.

From the affidavits, it appeared that the parties reside in the Vryburg district, respondent being a farmer. Applicant alleged that her husband had formed an illicit attachment to a native woman, and she proposes to sue him for divorce on the ground of adultery. Respondent intends to defend the action and claims in reconvention a divorce on the ground of his wife's adultery.

Mr. Upington was for applicant (Alice Adelaide Hannay); Mr. Russell was for respondent (Robert F. Hannay).

Mr. Upington said that the only questions outstanding at the present stage were as to the amount to be paid by respondent to enable applicant to bring her action, and as to the custody of the child. His offers under the other heads would be accepted by applicant. As to the funds for the action, he offered £25, and as to the custody of the child, he proposed to retain the boy and to give his mother right of access while he was present.

Affidavits having been read and counsel having been heard in argument,

Maasdorp, J.: In this case it would appear that the applicant, who was entitled to certain property and funds in the hands of the respondent, has a right to assistance in prosecuting this action, and the Court thinks that for purposes of commencing the action £35 would be enough

to allow her. The respondent will be ordered to pay £35 towards costs, £8 for alimony, and £6 towards expenses of confinement. As to the custody of the child, it seems, from what the respondent himself says, that the child, up to the present, has really been in the care of the mother. It is still a child of very tender years, and it is of that age when the care of the mother is more required than the care of the father, unless something is shown in the character of either party which would induce the Court to alter the ordinary rule. The ordinary rule is that until the case is placed before the Court in such a form as to decide definitely as to who shall permanently have custody of the child, then a child of tender years must remain with the mother, and in this case I think the child can safely be left to the mother until the case is tried. Certain of the statements made by the father are wholly inexplicable, and I might almost say unjustifiable. Apparently he has been as much responsible for the child up to the present as the mother, and in spite of that he says that the child was badly brought up, that he uses bad language, and has been allowed to associate with Kafirs. Then, again, he says that the mother is not fit to have the child, because the child would hardly be safe in her custody, and that she had stated that she wished the child to die. I can quite understand such a remark, considering the relations between herself and her husband were of that character, but I think it is most unjustifiable to construe that into meaning that the child would not be safe in her hands. She could not have meant anything of the kind. We have the evidence of two independent witnesses who have observed her treatment of the child, and who say that it has been proper and kind. Under the circumstances the Court will order that the custody is to be given to the mother, pending further order of Court. As to the *forum* which has been mentioned, the Court cannot now direct anything upon that, but I think there is no doubt that, unless there should be something which does not now appear, this case should be heard somewhere up in Griqualand West, either on circuit or Kimberley, and that the expenses will not be as heavy, and that £35 will go a great way towards covering them. Respondent must pay costs of this application.

#### FALCONER V. WILLIAMSON.

This was an application for the personal attachment of respondent for contempt of Court in failing to obey an order granted by the Court on the 13th December, directing him to give immediate delivery of certain furniture ordered

and purchased by plaintiff from defendant or, alternatively, to refund the sum of £100 paid for same (16 C.T.R., 1127).

It was not denied that respondent had failed to obey the Court's order, but he said that the money was given to him for the purchase of furniture in England during a projected visit. Respondent was disappointed in not obtaining the money in England that he had expected to obtain, and he was unable to buy the furniture. He was now without employment or means, and had only recently recovered from a severe illness.

Applicant, in a replying affidavit, said that he did not authorise the respondent to spend any portion of the money on his projected trip to England, but to expend the funds in the purchase of furniture for applicant.

Mr. W. Porter Buchanan was for applicant; Mr. Rowson was for respondent.

Mr. Buchanan having been heard in argument,

Maasdorp J.: This does not seem to be a matter for attachment of the person of the respondent for contempt of Court, because there has been no proof that there has been any wilful refusal or neglect to do what the Court ordered, while it was in the power of the defendant to carry out the order of the Court. He was ordered either to restore certain furniture or to deliver certain furniture, or pay the value thereof. There is no proof that he had ever had any of the furniture in his possession which he could have delivered. The ordinary mode of taking out an execution against the defendant would have been to have proceeded for the value of his furniture. Under the circumstances, the Court cannot grant an order for contempt, but at the same time, while I have to refuse this order, I refuse it without any costs, because the applicant certainly had a right to come to the Court to demand that his judgment should be carried out. It now appears to the Court that it cannot be done, and, consequently, the Court cannot impose it. On the other hand, the explanation given by the respondent as to his position with reference to the funds handed to him is certainly very unsatisfactory. The application is refused; no order as to costs.

Mr. Rowson urged that the applicant should be ordered to pay costs, seeing that he had failed to show any ground for the application.

Maasdorp J.: The applicant took rather a favourable view of the respondent's conduct, and that was that he used the money for the proper purpose, viz., to buy the furniture. The fact of the furniture being absent is the unsatisfactory part of the business. There will be no order as to costs.

#### KELLY V. R.M., WOODSTOCK.

This was an application, upon notice to the R.M. of Woodstock, to show cause why applicant should not be admitted and enrolled as an agent of the Resident Magistrate's Court in terms of section 36 of Act 20, 1856, and Act 43, 1885.

Applicant had applied to the R.M. for admission as an agent in his court on December 31 last, and had been refused. The Magistrate's ground for refusal was that although it might be that there were not two attorneys, each of whom had an office in that district on December 31, he was of opinion that the attorneys, a considerable number of whom had offices in Cape Town, within easy reach of the court, were regularly taking out process, and appearing to conduct cases in that court, and were in practice in terms of section 8, Act 43, 1885.

Dr. Greer appeared for applicant, James W. Kelly; Mr. Close appeared for respondent.

Dr. Greer, in order to avoid a postponement admitted that Cape Town attorneys did take out process in the Woodstock Court. He contended, however, that the magistrate was bound to admit as agents, in any district where there were less than two attorneys practising any person of good character and fame. The next point was whether the Cape Town attorneys who frequented the Woodstock Court could be said to be "in practice" at Woodstock. He cited the case of *Johnson v. R.M. of Woodstock* (16 C.T. 776), which went on the assumption that unless there were two attorneys having offices, no agent could be refused admission. It was in the mind of the Court that the fact of MacLeod having an office constituted his being in practice. The only test was whether the attorney had an office in the district or not.

Mr. Close said that this case involved the meaning of the words "in practice," while the test which was adopted in Johnson's case was whether there was a room taken. That was not the only test.

[Maasdorp J.: Did the Court lay down that there had to be two attorneys with offices?]

Mr. Close said no, although that was the point on which the application turned. The Chief Justice expressly left the point of practising by appearing, open. The Cape Town attorney who took out process in Woodstock could be said to be in practice at Woodstock. He cited the case of *Van Wijk v. R.M. of Willowmore* (13 S.C. 216), where the Court said that the section in question was intended, without affecting vested interests, gradually to substitute attorneys for agents.

After hearing Dr. Greer in reply,



Maasdorp, J.: If the 36th section of Act 20 of 1856 had remained in force in its original form, then undoubtedly the applicant in this case would now be entitled to be enrolled as an agent in the Magistrate's Court at Woodstock. The question is whether that enactment, as modified by section 8 of Act 43 of 1885, at all interferes with the right which the applicant possessed under the former law. The 8th section provides that: "From and after the taking effect of this Act no person in any district, where not less than two attorneys are in practice shall be admitted and enrolled as an agent in the Court of any Resident Magistrate." The question, therefore, arises whether there are at present two attorneys in the district of Woodstock. If that is answered in the affirmative then the present application must fail; if in the negative then the applicant will be entitled to succeed. This question as to whether any attorney is practising in any district seems to me to be a matter of fact—it has nothing to do with any legal definition; it has nothing to do with residence; but it is a question of fact whether a particular attorney is practising in any particular court. For that purpose it is necessary to ascertain whether it is his habit, or his custom, to practise in that court, whether his services are constantly available for litigants in that court; whether he is easily accessible to them, and whether he is willing to render the necessary service. If, together with all these qualifications, he appears constantly in the court, and renders service, then it seems to me that it is proved that he is practising in that court. In the case which has been cited at the bar—*Johnson v. R.M., Woodstock* (16 C.T.R., 776)—attention was directed chiefly to the point whether the attorney had an office in the district, whether he had an office which he *bona fide* conducted as an attorney, and it was there decided that if it were once accepted that an attorney had an office in which he *bona fide* carried on business, then there could be no doubt that he was practising in the district. There was no reason for the Court to go further in that case. The Court, therefore, held that two attorneys having offices in the district, clearly must have been practising there, showing that the office was not there merely as a matter of pretence, but that it was occupied by a clerk in favour of the attorney. Now, the question arises whether that excludes from practising an attorney who has not an office in the district. As I say, if we take this view as to what actual practise in court is, then it seems, to my mind, that it may exist without an occupation of any office in the district, and it is quite possible that a man might

be at the Magistrate's Court always available for those who are about the precincts of the Court, and may not have residence or an office in such district, and it would be impossible to say when he is there all day, willing to render service, that he should not be regarded as practising, simply because he has no office. We have an affidavit put in, in which it is alleged that the attorneys mentioned there are regularly practising in the Magistrate's Court at Woodstock. Now, I take it, if that is a *bona fide* statement, they are regularly practising in that Court. It so happened that their offices were outside the boundaries of the district of Woodstock, but practically for the purpose of business they were as available in the district of Woodstock as certain persons who might reside in the district, and perhaps have an office in the district, and who, it might be, are further from the office of the Magistrate. Under the circumstances, if an attorney living beyond the boundary of Woodstock, and having an office in Cape Town, regularly makes his services available to any litigant in Woodstock, and is prepared at any moment to practise there, and certainly is willing to do it, as frequently and regularly happens, I think he is an attorney practising in the Resident Magistrate's Court. Under the circumstances, there would appear to be not only more than two, but a great many more than two attorneys, practising in Woodstock. The application must be refused, but there will be no order as to costs.

CAIRNCROSS AND ANOTHER V. FAGAN  
AND SOMERSET WEST STRAND MUNICIPALITY.

This was an application calling upon respondents to show cause why the first-named respondent's office as a Municipal Councillor should not be declared vacant.

Mr. Upington was for applicants; Dr. Greer was for respondents.

Dr. Greer applied for a postponement of the matter until the 19th February, to enable respondent, Fagan (Mayor of the Municipality), to prepare his case.

Mr. Upington said that he should not oppose a reasonable postponement, but he could not consent to such a long postponement as was asked for. He added that a most scandalous letter had been attached to the respondent's affidavit, which really had nothing to do with the postponement, or with the merits of the case. He did not know whether his learned friend proposed to read that letter, but if he did he (Mr. Upington) should ask his Lordship to rule that it should not be read.

[Maasdorp, J.: Is it a letter from Van Zyl and Buissinne?]

Mr. Upington: No, it is a letter written by Mr. Fagan on the 31st January.

Dr. Greer said that he would set his learned friend's mind at rest at once by saying that he did not intend to read the letter.

Maasdorp, J., asked what the ground of the application against the respondent was?

Mr. Upington said that he was alleged to have contravened the Municipal Act.

[Maasdorp, J.: By doing what?]

Mr. Greer: Participating in profits that have been earned from the Municipality.

Affidavits having been heard, and counsel having been heard in argument,

Maasdorp, J.: It seems to me that there is really no necessity on the part of the applicants to hurry this matter through, or rather to have the matter heard at an early date, no pressing necessity to have it settled one way or another. It seems to me far safer to allow Mr. Fagan full time so that the matter may be ready by the 19th than to have the matter before the Court in an incomplete form if brought on at an earlier date. The matter will stand over until the 19th February, question of costs to stand over.

#### RYNHOUD V. RYNHOUD.

This was an application for alimony and funds to enable applicant to institute an action against her husband.

Mr. Alexander appeared for applicant; Mr. J. E. R. de Villiers appeared for respondent.

Mr. Alexander applied for a postponement until Friday next to enable applicant to file replying affidavits.

Mr. De Villiers said that he did not oppose the postponement, but there must be some limit to the affidavits filed by applicant.

Maasdorp, J., said that that matter could be decided when the motion came on for hearing. The matter would stand over until Friday next, costs to be costs in the cause.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WAR DEPARTMENT V. { 1907.  
DUFFUS AND CO. { Feb. 5th.

Auctioneer—Broker.

*Plaintiffs had engaged defendant to sell certain property at a reserved price. His commission was to be one per cent. It was not disposed of at the price fixed, but some of it was thereafter sold out of hand by the auctioneer at the said price. For this sale he charged the ordinary brokerage fee of 2½ per cent.*

*Held, that he was entitled only to one per cent.*

Mr. Upington was for the plaintiff; there was no appearance for the defendant.

Mr. Upington said that in this matter, owing to the absence of the defendant, it was impossible to serve notice of set down in the ordinary way, according to the rules, defendant being away from the Colony, and his attorneys having withdrawn from the case. It was necessary, therefore, to make application to the Court for an order as to service, and on November 1 an order was granted that notice of set down of the case be published once in the "Gazette" and once in the "Cape Times" (16 C.T.R., 958). This had been done.

[Maasdorp, J.: How is the defendant in default—of appearance or plea?]

Mr. Upington: He is simply in default of appearance. I will give your lordship a history of the case shortly. He filed a plea, the pleadings were closed, evidence was taken on commission, and he appeared before that Commission, *de bene esse*, by counsel. The action was one in which the plaintiffs claimed the sum of £334 2s. 6d., being money received in connection with the sale of certain landed property by Duffus (who was carrying on business in Cape Town as an auctioneer under the style of Duffus and Co.), in his capacity as auctioneer for the Imperial Government. The case arose out of the sale of buildings and ground formerly occupied by the Main Barracks in Cape Town. The declaration set forth that in March, 1903, the defendant agreed to perform all auctioneering services required by the

Imperial Government for a year from the 1st April, 1903. The agreement was in writing, and provided that the defendant should be paid a commission of 1 per cent. The buildings were sold at auction on October 8, 1903, for £1,215, and the ground was sold for £22,275. The defendant had wrongfully claimed to deduct 2½ per cent., and had deducted as commission a sum of £556 17s. 6d., instead of £222 15s. The plea was that the allotments were not sold at the auction, not having reached the reserve prices, but subsequently they were sold out of hand at the reserve prices, and defendant claimed that, having sold them in his capacity as a licensed broker, he was entitled to charge 2½ per cent. commission. Plaintiffs, on their replication, denied that defendant was employed as a broker.

The evidence of Colonel Hosken, taken on commission, was read in support of the allegations in the declaration.

J. Hablutzel, partner in the firm of Messrs. J. J. Hofmeyr and Son, auctioneers, gave evidence to the effect that it was the practice, if property offered by auction did not reach the reserve and a purchaser came subsequently to the auctioneer and offered the reserve, to charge only 1 per cent. That was a reasonable and customary charge.

Judgment was given for plaintiffs for £334 2s. 6d., with interest *a tempore morae*, and costs.

#### VAN BLERK V. ESTATE AURET AND VAN BLERK.

This was an application in respect of interest of a share of inheritance under the will of the late Abraham Aurret, who was the father of the applicant, for an order authorising the executors in the estate of her father to pay over the interest due to the petitioner upon receiving a receipt for such payment, without the assistance of her husband. The parties were married in community of property. A further order was asked for that the husband's signature was not necessary on the receipts for the payments.

The petitioner, in her affidavit stated that a similar application was made to and granted by the Court last year, in respect of the interest then due, but the Court refused then to make an order with reference to future moneys, and the present application concerned the year's interest, which had become due. The petitioner had lived away from her husband during the last 16 years in terms of mutual consent, and had since earned her own livelihood and supported the children. The defendant, owing to having suffered a stroke of paralysis was unable to support her. He now claimed to be entitled to share in the

interest, but the plaintiff contended it was not the testator's intention that he should do so.

In an answering affidavit, the second respondent stated that he had offered to provide a suitable home for applicant. He was an invalid, but was quite capable of controlling the property for the benefit of his family.

Petitioner, in a replying affidavit, stated that she was unable to accept respondent's offer of a home, as she found he had lived with another woman, named Mollie Freer, at Claremont. She intended to sue for divorce.

A further affidavit was read to the effect that in 1894, the second respondent lived with the woman Freer at Claremont.

[Maasdorp, J.: We don't want to go back to 1894, Mr. McGregor. If he wants restitution, he can claim it.]

Mr. McGregor for applicant; Mr. Sutton for Johannes van Blerk (the second respondent).

Mr. Sutton submitted that respondent should share in the property in community, as he was entitled to do. The will could not, he contended, be construed, on motion, in such a way as to debar respondent from participating. It was a matter for a special case. It was the policy of the law to keep all property as far as possible in community, and there was nothing in the will, he contended, which could be held to keep the property out of community. The intention of the testator was to protect the wife not only against her own creditors, but also against the creditors of her husband, and to prevent the husband anticipating the usufruct, but the intention was not to keep the property out of community. Counsel quoted *Bozman v. Richter* (2 Searle 78), *Tesselaar's Executors v. Blankenberg's Executors* and *Tesselaar* (Buch. 1877, 54), *Hidding's Trustee v. Colonial Orphan Chamber and another* (2 Juta, 273).

Maasdorp, J.: In my opinion, the questions which have been raised by Mr. Sutton in argument do not call for decision in determining the present application. If the applicant and the respondent were now living in the ordinary way as husband and wife, he undoubtedly, under the marriage contract, in which community of property was retained, would have certain rights and interests in respect of moneys which come to her, and also, if creditors in insolvency were now interested in the property of either of these parties, the question would have to be decided in how far the will protects this money in the hands of the fiduciary heirs. But neither of these conditions have arisen here. As a matter of fact the applicant and the respondent are living apart by mutual consent, and I take it that under such general agreement for separate living, until

it is proved that there are other terms contained in their agreement, the result would be that each would retain for his or her own benefit any moneys which would come to him or her. The husband is living apart from his wife. He is reserving for himself any benefits which he might obtain in any way. He has not contributed to her support in any respect, and consequently he has no claim to any moneys which she may acquire by means of bequest or otherwise. Nothing has been placed before the Court in the present application which makes me think that the former order should in any respect be varied. The applicant is entitled to receive these moneys. The respondent has in no way taken part in the management of her affairs for many, many years, and there is no reason why his receipt should now be considered necessary on the part of the executors. The executors will be authorised to pay the interest due to the applicant, and to take her receipt as an acquittance, and it is further ordered that in future, until this order is varied, the executors shall be authorised, from time to time, to treat her receipts as a sufficient acquittance.

Mr. Sutton: The applicant does not ask for that, my lord.

Maasdorp, J.: The respondent has really no *locus standi* at all. I would like to say this: If there is any wish on the part of the respondent to escape the consequences of the agreement for separation, he must set about effecting that in another way. That can only be by means of an action to compel his wife to grant to him restitution of conjugal rights. But when I say this, I will say at the same time that I do not suggest at all that the respondent should attempt to take up that position, because if what is contained in the affidavits put before the Court be facts, then the respondent will undoubtedly be unsuccessful in any such action. It is, therefore, advisable to give this further order as to future action at once.

Having heard counsel on the question of costs,

Maasdorp, J.: Under the circumstances and considering the condition of pauperism in which, one would say, the respondent appears to be, and considering that this now finally settles the question between them, in so far as it can be settled on motion, the Court will make no order as to costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. } 1907.  
Feb. 5th.

Mr. Sutton moved for the admission of Alexander Peters Darras as an attorney and notary.

Application granted, oaths to be taken before the R.M. of East London.

### PROVISIONAL ROLL.

#### BUIRSKI V. PHIPPS.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £1,750, with interest from 30th June, 1900, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### VILJOEN V. SWANEPOEL.

Mr. Howes moved for provisional sentence on a mortgage bond for £140, with interest, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### COHEN BROS. WHOLESALE V. LEVINI (*alias* LEWIN).

Mr. Sutton moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £88 15s. 11d., together with £11 odd costs.

Defendant offered to pay 10s. a month. He said that he had property at Moorreesburg, but it was heavily bonded. He denied that he had misrepresented the state of his affairs to his creditors. He added that he was a hawker, but had been unable to obtain a licence. He had already served a term of imprisonment for debt at Malmesbury.

Decree granted, execution to be suspended pending payment of £5 per month, first payment to be made on the 1st March.

#### MILLS AND SONS AND ANOTHER V. LING TONG SEN.

Mr. Pohl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**MARTIENSSEN, GRIMM AND FRASER V. WILLIAMS.**

Mr. Russell moved for the final adjudication of the defendant's estate as insolvent. Counsel said that the plaintiffs were the defendant's agents. Service had been made at the hotel, which was his last known place of residence. Defendant left there on the 6th January, but it was not known where he had gone.

Order granted, on the understanding that the hotel was defendant's last known place of residence.

**STREETER V. MYERS AND PUXTY, TRADING AS MYERS, PUXTY AND CO.**

**Civil imprisonment—Partnership debt—Summons.**

*In order that a partner in a firm may be held individually liable for a partnership debt, the summons must clearly state that he is so held liable, nor can he be civilly imprisoned unless he be notified that failing satisfaction of the judgment, application for a writ of civil imprisonment will be made against him individually.*

Mr. J. E. R. de Villiers moved for a writ of civil imprisonment upon an unsatisfied judgment of this Court for £20 6s. 3d., with costs.

Counsel said that the judgment of the Court was given against the defendants individually, and he applied for a writ of imprisonment against them individually. He admitted that he had no authority that he could produce at present in support of the application.

[Hopley, J.: You may mention the matter again if you can produce an authority for such a course. I will not make an order at present.]

At a later stage Mr. De Villiers mentioned, as authority, the case of *Theunis v. Fleischer*, reported in 3, E.D. Court, p. 291.

Hopley, J., said that the point was that these people had not been summoned individually, and it had not been brought to their notice that it was to be asked that they should be imprisoned individually.

Mr. De Villiers said that a partnership firm consisted of nothing else in the eyes of the law than the partners. That was where it differed from the case of a company. According to Van der Linden, a party could be summoned in a particular capacity, and was liable to civil imprisonment. Here the defend-

ants were summoned in their capacities as partners.

Hopley, J., said there was nothing in the summons to show that this was an application against the two persons of the two defendants individually. There was nothing to show that the defendants had been levied against individually. Every bit of the proceedings, so far as he could see, was against the firm.

Mr. De Villiers said there was no such entity in law as "a firm." A firm had no right beyond the rights possessed by the partners separately.

Hopley, J.: In this case it appears to me, as far as I can make out from the papers, that two people were originally summoned as the firm of Myers, Puxty and Co., and judgment was obtained against them for something over £20, together with a certain amount for costs. Afterwards a writ of execution was issued out of the Supreme Court against the goods of Jacob Mars Myers, and Chas. Ivor Puxty, trading in co-partnership under the style of Myers, Puxty, and Co., proprietors of "Acrum." The sheriff's officer proceeded to somewhere or other, and he states: "No goods or chattels of the defendants were pointed out, and after diligent search, found, whereof the exigencies of this writ or any part could be met." He doesn't say where he tried, whether at their place of business or at their residences. Presumably, as the writ is against the firm, he went to their place of business and tried to find something there to satisfy the exigencies of the writ, and failed. Upon that they are summoned to-day for civil imprisonment on a summons which again describes them as trading in co-partnership under the style of Myers, Puxty, and Co., proprietors of "Acrum." Now, all these proceedings seem to me to be directed against these people trading as a firm. There is nothing in any of these papers calling upon them as individuals, or bringing to their notice their liability as individuals. I am asked on these papers to grant writs of civil imprisonment against each of these individuals separately, on the ground that, as each is liable for the debt of the firm, therefore each may be at once summarily civilly imprisoned, without any steps being taken other than a simple return of *nulla bona* on a writ against the firm, and executed, so far as I know, against the assets of the firm. I think that would be a wrong procedure, and though I think there is another way of getting at the partners and of eventually holding them liable to civil imprisonment, still all intermediate steps should be properly taken, and until some authority can convince me that the course ought to be different, I am inclined to hold that if a partner is to be held



individually liable, it ought to be clearly put before him in the summons that he is being held liable for a partnership debt individually, and that this writ of imprisonment is to be issued against him individually. There is nothing in the present case to show the partners that they would be held liable to this extreme penalty of imprisonment as an expiation of the partnership debt. The order must be refused.

### ILLIQUID ROLL.

HARTLEY V. ANDERSON. { 1907.  
Feb. 5th.

Mr. Long moved for judgment, under Rule 329d, for £37 10s., rent, with interest *a tempore morae* and costs.  
Order granted.

### EVANS V. EVANS.

This was an action brought by Maria Catherina Evans, of Prieska, against her husband, Benjamin James Evans, a clerk, at present residing at Upington, for restitution of conjugal rights, failing which, a decree of divorce.

Plaintiff, in her declaration, said that she was married to defendant in community of property at Prieska on the 12th September, 1902. There had been one child of the marriage. In January, 1906, defendant deserted her, and was still absent from her. She prayed for a decree of restitution, failing which, a decree of divorce, with custody of the child and maintenance at the rate of £5 a month, and costs.

Mr. Roux was for plaintiff; defendant was in default.

Wm. Thos. Birch, officer in charge of Marriage Register, Colonial Secretary's Office, having given evidence,

The plaintiff said that her married life had been very unhappy. In January, 1906, defendant deserted her, and left for German South-west Africa. Defendant called at Prieska in November last, and saw the child, but he did not visit witness. He was now residing at Upington. He had declined to receive witness.

Mr. Roux read a letter addressed by defendant to plaintiff, in which the former said: "You must try and work in our cause." He went on to say that he wanted to marry a young lady on a farm there and to take her round by Cape Town to Natal.

Witness (in answer to the Court) said that she had not entered into an arrangement with defendant to obtain a divorce from him.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 1st April, failing which to

show cause on the 23rd April why an order should not be granted as prayed, except as to maintenance, which should be at the rate of £3 a month.

### LOUBSER V. LOUBSER.

This was an action brought by Jasper Smith Loubser, of Malmesbury, against his wife, Anna Gysbert Loubser, also of Malmesbury, for restitution of conjugal rights, failing which a decree of divorce, with custody of the children of the marriage.

Mr. Inchbold was for plaintiff; defendant did not appear.

W. T. Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, having given evidence,

Plaintiff said that he was married to defendant on the 12th December, 1900. They had differences after the marriage, mostly about money matters. There were two children of the marriage. Defendant deserted him without assigning any cause, and he was unable to give any definite reason for her course of action. He had custody of the children at present.

By the Court: Defendant was a widow when witness married her, and had six children by her previous marriage.

Decree of restitution granted, defendant to return to plaintiff on or before the 1st April, failing which to show cause on the 23rd April why a decree of divorce should not be granted and plaintiff be given custody of the child.

### CURTIN V CURTIN.

Divorce — Adultery — Venereal disease.

*Divorce granted on the ground of adultery, the only proofs being communication of venereal disease to plaintiff within a short time after the marriage and an admission made to plaintiff's attorney.*

This was an action brought by Agnes H. Curtin, of Observatory-road, against her husband, David Daniel Curtin, whose present whereabouts are unknown, for a decree of divorce.

Plaintiff, in her declaration, alleged that in the year of her marriage with defendant the latter admitted adultery with some person or persons unknown to plaintiff. She prayed for a decree of divorce, custody of the minor child, alimony, and division of the joint estate.

Mr. Rowson was for plaintiff; defendant did not appear.

W. T. Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, having given evidence,



Plaintiff said that she was married to defendant on the 6th July, 1903, and lived with him at Mountain-road, Woodstock. They did not live very happily together. Some time after marriage she found she was suffering from a disease, and in February, 1906, she called in Dr. McMullen. Defendant had been a policeman, and used to be at the Police Court. She did not know where he was now. He had left the police force. She did not wish defendant to contribute to the support of the child. She had received a letter from defendant in which he said he was going away.

Dr. John McMullen said that defendant had admitted to him that he was suffering from a venereal disease. The disease communicated to plaintiff was gonorrhoea, which only takes a few days to develop.

Edward I. Sydney, attorney, said that when he served the documents upon him Curtin admitted the adultery.

Decree of divorce granted as prayed, with costs, plaintiff to have custody of the child.

#### WHEELDON V. WHEELDON AND ANOTHER.

This was an action brought by Charles Wheeldon, of Cape Town, against his wife, Carrie Wheeldon, for a decree of divorce on the ground of her adultery with one Thomas Gibson, against whom £250 damages were claimed.

Plaintiff, in his declaration, said that the first defendant, to whom he was married on the 23rd June, 1898, deserted him on the 8th September, 1906, and had since been living in adultery with the second defendant, Gibson. Plaintiff claimed as against the first defendant a decree of divorce, and custody of the minor child, and as against the second defendant damages in the sum of £250, and costs of suit.

Mr. Alexander appeared for plaintiff; defendant and co-defendant did not appear.

Charles Wheeldon (the plaintiff) said he was married to the first defendant on the 23rd June, 1898, in Sydney, New South Wales. There was one child living. In June, 1906, he went to England for the benefit of his health. He had previously been living with defendant on good terms for about four years. When he went to England he left his wife and child at a house in Buitengracht-street. He returned to this country in September. His wife had funds provided for her maintenance while he was away. On his return he found that his wife did not give him the welcome that he had expected. He found that there were two men in the house, boarding and lodging there. His wife seemed to be familiar with Gibson, and he spoke to her about her conduct. She said that if the boarders had to go she would go also. He noticed whispering between

them in the morning. One night he heard her say in her sleep: "What shall we do, sweetheart, when Wheeldon comes back." On Saturday, the 8th September, she left the house. On the following Monday Gibson and the other man left. Later he saw his wife and Gibson going into a house in Jordaan-street. Witness subsequently found in the house a very affectionate letter addressed to his wife, and signed "Tom."

Mr. Alexander (in answer to the Court) said that both the defendants seemed to be now employed at a tobacco factory.

A letter was read which the first defendant had addressed to the plaintiff a few days after she went away. In this the writer accused plaintiff of having brutally treated her, and declared that his disposition had always been "fierce, brutal, and cruel."

Plaintiff denied that he had treated his wife badly.

In answer to the Court, witness said that his wife had been constantly worrying him about a change. She always wanted to be moving about from one place to another.

[Hopley, J.: Then you will be rather glad to be rid of her.]

W. H. Faragher gave evidence to the effect that plaintiff's wife and Gibson had been living together as man and wife at a flat in Jordaan-street.

David Lytton, inquiry agent, spoke to having seen the defendants together at Palace Chambers and in Jordaan-street.

By the Court: Gibson was earning about £3 a week.

A coloured woman said that a few days before plaintiff returned from England, Mrs. Wheeldon said that she was sorry she had married when she was so young.

Decree of divorce granted, plaintiff to have custody of the minor child, with right of access to the first defendant so long as the child remains in this colony, the second defendant to pay costs, but no order on the prayer for damages against him.

Hopley, J., observed that it seemed to him the plaintiff had got good ridance of a position that was by no means acceptable to him.

#### LABUSCAGNIE V. LABUSCAGNIE.

This was an action for restitution of conjugal rights brought by the husband against Martha E. Labuscagnie.

Mr. Pohl was for the plaintiff.

Hopley, J., pointed out that there was not proper proof of service.

Mr. Pohl asked that the case should be heard subject to proof being subsequently produced.

Evidence was given of the marriage of the parties in November, 1900.

Willeim Peter Labuscagnie, the plaintiff, said that after the marriage he

lived with his wife at Jamestown. Their relations were happy until 1904, when, during witness's absence from home, his wife left the house, leaving no message at all. She went to Aliwal North. He had since seen her in Aliwal North. He asked her why she did not come back, and she replied that she would never come back. She gave him no reason. There was one child of the marriage. Witness asked for the custody of the child. He had sent a cart to bring her back, but she refused to return. The marriage was in community. The defendant was living with another man, but he was willing to take her back.

Subject to production of proof of service an order for restitution was granted, defendant to return to plaintiff on or before the 1st April, failing which to show cause on April 23 why a decree of divorce should not be granted with custody of the child to the plaintiff, and forfeiture of the defendant's rights in community.

### REHABILITATION.

Mr. Louwrens moved for an order for the rehabilitation of George Ebenezer Boulton.

Order granted.

### GENERAL MOTIONS.

*Ex parte* GARLICK AND { 1907.  
OTHERS. { Feb. 5th.

Mr. Louwrens moved for the appointment of a *curator bonis* in the insolvent estate of Thomas Jacobson, with power to carry on the business.

An order was granted authorising the Master to appoint a *curator bonis* until the provisional order of sequestration be set aside, or until the appointment of a trustee in the estate, with power to sell perishables and to collect debts.

### LOWRY BROS. V. WHITE.

Mr. Louwrens moved for leave to sue the defendant by edictal citation. The defendant's whereabouts were unknown. He was last heard of in 1899. Property in Umtata was still in his name. He left Umtata to go to Mafeking to join the Imperial forces.

Leave granted, publication to be made once in the "Gazette" and once in the "Mafeking Mail." The return day was fixed for April 16.

### *Ex parte* ROBINSON.

Mr. Alexander moved for a declaration of rights in regard to a certain

deed. The petitioner borrowed a small amount—£7—from the Assets Realisation Company. It was alleged that the manager of the company—Home Drummond—got Robinson by fraud to sign documents to the effect that he had obtained a large sum of money as a loan. Home Drummond had written to England, apparently alleging that he had certain rights in respect to a life interest in English property held by petitioner, and in respect to a reversionary interest in property held by Robinson's mother. It was now sought to have it declared that Home Drummond had no such right. The liquidator of the company had satisfied himself there was fraud, and had released Mr. Robinson from any liability on the documents, beyond £7. Drummond had claimed a cession of the interest, and Mr. Robinson's representatives in England were unable to act in the matter.

A rule *nisi* was granted, to be served on Home Drummond, calling on him to show cause why an order should not be granted declaring that he had no such interest as the documents in question purported to give. The rule *nisi* was made returnable on February 12.

### *In re* THE CAPE CANNING CO. (IN LIQUIDATION).

Mr. Benjamin moved that a final day be fixed for the filing of claims. There was a creditor in Paris whom the liquidator had not yet been able to get to file his claim. Counsel moved further for confirmation of the official liquidator's report.

The Court confirmed the report, and fixed the 15th May as the final date for proof of debt, the order to be published in the "Cape Times."

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

BURCHELL V. BURCHELL. { 1907.  
Feb. 6th.

Will—Attestation—Wills' Ordinance, 15 of 1845.

*A will was signed at the foot thereof by the testator's mark,*

*but the witnesses who saw him make the mark did not attest the will until after his death.*

*Held, that as the Wills' Ordinance of 1845 required that the witnesses should attest and subscribe the will in the presence of the person executing the same, the will in question was invalid.*

This was an action to set aside a certain will.

The declaration was as follows:

1. The plaintiff James Edward Llewellyn Burchell has recently attained full age and is the eldest son of the late James Mathew William Charles Burchell who died in the division of Port Elizabeth on the 14th March, 1889.

2. The first defendant, Ignatius Theodore Price Burchell is a brother of the plaintiff's said father and the second defendant, Annie Violet Sophia Watson (born Daniell) is the plaintiff's mother, who, after her first husband's death, was, and is still, married without community of goods to Thomas James Watson, by whom she is assisted so far as is necessary in this suit.

3. The said defendants, together with the plaintiff's grandfather, named James Edward Llewellyn Burchell, and another brother of the plaintiff's father, named Gilbert Farmer Price Burchell, after the death of the plaintiff's father received on the 2nd day of April, 1889, from the Master of this Honourable Court letters purporting to appoint them executors testamentary to administer the estate of his late father pursuant to the document hereinafter referred to, and the first and second defendants now alone survive of the said four persons, and are sued in their capacity as the holders of the said letters of administration.

4. The plaintiff annexes hereunto a copy of a document which was filed in the Master's Office on the 1st April, 1889, as the last will and testament of his late father, and specially begs to refer to the original of the said document when produced at the trial of this cause.

5. The said document was not and is not the true and legal last will and testament of the plaintiff's said father by reason of the matters hereinafter set forth.

6. At the time of the alleged execution by the plaintiff's father of the said document he lay dying as the result of an accidental gun-shot wound at his farm "Duine," he was not in health of body nor of sound and disposing mind, nor was he capable of making nor did he make the dispositions of his proper-

ty set forth in the said document which was on that day, to wit the 14th March, 1889, drawn up on six leaves at the said farm "Duine" by one Thomas O'Brien, who purports to be one of the witnesses to the alleged will.

7. The said document, the contents whereof were not explained to the plaintiff's father, purports to bear marks representing his signature at ten places on the six leaves aforesaid, but of the said ten marks one only was made by the plaintiff's father, and he died almost immediately thereafter.

8. John George Uppleby, a medical attendant, and the said Thomas O'Brien were, amongst others, present when the plaintiff's father made the said mark, and at the instance of the said O'Brien the said Uppleby at the said farm and after the death of the plaintiff's said father, signed as a witness to the said mark, and thereafter at the town of Port Elizabeth some days after the said death the said John George Uppleby, also at the instance of the said O'Brien and on his representation that the document must be signed and witnessed on every page did, in ignorance of the law, sign as a witness to the other marks then purporting to have been made by the plaintiff's said father as his signature.

9. The plaintiff says that the said document was not drawn up upon instructions given by his father, nor was it explained to him, nor had he capacity to execute the same, nor did he execute it in due and proper form of law as his last will and testament, in accordance with the provisions of Ordinance No. 15 of 1845.

10. The estate of his late father remains in the hands or under the control of the defendants, and in part is represented by funds in the hands of the Master of this Honourable Court, who is joined as a party to this suit.

Wherefore the plaintiff prays for

(a) An order declaring that the said document is not the last will and testament of the late James Mathew William Charles Burchell;

(b) An order setting aside the appointment of the first and second defendants under the letters of administration aforesaid;

(c) An order compelling the first and second defendants duly to account to an executor or executors dative to be duly appointed for their administration under the said letters of the assets of the estate of the late James Mathew William Charles Burchell;

(d) Other relief;

(e) Costs of suit out of the said estate.

To this declaration, the second defendant pleaded as follows:

Sophia Watson says that in so far as the allegations in the declaration re-

late to her, she acted *bona fide* in the belief that the will under which the Master of this Hon. Court issued Letters of Confirmation to her, *inter alia* as executrix was valid and of full legal force and effect; otherwise she submits to such judgment as to this Hon. Court may seem fit and prays that she may be indemnified in her costs out of the estate.

The fourth defendant pleaded:

1. The fourth defendant is the widow of the late James Edward Llewellyn Burchell, senr., and is the mother of the late James Matthew William Charles Burchell. She intervenes by leave of this Hon. Court granted 15th January, 1907.

2. Paragraphs 1, 2 and 3 are admitted save that the fourth defendant says that the first and second defendants were and are the duly appointed executors testamentary of the said estate.

3. Paragraph 4 is admitted, save that the fourth defendant craves leave to refer for greater certainty to the original of the said document when produced at the trial.

4. Paragraph 10 is admitted.

5. The said document so filed in the Master's office is the last will and testament of the said late James Matthew William Charles Burchell, and was by him on the 14th March, 1889, duly executed according to law as his last will and testament in the presence of the said Uppleby and O'Brien, who duly witnessed the same, at a time when the said Burchell lay dying of a gun-shot wound, accidentally inflicted, and when the said Burchell was of sound and disposing mind. The said document was drawn up by the said O'Brien on the said date.

6. Save as above, the fourth defendant denies the allegations in paragraphs 5, 6, 7, 8, and 9 as specifically as if set out herein!

The replication to the plea of the fourth defendant was general.

Mr. Schreiner, K.C. (with him Mr. W. P. Buchanan) for plaintiff. Mr. Benjamin for the second defendant (Mrs. Watson). The fourth defendant was not represented.

Dr. Uppleby gave evidence to the effect that he was called to see Burchell. A document was produced by O'Brien, which witness signed. He had made an autopsy before he signed. He signed the document at the bottom of the page without knowing it was a will. Later on O'Brien brought the will to witness, and he was told that he must sign it on each of the six pages. He accordingly did so. With the exception of one signature none was made at the farm. All the others were made at his consulting room. When witness was asked to sign the will the testator was not

in a fit state to make a series of elaborate dispositions.

By the Court: Witness was 27 or 28 years of age when he signed the will; he had been in practice about three years at the time. He did not put his signature on the will before the man died.

[De Villiers, C.J.: It does seem strange that a man at your age should have thought a signature made to a will after the man had died was valid.]

All I can say is that it does seem somewhat foolish, but I had no reason to suppose there was anything wrong. I suppose it was a negligent sort of thing to do.

James E. Daniel (brother of Mrs. Watson, the second-named defendant) said that he was a member of the hunting party on the day of the accident. Witness helped to carry deceased to the house. When O'Brien came he went up to the dying man, put a pen in his hand and helped the testator to make his mark. The testator then died. Dr. Uppleby signed the will some time after death had taken place. The will was not read over to deceased. No instructions were taken by O'Brien from deceased.

By the Court: Witness was about 22 years of age when the accident took place. He was aware that his sister had a suit afterwards in regard to the will.

[De Villiers, C.J.: Did it never strike you all that time that that will might be invalid owing to the manner in which it was made?]

Witness: No, my lord; I was quite ignorant about wills.

In further reply to the Court, witness said that he did not tell anybody until about eight months ago about the suspicious circumstances under which the will was made.

Mr. Benjamin said that he would like to call Mrs. Watson to explain her position in regard to the will.

[De Villiers, C.J.: Are you defending?]

Mr. Benjamin: No, we are submitting to the judgment of the Court.

Mr. Schreiner: There is no defence to the action.

Mrs. Annie Violet S. Watson said that her former husband was Mr. Burchell, who met with an accident in March, 1889. When he was brought home he was very ill. Witness was only in the room where he was placed towards the last. Mr. O'Brien was not in the room when she went in. O'Brien went in just before her husband died. He went to the bedside and guided her husband's hand, and made a cross on a paper. She did not know that it was a will. She thought the document had something to do with the accident. Later on O'Brien called and asked about



the will. Witness said that she did not know there was a will; O'Brien said that he had fixed it up, and a search resulted in the discovery of the document.

[De Villiers, C.J.: Did you look upon this as a valid will?]

Witness: I did not know; I was very ignorant. My husband told me he had no will.

[De Villiers, C.J.: You had a law suit about this will; did you never tell anybody about the circumstances under which the supposed will was made?]

I explained everything to my attorneys, and, in face of the signatures, they laughed at the idea of Dr. Uppleby and Mr. O'Brien having done such a thing. They advised me to fight for my half share.

Mr. Schreiner said that he would like to call the plaintiff.

James Edward Llewellyn Burchell (the plaintiff) said that he came of age in June last. Just before he came of age he asked his mother what his inheritance would be. His mother said that he would get less, because everything was left to the brothers and sisters. This led him to make an investigation.

[De Villiers, C.J.: What would be the result if the will is set aside?]

Mr. Schreiner said that the brothers and sisters would drop out. No money had been paid out pending the death of the grandmother. The brothers and sisters had up to the present received nothing.

Witness (in further evidence) said that he had two brothers and sisters, who were both minors. Witness knew that the law agent O'Brien had been working in the present case.

[De Villiers, C.J., asked Mr. Schreiner whether there was any limit of time within which a will may be set aside?]

Mr. Schreiner said that there was not. Counsel went on to severely comment upon the conduct of O'Brien.

De Villiers, C.J.: It is quite clear that the alleged will in suit was wholly invalid. The Wills Ordinance requires not only that the testator shall sign the will in the presence of the witnesses present at the time, but also that such witnesses shall attest and subscribe or shall have attested and subscribed the will in the presence of the person executing the same. The two alleged witnesses to this will were Dr. Uppleby and Mr. O'Brien. Mr. O'Brien has not come to state what took place, but we have the clear evidence of Dr. Uppleby, one of the witnesses, that he did not attest this will until after he had performed autopsy on the deceased man, and then he only signed at the foot of it, and such will, such alleged will, was afterwards brought to him by Mr. O'Brien at his consulting room, where he signed the will in other portions where his signature was requir-

ed. It is quite clear from his evidence that the other witness, O'Brien, had no opportunity of signing the will in the presence of the deceased. Mr. Daniels's evidence is also clear on the point. He was in the room as well as the doctor until the man died, and there would be no opportunity for Mr. O'Brien to attest the will, before the man's death without these witnesses seeing it. They are satisfied that nothing of the kind could have taken place. I am satisfied, therefore, that not only the signature of Dr. Uppleby, but also the signature of Mr. O'Brien was attached to the will after the death of deceased, and that would be quite sufficient to invalidate the will. But then there are other points in the case which would tend to invalidate the will. The concluding portion of the 3rd section of Ordinance 15, 1845, says that "where the instrument shall be or shall have been written upon more leaves than one, the party executing the same and the witnesses shall have signed their names upon at least one side of every leaf upon which the instrument shall be or shall have been written." This instrument is written upon several leaves, and the mark of the testator, according to the witnesses, was only made at one place, that is at the foot of the will. All the remaining marks, which purport to be duly attested, must, therefore, have been made upon the will after the death of the testator, and, consequently, the will was wholly invalid. The only possible question that might be raised in this case is whether, after the lapse of eighteen years from the making of the alleged will, after it had been acted upon by all persons interested in it, the Court should now take upon itself to set aside the will. Well, I confess in every case of this kind I should require the very strongest evidence of invalidity before I took upon myself to set aside a will of this kind. But, if the invalidity is clearly proved, and the persons interested in this will do not come forward to disprove the facts relied upon on behalf of the plaintiff, I think that the Court has no option in the matter, especially as there is no proof in the present case that there has been any acquiescence on the part of the plaintiff in an illegal or invalid will being acted upon for so many years. The plaintiff has only recently come of age, and the invalidity of the will was discovered only shortly before he came of age, and he has done nothing, in my opinion, to prevent him now from asserting the rights which he would have as the son of the deceased, as one of the heirs of the testator, to claim that the will so invalidly executed should be set aside. The judgment of the Court, therefore, is that the will be set aside. As to the costs, I think they should come out of the estate.

Mr. Schreiner mentioned the costs of Ignatius Burchell, one of the executors, to whom the Ægis Insurance Co., who administered the estate, had been directed to pay over a sum of £350 from the funds, to enable him to defend the action. Counsel submitted that Ignatius Burchell should be ordered to repay the sum of £350 intact, and that he should pay the costs of the application which he had made.

His Lordship said that Ignatius Burchell might have no means, and then it would be upon his attorneys, Messrs. Walker and Jacobsohn, to pay back this money if he made such an order. He did not think that, without notice, he could make such an order.

Mr. Benjamin mentioned the matter of the costs incurred by Mrs. Watson, and said he took it that those costs would come out of the estate.

His Lordship said he did not suppose counsel for plaintiff would object.

Mr. Schreiner: Between mother and children, I take it, costs may come out of the estate.

His Lordship gave judgment in terms of prayers (a) and (b) of the declaration, costs of the action to be paid by the estate, excepting costs of the application by Ignatius Burchell, for leave to purge his default of plea, which must be paid by the said Ignatius Burchell. The costs of Mrs. Watson would be included as part of the costs of the action.

[Plaintiff's Attorneys: Findlay and Tait. Defendants' Attorneys: Fairbridge, Arderne and Lawton; Syfret, Godlonton and Low; Walker and Jacobsohn.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

MCKINNON V. MCKINNON. { 1907.  
Feb. 6th.

This matter came on for argument upon an exception taken by the defendant in the action to the plaintiff's plea in reconvention. The parties reside next door to each other at Woodstock.

McKinnon said that he was too poor to employ counsel to argue his exception.

The matrimonial affairs of plaintiff and her husband had previously been before the Court. She had instituted an action against him for judicial separation, on the ground of cruelty and threats, and applies for custody of the minor child and alimony. Defendant, in his plea, denied the allegations of violence and threats, and in recon-

vention, he claimed an order for restitution of conjugal rights, or, in the alternative, a decree of divorce. Plaintiff, in her replication, joined issue, and for a plea in reconvention, craved leave to refer to the allegations in the claim in reconvention, and prayed that the claim in reconvention be dismissed. The defendant filed an exception to the replication, on the ground that it was bad in law, and was not sufficient answer to the defendant (now plaintiff in reconvention).

Excipient appeared in person; Mr. J. E. R. de Villiers appeared for respondent (plaintiff in the action).

Mr. De Villiers said he took it that the defendant excepted to the plea in reconvention.

Excipient said that his wife had not pleaded to the claim in reconvention, as required by law.

His Lordship said that the points now raised by the excipient should be raised at the trial. Instead of saving costs, he was simply wasting costs. The exception would be dismissed, question of costs to stand over.

## THIRD DIVISION.

[Before the Hon. Mr. Justice HOPEY.]

## PROVISIONAL ROLL.

SOMERSET WEST STRAND { 1907.  
MUNICIPALITY V. KYRAN. { Feb. 6th.

Mr. Sutton moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court of Somerset Strand for £5 for Municipal rates, and £2 2s. 7d., £8 14s. 5d., and £2 5s. 4d. costs in obtaining the judgment. A decree of civil imprisonment had been granted against the defendant for a period of one month, but that time had lapsed. Counsel also applied to have the property declared executable.

Order granted.

## CORDES V. WORTREICH.

Mr. Palmer moved for provisional sentence on a mortgage bond for £2,700, with interest, and that the property be declared executable and the rents attached.

Order granted.

## ORTELL V. JACOBS.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £475, with interest, less £12 paid on account, and that the property be declared



executable. The bond became due by reason of non-payment of interest.  
Order granted.

ESTATE MACGREGOR V. PATTISON AND MORRIS.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £12,000, with interest, less £300 paid off. The bond became due through non-payment of interest. Counsel also moved to have the property specially hypothecated declared executable, and for judgment against the defendant firm and the members individually.  
Order granted.

NORWICH UNION LIFE ASSURANCE SOCIETY V. BARS DORF.

Dr. Rainsford was for the plaintiff, and Mr. Alexander was for the defendant.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £500, with interest, together with £17 13s. 3d. and £14, premiums due on the bond, and £2, fire insurance, paid by the plaintiff. Counsel also moved to have the property declared executable. The bond was called up by reason of the terms.

Mr. Alexander read an affidavit by the defendant, which set out that he did not remember receiving notice calling up the bond. He contended that the company did not adhere to a subsequent agreement, and that the bond was not legally due.

A replying affidavit set out that the notice had been delivered personally at the office of the defendant. The policy on the insurance of the defendant's life had lapsed, by reason of non-payment thereon.

Hopley, J., said he thought there should be provisional sentence in this case for £500 and for the premium paid on the fire insurance over the property. As to the rest, he could not say that the bond had clearly shown what the premiums of the insurance referred to. It might refer to the premium of the fire insurance. Provisional sentence would be granted for £500 and £2, with costs, and the property be declared executable.

ILLIQUID ROLL.

TEUBES V. KALTWASSER. { 1907.  
Feb. 6th.

Dr. Greer moved for judgment under Rule 329d for £45, house rent, with interest and costs.  
Judgment as prayed.

STEER V. ROBERTSON.

Mr. Russell moved for judgment under Rule 329d for £113 16s. 6d., balance of account for money lent, and professional services rendered to the defendant.

Judgment as prayed.

WIENER AND CO. V. DE VRIES AND ANOTHER.

Dr. Greer moved for judgment under Rule 329 in default of plea for £342 3s. 3d. with interest and costs.

Judgment as prayed.

GENERAL MOTIONS.

*Ex parte* GROENEWALD.

Mr. Louwrens was for the applicant and Mr. Gardiner was for respondent. Mr. Louwrens moved to have a rule nisi made absolute calling on the respondent to show cause why the applicant should not be allowed to appeal against a decree of civil imprisonment granted against him by the Resident Magistrate of Bredasdrorp on an unsatisfied judgment for £103 3s. 10d.

The affidavit of the petitioner set out that on November 26 last the plaintiff obtained a decree of civil imprisonment against him, notwithstanding the fact that the petitioner had no property to satisfy the judgment. He submitted he was entitled to have leave to appeal. He was not possessed of property to the value of £10. Counsel moved for leave to prosecute the appeal *in forma pauperis*, and that the decree should be stayed pending the decision of the appeal.

The affidavit of the respondent set out that the applicant, before the action was instituted, was in possession of property of considerable value. The agent of the applicant had actually paid the first instalment, which had been fixed at 7s. 6d. a month. Mr. Gardiner contended that the defendant had to prove to the satisfaction of the Court that he had no means. The onus was not upon the plaintiff. The applicant had not satisfied the Magistrate that he had no means. He was able to find money for his divorce, and after his insolvency he had given away a cart and horse to his son to pay a debt. Mr. Louwrens said that it was nowhere stated in the evidence that this man was capable of earning any money at all. The only evidence which the Magistrate admitted was the evidence of the defendant himself, in which he said he had no means. How was it possible for this man, who was earning nothing and living on other people, within four days to raise sufficient money to avoid ar-

rest for civil imprisonment. It was always open to the plaintiff to come to Court if the applicant came into any property or was earning any money, and the granting of the appeal was no injustice to the respondent.

Hopley, J.: All the evidence in this particular case seems to be one way. There is no evidence that the man has even £5 in the world. It seems to me that there is good ground for appeal. The evidence is that he is not possessed of £10, and so the rule will be made absolute and leave granted to appeal *in forma pauperis*. Mr. Louwrens to act as counsel and Messrs. Herold and Gie as attorneys.

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*Ex parte* ESTATE HANEKOM.

Mr. De Waal moved for leave to the executor in the estate to mortgage certain property for the sum of £700. The money was required to make improvements on the farm. The Master's report was favourable, and all the interested parties were agreeable.

Application granted.

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*In re* "THE OWL," LTD. (IN LIQUIDATION).

Dr. Greer, on behalf of the official liquidator, moved for the confirmation of the first and final report, for the distribution of the assets in terms of the account annexed, and for the dissolution of the company.

Application granted.

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OTTESTROM V. ESTATE STEPHAN BROS.

Dr. Greer, for the applicant, said the defendants were not appearing. Leave was granted to the plaintiff to sue *in forma pauperis* for compensation for certain injuries which he alleged he received in the service of the defendants. Counsel moved for leave to take evidence of certain witnesses on commission at Port Nolloth. Counsel suggested the Resident Magistrate of Port Nolloth as commissioner.

Commission granted as prayed, the Resident Magistrate of Port Nolloth to act as commissioner.

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SCOTT V. CALDER.

This matter came before the Court on a notice of motion calling on the respondent to show cause why the taxation by the taxing officer of the plaintiff's bill of costs should not be reviewed in respect of the preparation of plaintiff's declaration, and why the cost of preparing that and incidental to the declaration should not be disallowed.

From the affidavits it appeared that the present respondent on January 21 took out a summons against applicant for a lump sum of money. The summons was served on defendant at Paarl on January 22, and on January 23 applicant's (defendant's) attorney wrote to plaintiff's attorney asking for a detailed account. On January 25 defendant's attorney received this detailed account, and was informed that if the account was not settled within two days plaintiff's declaration would be filed. January 27 was a Sunday, and on Monday, 29th, defendant came in, and after consultation with his attorney, tendered £27 5s. 6d. in full settlement, with taxed costs. In the meantime, however, on the 29th counsel had been instructed to draft plaintiff's declaration. On January 31 the parties attended before the taxing master, who in spite of defendant's objection that the expenses incurred with regard to the declaration were unnecessary, allowed the cost of preparing the declaration. The taxing officer reported that he considered that defendant had had ample time to settle, and he overruled the objection against allowing the costs in respect of the declaration.

Mr. J. E. R. de Villiers appeared for the applicant; Mr. De Waal appeared for the respondent.

Mr. De Villiers submitted that the taxing master was wrong. Costs in order to be allowed between party and party had to be necessary costs; *Alexander v Armstrong* (Buch. 1879, p. 233). He referred to the White Book (Annual Practice), under the heading "Lump Sums," where it was laid down that a plaintiff claiming a "lump sum" must give particulars of how the lump sum has been made up. The taxing officer erred in not applying the principle that the costs incurred had to be necessary costs. Defendant got a detailed account on January 26, and he paid it on January 29. Of the intervening days one was a Saturday and one a Sunday.

Hopley, J., said that it was not necessary to hear Mr. De Waal. The principle that costs should not be unnecessarily incurred was well known and applied by all taxing masters, but in this case the costs objected to were not unnecessarily or unreasonably incurred. On January 22 the applicant was served with a summons claiming something like £40. On the 23rd he came in from Paarl and saw his attorney, and there was nothing to have prevented him from giving all necessary information to his attorney, as he must have known what kind of debts he had incurred. He must have known that some of the amounts claimed were for drinks and others for gambling debts. On January 24th applicant's attorney wrote for a specified account, and on the 25th an

account was sent with the distinct warning that it had to be settled within two days, or counsel would be instructed to draft the declaration. At this stage applicant's attorney did not say that the time was too short, and that he wanted a longer period, as his client was at the Paarl. He took no such steps but preferred to communicate with his client through the post. If any necessary costs had been incurred they would seem to have been caused by the conduct of applicant's attorney. The taxing master allowed the costs, and his taxation was reasonable. The application would be refused, with costs.

*Ex parte SOLGREEN.*

Mr. W. P. Buchanan moved on behalf of petitioner for an order authorising the Master to pay her a certain sum of money standing to her credit. The Master had refused to pay out this sum of money, unless there was a receipt by petitioner's husband, who had not been heard of for a long time, and who had been reported to have been killed in the late Anglo-Boer war.

The Court authorised the Master to pay petitioner half of the sum of money in question on her sole receipt, and granted a rule *nisi* returnable May 2, calling on the husband, Olif Solgreen, to be published once in the "Gazette," to show cause why the death of the said Solgreen should not be presumed, and why the Master should not be authorised to pay out the balance.

**SOUTH AFRICAN NEWSPAPER CO. AND OTHERS V. S.A. GENERAL WORKERS' UNION LOCK-OUT CIGARETTE WORKERS' CO-OPERATIVE SOCIETY, LTD.**

Dr. Greer, on behalf of petitioners, moved for an order placing the respondent company under compulsory sequestration. The company was unable to pay its debts, and creditors had resolved to apply for a sequestration order.

The Court granted a rule *nisi* calling on respondents to show cause on April 18 why an order should not be granted as prayed, and why Mr. Ise Levy should not be appointed official liquidator, rule to be published once in the "Cape Times" and once in the "South African News." Mr. Ise Levy was appointed provisional liquidator of the company, with the power to sell perishables.

*Ex parte HOOK.*

Mr. Gardiner, on behalf of petitioner, applied for an order authorising him to sell and pass transfer of certain two pro-

perties at King William's Town, belonging to the estate of the late Jane Elizabeth Hook. The properties were not bringing in any revenue, and the addresses of some of the heirs were unknown.

Ordered as prayed.

*Ex parte ARDERNE.*

Mr. D. M. Buchanan obtained leave on behalf of Henry Mathew Arderne to pass transfer to himself of certain property at Claremont, bought at a public auction, from an estate of which petitioner was executor.

**WITTHUHN V. SMIT.**

On the motion of Mr. Van der Byl this case was removed to the ensuing Circuit Court at Dordrecht for trial. There was a consent paper.

*Ex parte GREYLING.*

Mr. Inghbold, on behalf of the petitioner, obtained an order authorising the transfer of a certain farm, Spits Punt, part of the farm Honingnestkloof, district Barkly East, to the petitioner, this being one-fourth share of the farm Honingnestkloof, bequeathed undivided to petitioner subject to a *fidei commissum* in favour of applicant's children.

**MARSH V. SCHWARTZ AND THE MESSENGER OF THE RESIDENT MAGISTRATE'S COURT OF CAPE TOWN.**

Mr. P. S. T. Jones, on behalf of the applicant, obtained a rule *nisi* to operate as a temporary interdict, calling on the respondents to show cause on Tuesday, February 12, why they should not be restrained from attaching or dealing with certain fixtures and other articles belonging to a property bonded to the applicant, and why they should not be ordered to pay the costs of these proceedings.

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP  
and a Jury.]

ROLLS V. TABLE BAY ( 1907.  
HARBOUR BOARD. ) Feb. 7th.

### Personal injury—Negligence.

This was an action brought by Walter Rolls, partner in the furnishing business of Hills and Rolls, to recover from the Table Bay Harbour Board £1,000 for damages sustained during the progress of the regatta in Table Bay on Saturday, February 28 last. Mr. Russell appeared for the plaintiff, and Mr. Upington (with him Mr. Sutton) was for the defendants.

The plaintiff in course of his evidence said that on the Saturday in question he was invited with Mr. Fairbourne to accompany Mr. Weller in a ship's life-boat to witness a regatta in Table Bay. Weller and Fairbourne handled the oars, and plaintiff sat in the stern. He took very little part in the management and control of the boat beyond moving the tiller according to instructions. When they arrived at a barge which was moored in the bay, they tied the bow of the boat to the stern of the barge, and then proceeded to watch a race that was in progress. He did not know that the Harbour Board tug was near them until he heard Weller shout: "Look out; where are you going?" On turning round, he saw that the tug was very close, and appeared as if it was going to crash into the boat. He did not think the tug was 20 feet away at the time. Thinking his life was in danger he prepared to cling on to the tug when she struck the boat. The tug did not slacken speed, and plaintiff put his hand on the gunwale of the boat to save himself, when his right hand was jammed between the tug and the boat. He was lifted to the tug and subsequently sent to the New Somerset Hospital. The two fingers of the right hand and the lower part of the hand were crushed, and Dr. Johnson and Dr. Coats amputated the fingers. On the day of the accident and for many days afterwards he suffered pain. For three or four weeks he had to attend the hospital, and during that time he could not attend to his business. After the first week he did not suffer so much pain. At present he was unable to attend to his business as he did before. After his partner left, witness could not attend to the business. He had to engage another man to help him, and of course he had to pay his assistant—the salary was £10 a month. Witness could

write with his hand, but not so well as before. The hand seemed to swell up after a little work. Witness was not an expert boatman, but he looked upon Mr. Weller as an expert boatman. Witness could not have done anything to avoid the accident.

Cross-examined by Mr. Upington: He did not know that the barge was there as a starting point or a finishing point. There was nothing else to tie a boat to, and they thought it was a good place to witness the finish of the race. About the centre of the square part they moored to the barge. He would swear positively that the tug never whistled or that anyone on the barge called out to him to look out. He was a witness in a Magistrate's Court case in which Mr. Weller sued for the value of the boat, and the evidence that there was a warning was untrue. Witness could not say that the boat was pulled three feet before the accident occurred. The tug was going at the rate of four to five miles an hour. At that time the race was not already over. Immediately after two pistol shots Weller shouted out: "Look out; where are you coming to?" Witness did not know that he had no business there to tie up to the barge. He heard no shouting whatever from the tug or the barge. There had been a falling-off in his business since the accident.

James William Hartman, senior dresser at the Somerset Hospital, said that in April last year he received the plaintiff, who was very weak. Witness prepared the plaintiff for the operation which was necessary.

Arthur James Weller, electrician, stated he had had experience of boats all his life. The boat in question he had for about two months. The tug was running at the rate of about three or four miles an hour. Witness shouted to those on the tug to look out, but they did not alter its course. Witness did not see exactly what happened to the plaintiff, but saw blood on the side of the tug and on the side of the boat. Witness pulled on the rope to get out of the way, as he had no time to do anything else. On the tug were policemen and several ladies.

Cross-examined by Mr. Upington: When the tug was about 30 yards off, he did not hear a whistle. Witness was sitting in the bow of the boat watching the race, when the tug was about 30 yards away. There was about 6 feet of a pull on the painter, and he only had time to pull about 3 feet when the accident occurred. If he had had a few seconds more, he could have pulled the boat out of danger. If he had not pulled the boat, the tug would have struck it amidships. If anyone had called from the barge he would willingly have gone out of the way. The tug first struck the boat, and then the

barge. Witness knew that the barge was there as a starting and finishing place for the regatta. Some of the officials were aboard the barge. He did not know that the starter was conveyed from the barge by the tug.

John Henry Fairbourne gave corroborative evidence.

Mr. Russell closed his case.

Mr. Upington called Alexander Watermeyer, a clerk in the Harbour Board, who stated that he heard the whistle of the tug when she was quite 20 yards away. The tug was coming along dead slow. He saw the plaintiff's head out at the end of the barge. Witness warned the plaintiff to get away several times, including the time when the tug was approaching. There was plenty of time to pull the boat out of danger. He would swear that the tug whistled loud enough for those on the boat to hear. At the time of the accident his impression was that it was caused through sheer ignorance and want of watermanship on the part of the three men in the boat. The slightest shove would have got them clear of the tug.

Cross-examined by Mr. Russell: He did not see the actual striking of the boat. Witness could certainly have got the boat out of the way. If the tug had only been 10 feet away, there was ample time to get out of danger. At the time of the whistle blowing he warned this particular boat to get out of the way, but he could not say that he did so previously. Boats were not supposed to be alongside the barge. Witness did not know of any other boats being alongside at the time.

Another witness who was on the tug said he shouted to the three men in the boat, and with the warning given them they ought to have known which course the tug was going to take. He was absolutely sure the small rowing boat could have got out of the way. When they came alongside the tug was simply drifting; she was hardly going at the rate of a mile an hour. The tug did not collide with any other boat that afternoon.

George Bellowes, a farmer, who was also on the tug at the time of the accident, stated that he was sitting at the bow, and there was nothing to interrupt his view. He remembered the tug changing her course, and the whistle sounding when about twenty-five or thirty yards off the barge. The rowing boat was lying at the back of the barge. Witness shouted loudly when about twelve or fifteen yards off the boat, "Look out." He did not remember anything been done to get the rowing boat out of the way. After witness shouted there was time for the boat to get clear. He did not think those in the rowing boat knew what they were doing, and he attributed the accident to mismanagement.

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David Thomas Phillips, sergeant in the Dock Police, said he was on board the tug when the accident took place. He remembered the tug altering her course to approach the barge, and the whistle sounding. Witness was standing amidships, and had a clear view of the rowing boat. Boats were not allowed to moor up to the barge. Witness heard shouts from the barge and the tug, and between the time of the warnings and the accident there was time for the occupants of the boat to get out of danger. One pull would have got them out of the way.

The jury, after an absence of an hour and ten minutes, returned with a verdict for the plaintiff for the amount of £307.

Judgment was accordingly entered for the plaintiff for that amount, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné. Defendants' Attorneys: Reid and Nephew.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SCHALKWYK V. FRASEBURG 1907.  
DIVISIONAL COUNCIL. (Feb. 7th.)

Declaration of rights—Infringement of rights—Exception.

*A declaration alleged that the plaintiff fenced his farm, as he lawfully might, by means of a fence crossing a certain track, that the defendant Council thereupon gave him notice to open the road or to place proper swing gates thereon, failing which, the Council would take legal proceedings against him, and that the plaintiff apprehended that he might therefore be disturbed in his quiet possession. The declaration therefore prayed for a declaration of rights to the effect that the Council is not entitled to make the claim as to the said track.*

*Held, on exception taken by the defendant Council, that the declaration disclosed no ground of action, inasmuch as the notice constituted no in-*



*fringement of the plaintiff's legal rights.*

This was an argument on exceptions. The declaration stated that the plaintiff was the owner of a certain farm called "Hoplan" or "De Bakken," in the district of Fraserburg, and that he was lawfully entitled to fence his property. In April last the defendant Council sent him a letter requiring him to open certain roads or provide proper swing gates therefor, failing which legal proceedings would be instituted. The plaintiff admitted that he had closed one track, and claimed in respect of it a declaration of rights. To this declaration the defendants excepted as disclosing no cause of action against them.

Mr. McGregor appeared for the ex-cipients (defendants in the action); Mr. Close appeared for the plaintiff.

Mr. McGregor, in argument, stated that a public body was free to act in the public interest if it did so *bona-fide* (*Smith v. South African Newspaper Company*, 16 C.T.R., 440). An action might possibly have been brought against actual trespassers, but not against the Divisional Council which had been guilty of no obstruction. If the Council had asserted a right of action and delayed in bringing it then the plaintiff could have proceeded against them for perpetual silence (*Van der Linden*, p. 425, Henry's Translation). By way of analogy, counsel referred to Slander of Title in English Law, and quoted *Brooke v. Rawle* (19 L.J. Ex., p. 13). A mere denial of rights was not such an interference as afforded a right of action. He quoted *Colonial Government v. Stephan Bros.* (17 S.C.R., p. 59).

Mr. Close quoted Ball on Torts (p. 100), and said that Slander to Title was a purely English form of action, and that in this case there was no ground for an action for perpetual silence. The threat of legal proceedings by the Council was an act upon which an action for declaration of rights could be grounded, because it infringed the plaintiff's right of quiet use and enjoyment.

Mr. McGregor having been heard in reply,

De Villiers, C.J.: The plaintiff, in his declaration, states that he is the owner of a certain farm and that he is lawfully entitled to fence in his farm, and that in so doing he had lawfully, by a fence, closed a certain track where it crossed the common boundary of his farm and the adjoining property. He further alleges that the defendant Council had written to him giving him notice that the Divisional Council of Fraserburg had received certain complaints to the effect that he had closed certain roads, and

in terms of sections 153 and 154 of Act 40, 1889, and section 1 of Act 31, 1896, he must open the said road or provide proper swing gates therefor, failing which the Council would be compelled to institute legal proceedings against him. The declaration further alleges that the plaintiff apprehends that he may hereafter be disturbed in his lawful and quiet possession and use and enjoyment of the farm by reason of the claims made and not withdrawn in respect of the said track by the Council, and the prayer is for a declaration of rights in respect of the said track and the use thereof, and more particularly, a declaration that the Council is not entitled to make the claims as to the said track in annexure contained. The defendant Council has excepted to this declaration on the ground that it discloses no ground of action. On behalf of the plaintiff, no case has been cited to support an action in the present form, while counsel in support of the exception has cited the case of *Colonial Government v. Stephan Bros.*, which seems to me to be entirely in point. The head note of that case is: "Plaintiff is not entitled to claim a declaration of rights, merely because such rights have been disputed by the defendant, but he must prove an infringement of one or more of such rights." In giving judgment, the Court referred to the law as to perpetual silence, and pointed out that under certain circumstances a person who makes a claim to certain rights may be put to silence and prevented from asserting those claims, but the mere fact that a dispute had arisen between the parties does not give either party a right to a declaration of rights unless the opposing party has done some overt act which amounts to an infringement of such rights. Counsel for the plaintiff in the present case contends that there has been an infringement of rights inasmuch as under the 153rd section "any gate placed across any public road, path, or track which is not a swing gate substantially constructed and properly hung, shall be deemed to be unlawfully so placed, and the owner or occupier of such property whereon such gate is placed shall in every case be liable to such penalties and obligations as would be incurred by any person wilfully obstructing such public road, path, or track." But it would lie on the prosecutor to prove that the road, or track, is a public one, and the mere fact that the notice was given to the plaintiff would not render him liable to conviction. The Council in the letter which they wrote said that if the plaintiff did not place a proper swing gate across the track then the Council would be compelled to institute legal proceedings against him. Well, he had only to wait for such legal proceedings, and if those



proceedings were delayed he might, under certain circumstances, have a good claim to a decree of perpetual silence, but he cannot say that there has been any infringement of a right. The Council did not say they were going to take immediate drastic measures to remove the fence or to institute any other criminal proceedings against a man, but they said, "If you don't place such swing gate there we will be compelled to institute legal proceedings against you." The exception, therefore, must be allowed, with costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### PROVISIONAL ROLL.

CLAREMONT MUNICIPALITY { 1907.  
V. MOHAMED (ALIAS MO- } Feb. 7th.  
HAMED).

Dr. Rainsford moved for provisional sentence on an unsatisfied judgment of the R.M., Wynberg, for £12 12s. 8d., with interest from the 5th May, 1905, and for £4 9s. 6d., taxed costs, and also for the property described in the summons to be declared executable; counsel also moved for judgment, under Rule 329d, for £4 17s. 3d., with interest, and for £22 16s. 8d., with interest, being owner's and tenant's rates for 1906, with costs.

Order granted as prayed.

At a later stage, Dr. Rainsford applied for leave to withdraw the case, as a settlement had been arrived at.

[Hopley, J.: I have given judgment now; you need not execute upon it.]

CLAREMONT MUNICIPALITY V. GAMAT  
(ALIAS AMARDIEN).

Dr. Rainsford moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate, Wynberg, for £5 14s. 3d., and £1 19s. 7d., taxed costs, and for the property described in the summons, to be declared executable; counsel also moved for judgment, under Rule 329d, for 14s. 3d., with interest, and £3 11s. 3d., with interest and costs.

Order granted.

MACLEOD V. DA GRANGE.

Mr. Gutsche moved for provisional sentence on a promissory note for £40 10s., with interest.

Order granted.

CENTRAL NEWS AGENCY V. EDWARDS  
(TRADING AS B. A. GREEN AND CO).

Mr. Inchbold moved for the final adjudication of the defendant's estate as insolvent. Service (counsel stated) was effected at the defendant's last known place of residence in Main-road, Sea Point.

Order granted.

CRAWFORD V. MOLLER AND ANOTHER.

Dr. Greer moved for provisional sentence on a promissory note for £53 17s. 4d., with interest from the 1st February, 1907, and costs.

The first defendant confessed judgment, and offered to pay £4 a month. He added that he had made an assignment of his estate, and was only receiving £20 a month from his earnings in order to provide for his domestic needs.

The matter was ordered to stand over to enable plaintiff's counsel to consult his attorneys with reference to defendant's offer.

Dr. Greer subsequently stated that he had been instructed to accept the offer of Mr. Moller.

An order was granted as prayed, execution to be suspended on payment of £4 a month, the first payment to be made on February 15.

PITTER V. D'ABREU.

Dr. Greer moved for the discharge of a provisional order of sequestration.

Provisional order discharged.

ST. LEGER V. BEELDERS.

Mr. M. Bisset moved for provisional sentence on two promissory notes for £28 10s. and £50 respectively, with interest and costs.

Order granted.

#### ILLIQUID ROLL.

CLAREMONT MUNICIPALITY { 1907.  
V. JACOBS. } Feb. 7th.

Dr. Rainsford moved for judgment, under Rule 329d, for £33 11s. 11d., owner's rates for the year 1903, with interest, and for further sums of £47 7s. 11d., £25 7s. 1d., and £50 18s. 11d., with interest and costs.

Order granted.

#### REHABILITATIONS.

Mr. De Waal moved for the rehabilitation of Ernest Frederick Greybe.

Granted.

Mr. Pohl moved for the rehabilitation of John William Henson. Counsel now produced the necessary certificate from the Master.

Granted.

### GENERAL MOTIONS.

*Ex parte* PRETORIOUS AND { 1907.  
OTHERS. { Feb. 7th.

Mr. Gutzsche moved for an order authorising partition of a certain farm.

Order granted as prayed.

### WOOD V. WOOD.

Mr. J. E. R. de Villiers moved to make absolute a certain rule *nisi* directing Mr. A. T. Hennessy to pay over to applicant a sum of £50 for the support of herself and children, and interdicting the respondent, Alfred Wood, from mortgaging or alienating certain property pending an action to be instituted by applicant against respondent for desertion. The applicant said that she had been living apart from her husband (the respondent), and she had acquired a certain property, which, owing to the fact that she was married in community, was registered in respondent's name. The respondent had taken possession of the transfer deeds and had raised a loan of £100 on the property through Mr. A. T. Hennessy, who had paid £50 over to the said Alfred Wood. Wood had gone to England and had arranged for the balance of £50 to be sent to him. The balance, however, had not been sent to him. Counsel said that a rule *nisi* had been granted, but owing to the short return day which had been fixed it had been impossible to effect service upon the respondent Wood.

Hopley, J., ordered that the respondent Hennessy to pay over the balance of the moneys in his hands to the applicant for maintenance of herself and children, and that the rule *nisi* be extended to the 15th April, to operate as an interim interdict, service to be effected on the respondent Wood by registered letter to be addressed to Post Office, Alton, Hants., England.

### BAYER AND CO. V. STRAUSS, ADLER AND CO.

#### Trade mark—Expunging.

*S. & Co. had registered a certain trade mark as "C. B. Corsets," but C. B. & Co. had sold these under this mark for some 13 years. C. B. & Co. now called upon respondents to*

*show cause why "C. B." should not be expunged from the afore-said trade-mark registry.*

*Held, that although corsets bearing this mark had been sold in America since 1877, as there was no evidence that they had been sold in S. Africa, the said trade mark had been unlawfully registered and must be expunged from the register.*

This was the return day of a rule *nisi* calling on the respondents to show cause why the alleged trade mark "C.B." in respect of corsets in class 38, should not be expunged from the Register of Trademarks.

From the affidavits, it appeared that applicants claimed to be the first originators of the "C.B." corsets, but that respondents had given notice in the Cape "Government Gazette" that they would apply to have the mark "C.B." registered. Applicants, who had sold "C.B." corsets for over £150,000 in this Colony, were resident in England, and could not object in time to prevent the registration.

Mr. W. P. Buchanan appeared for the applicants; Mr. Gardiner for the respondents.

Mr. Buchanan now moved that "C.B." be expunged, and read affidavits by applicants and by Cape Town drapers to the effect that applicants' "C.B." corsets had been sold in Cape Town as far back as 13 years ago, and probably before 1877.

Respondents said that they had since January, 1877, adopted the trade mark "C.B." although they could not swear that their corsets had been sold in this Colony prior to the registration of their mark.

Hopley, J., inquired if this was the proper procedure and if this Court had jurisdiction.

Mr. Buchanan referred to the case of *Wright, Crossley and Co. v. Royal Baking Powder Co.* (14 S.C., 366), where the practice was laid down.

Mr. Gardiner, in argument, said, *inter alia*, that section 7 of Act 22 of 1877 provided for the framing of rules with regard to trade marks; these rules had to be laid before Parliament, and they were therefore to be treated as if they had been enacted by statute. Rule 6 provided for advertisement of the intention to apply for the registration of any mark, and that section had been complied with. Under Rule 13 any person objecting to the registration had to give notice, and no objection had come in within the period allowed by the rule. His contention was that the rule was imperative on the Court, and that no extension of

the time for objecting could be granted. In England the Controller of Trade Marks could extend the time (Kerley, 2 ed., p. 701), but this could not be done here. Applicants, not having objected in time, could not do so now. Section 1 of the Act of 1877 provided that no person who was not the registered owner could institute proceedings to have a trade mark expunged. He referred to *Lewis v. Lazarus* (13 S.C., 420). He admitted that if the public were defrauded there might be a "passing-off" action, but here there was nothing from which the Court could conclude that his clients were perpetrating a fraud, and in case of fraud, it would be necessary to proceed by way of action. Applicants gave no clear proof of user prior to 1877, or of very old user. They were registered in England in 1886, and respondents said they adopted the trade mark "C.B." in 1877. His clients were on the register, and there they were entitled to remain until applicants could prove that they had committed a fraud.

[Hopley, J.: Do you say that your registration would not prevent their selling "C.B." corsets?]

Mr. Gardiner said that he did not like to say. His clients might have to bring an action to prevent them. In England two similar marks had been registered (*Monson v. Boehm*, 26, Ch. D. 398, and *Paine and Daniells*, 1893, 2 Ch. 567).

Mr. Buchanan said that applicants were not asking the Court to order the Registrar to register their mark; they asked that respondents' mark be expunged. Under section 5 of Act 22 of 1877, any person aggrieved might apply for a rectification of the Register. The letters "C.B." could not be registered at all, unless the party wishing them to be registered could prove that they were used before August 8, 1877, in this Colony. He referred to Sebastian on Trade Marks (4 ed., p. 45). In the cases of *in re Biricre's Trade Mark* (26 Ch. D. 48) and *re Munch's application* (50 L.T.N.S., 12) it had been decided that user of a trade mark had to be user in the United Kingdom, and therefore in order to register here user in this Colony was necessary. Respondents were registered, because they had declared that their trade mark was used since January 1, 1877: although it might have been used in America it certainly was not used here. With regard to the registration of initials, he cited Sebastian (pp. 33 and 35, also p. 76). Distinctiveness was required. Each mark had to be such that if a question of infringement arose it would be quite clear what it was that was infringed.

[Hopley, J.: Supposing the Registrar has wrongly registered, is this a competent way to rectify?]

Mr. Buchanan said that it was, and referred to section 5 of the Act of 1877 and to Kerly (2 ed., p. 265). Their mark was not a registrable mark at all (Kerly, pp. 171 and 173). In England the controller's decision was no bar to a rectification. (Kerly, p. 275.) On the purity of the register he referred to *Thompson v. Montgomery* (45 Ch. D., 35); *Powell's Trade Mark* (1893, 2 Ch., 388); Kerly (pp. 227, 228, 229). He also referred to section 6 of Act 22 of 1877. In this case the Registrar had palpably been deceived; he took user in the United States as being user in this Colony. Even assuming that the mark was registrable, respondents could not come and have it registered here where applicants had been using that mark. He quoted *Hudson's case* (32 Ch. D., 320) and *Roger's case* (12 R.P.C., 149).

[Hopley, J. (to Mr. Gardiner): Can you say that "CB" or "C.B." are registrable? The Premier of England might object.]

Mr. Gardiner: But he is "C-B" with a hyphen. Bayer's "C.B." has been protected in England. He quoted 16 R.P.C. and 15 R.P.C.; and, continuing, said that the onus was on the applicant, who wished to get respondent off the register, to show that respondent's mark was not in use here before 1877. Applicants could not complain that they had no notice. He referred to *Stockham v. Colonial Building Society* (19 S.C.).

Hopley, J., reviewed the circumstances of the application, and said that the point to consider was whether, had the facts been before the Registrar that were now before the Court, the Registrar would not have refused the registration on the respondent's application. His Lordship did not think the Registrar would have gone to the extent of giving a possible monopoly of that particular mark to the applicants, to the exclusion of the people who for so many years had been selling corsets marked C.B. in this country. Furthermore, there was ambiguity about the declaration made by the respondents' firm on the point of the use of the mark prior to the 8th August, 1877. He (the learned judge) thought the declaration meant that the corsets bearing that mark were sold in America prior to 1877; but there was no evidence at all that they were sold in this country before that time. If that were so, was the Registrar right in allowing the registration of such a trade mark—merely two letters of the alphabet? The requirements of the Trades Marks Registration Act (12 of 1895) were not fulfilled by two letters of the alphabet so as to make them registrable as a trade mark. But if such a pair of letters had been in use by any tradesman in this Colony before August 8th, 1877, in combination as a trade mark, then they could be so regis-

tered on the application of the person who had so used that particular mark. In the present case the Registrar may have been deceived by the ambiguity of the respondent's declaration, which in reality went no further than to assert a user of the letters C.B. as a trade mark for corsets in the United States of America before 1877. Now the applicants had made out the use in this Colony by them, before 1877, of the letters C.B. as a trade mark for their corsets; and they, being naturally aggrieved at the registration of the same letters by the respondents, and the possible exclusion from the markets of this country of their wares, were within their rights in appealing to the Court for a rectification of the Register. I am of opinion that the registration was wrongful, and that the relief asked for should be granted. The rule will be made absolute, with costs.

#### VAN ROOYEN AND OTHERS V. MACKAY.

Mr. Molteno moved for the extension of a certain rule *nisi* for a fortnight, and for an amendment in the rule. The rule called upon respondent to show cause why he should not be ordered to transfer a certain farm to the applicants it was now desired to add the names of other applicants to the order.

Application granted, the rule being made returnable on February 21.

#### *Ex parte FERREIRA.*

Dr. Rainsford, on behalf of the petitioner, applied for an order declaring one J. W. Ferreira, of the district of Willowmore, who was upwards of 74 years of age, and who had leased certain properties to different people, to be incapable of managing his affairs, and for the appointment of P. M. van Noorden as *curator bonis*.

Counsel referred to the case of *Van der Vyver* (15 C.T., 1,007).

The Court intimated that it could not appoint a curator in such a summary manner, and asked counsel to consult with his attorneys and mention the matter again to-morrow.

#### *Ex parte STAYN.*

#### Divorce—Adultery—Restitution of conjugal rights.

*S. had sued his wife for divorce on the ground of her adultery. He did not succeed, as the Court found it proved that he was himself guilty. He thereafter offered to take his wife back*

*but she refused to return and deserted him. Applicant now applied for an order to sue his wife by edictal citation for restitution of conjugal rights.*

*The Court refused the order.*

*Heathershaw v. Heathershaw (1 Rosc. 186) not followed.*

Mr. Rowson, on behalf of the petitioner, moved for leave to sue petitioner's wife, Elizabeth Stayn, by edictal citation for a decree of restitution of conjugal rights, failing which for divorce.

Counsel said that in or about 1889 Mrs. Stayn deserted her husband, and in 1902, on finding her living with another man, he sued her for divorce. Petitioner failed to obtain a decree, as the Court found that he himself had been guilty of adultery; he now wished to sue his wife for restitution of conjugal rights. In 1902, after the divorce proceedings, he had asked his wife to let by-gones be by-gones, and to come back to him, but she had refused. Counsel relied on Voet (24, 2, 6), and on *Heathershaw v. Heathershaw* (5 S., 35, and 1 Rose, 186).

Hopley, J.: In this case the applicant endeavoured to obtain a decree of divorce on the ground of his wife's adultery, but unsuccessfully, because his wife at the trial proved, that though she was living in a state of adultery, the plaintiff was equally guilty.

After that trial it is now stated that the plaintiff made overtures to his wife to the effect that there should be mutual condonation of their respective conjugal misconduct and that they should once more live together, but that the defendant refused this offer. It is now alleged that the defendant then deserted her husband maliciously, that she departed from the jurisdiction of this Court for some place or country not known to the applicant, and he now asks to be allowed to sue her by edictal citation with a view to obtaining a decree of divorce.

In such circumstances, I do not feel disposed to assist the applicant in gaining a divorce on the ground of desertion. There are no doubt cases, like the one quoted by Mr. Rowson, in which the Court might, in somewhat similar circumstances, assist a man who was genuinely anxious to get his wife back, but in the present case such is not the applicant's intention. If he really wishes to get his wife back, let him trace her and sue her in her present domicile for a restitution of his rights. There will be no order.

[Applicant's Attorney: E. I. Sydney. Respondents in default.]

*In re* THE ROYAL HOTEL CO. (IN LIQUIDATION).

Mr. Roux moved for confirmation of the liquidators' report, and for an order that the company be dissolved, and the books destroyed, and for payment of remuneration to the liquidators. Order granted as prayed.

*Ex parte* STREETER.

Mr. J. E. R. de Villiers moved for leave to attach certain money in satisfaction of a judgment obtained against the firm of Myers and Puxty. Applicant stated in an affidavit that he had reason to believe that a sum of £100 had been cabled to be paid to respondents upon shipment of certain goods, and that this sum was in the hands of Reuter's Telegram Co.

A rule *nisi* was granted, returnable on Tuesday next, calling on respondents to show cause why a sum of £60 should not be attached to satisfy the writ.

KOCH V. COHEN.

Mr. Douglas Buchanan moved for an interdict restraining respondent from removing certain goods from his shop at Wynberg for the purposes of sale, pending action to be brought.

A rule *nisi* was granted, calling on respondent to show cause why he should not be interdicted from removing any of the goods in the tailor's shop, pending action for rent, returnable on Tuesday next, the rule to act as an interim interdict.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

HOVEN V. CAPE TOWN STEVE- ( 1907.  
DORING CO., LTD. ( Feb 8th.

Breach of warranty—*Actio redhibitoria*—Recission of sale.

*The vendor of a launch warranted her to be in good working order. The purchaser,*

*after giving her a fair trial, found that she was not in good working order and that she really required a new boiler.*

*Held, that the purchaser was entitled to have the sale rescinded and to recover back the price which, under the terms of sale, he had paid on delivery.*

This was an action to recover the sum of £100, being an instalment of purchase price alleged to be due in respect of the purchase from the plaintiff by the defendant company, of a certain steam launch.

The declaration set forth that the defendant company was an incorporated limited liability company, duly registered, carrying on business in Cape Town. On the 7th June the plaintiff sold a steam launch known as the Nellie to the defendant company, for the sum of £338. The sum of £38 was to be paid on delivery, and was so paid, and the balance was to be paid in three instalments each of £100, of which the first instalment became due on the 1st December last. The defendant company refused to pay that instalment, and the plaintiff claimed judgment for that sum, with costs.

The plea stated that the plaintiff sold on a guarantee, contained in the deed of sale, that the launch was watertight, and was in sound condition, and that the engine, boiler, machinery, etc., were in proper working order. The launch was not in sound condition and the boiler was not in proper working order, being wholly defective and unfit for use. The defendant company had therefore repudiated the sale, demanded the return of the £38, and tendered the return of the launch. The defendants claimed, in reconvention, damages in the sum of £50, including seven guineas spent on an examination of the launch.

Mr. Close (with him Mr. Swift) was for the plaintiff; Mr. Gardiner (with him Mr. Watermeyer) was for the defendant company.

Mr. Close submitted that the onus was on the defendant company.

Mr. Gardiner said he admitted that was so. He called

William G. Mathie, master mariner, and a director of the defendant company. He stated that he remembered the wreck of the Oakburn some time in July. Some cargo—oil cakes—floated in the Bay, and the launch in question was sent out to do some salvage. It went out the first day, and returned with some casks, but on the second day the engineer of the launch raised objection to going out. Previously to this



the launch had been giving trouble. The launch was delivered in June.

[De Villiers, C.J.: Why was she sent out if there had been trouble with her previously?]

Witness: The trouble did not appear to be so serious at that time. The witness, proceeding, said that the tanks were found to be leaking. The launch was sent out twice, and in consequence of a report made by the engineer, the boiler was taken out and examined. The boiler had been inspected with a view to repairing, but it was decided to have nothing done. Witness was not an expert, but he could see that the shell was corroded. The boiler was now lying on one of the company's boats.

Cross-examined by Mr. Close: The company was formed of conflicting firms of stevedores. The partners were: (1) Witness, (2) Van Hoven and Jacobson, and (3) Watson and Williams. The company were not anxious to buy the launch. One of the prime reasons the boat was bought was that it was thought the plaintiff was minding his own business and not the company's. The company had previously hired Hoven's launch. On occasions previous to the purchase, the launch had broken down once or twice, and the company knew it, but the breakdowns were not serious. He was not aware that there had been a breakdown for a fortnight. Before and after the sale he was told the boiler had broken down. Witness was told that the tubes in the boiler had to be replaced. The company did not repudiate the sale at once, but gave plaintiff an opportunity of making the boiler good.

Joseph Watson, master mariner, and director of the defendant company, said that a few days after the sale he spoke to the plaintiff about the condition of the boat, and plaintiff attributed it to defective tubes. If the defect had only been with the tubes, the sale would not have been repudiated, because that could easily have been remedied. There were many complaints, and ultimately the boiler was taken out and vital defects were discovered. Hoven had told him there was nothing vitally wrong with the boat, nothing that could not easily be repaired. Plaintiff had refused to submit the matter to arbitration. Mr. Hoven was a director, but he resigned his position about a week ago.

Mr. Close: Mr. Hoven made an offer to cancel the sale, if you were dissatisfied, did he not?

Witness: Yes, and I accepted it, but Mr. Hoven went back on his word.

How long before the final breakdown—about the 27th July—did Mr. Hoven offer to cancel the sale?—I cannot definitely say, but I think it would be a week or ten days.

And when did you accept the offer?—

On the spot, but it was withdrawn in two minutes.

In further cross-examination, the witness said that Mr. Hoven offered to take off £50 for repairs to the boiler.

Re-examined: The company would not have bought the launch had they been aware of the condition in which the launch actually was.

Wm. Frederick Bonsey, secretary of the company, also gave evidence. Mr. Hoven instructed him to write to a Home firm with regard to a new boiler.

Other witnesses gave evidence as to the defective condition of the boiler.

The defendant, in the course of his evidence, stated that before buying the boat he put the matter of its purchase before the company, but the company would not buy the launch. Witness purchased it, and ran it for about a year, making a profit of about 50 per cent. Outside the Harbour Board tug, there was no boat available for the work of the company but the Nellie, and witness did considerable work for the company. It was complained by the company that witness was devoting too much of his time to the launch, and the question of its purchase by the company arose. When witness got his licence at the beginning of the year, there was a special clause written in the licence to the effect that the licence was granted subject to re-examination of the engines and boiler on the 1st July. The boiler had continually broken down, and witness said at the time of purchase that he would give no guarantee as to the boiler, except that it was then in working order. The members of the company knew as much as witness did in connection with the condition of the boiler. A few days after the sale there was a conversation about the breakdown of the boat. They said it was not giving satisfaction. Witness was upset about it, and offered to take the boat back and return the £38, but Mr. Jackson and Mr. Watson both pooh-pooed it. They wanted to get the boat to keep witness out of competition. Witness continually offered to cancel the sale up to the time the boiler was taken out. During the whole time the boat was running, witness's offer stood.

Mr. Gardiner said he would point out to the Court that it was not pleaded that there was an offer to cancel the sale.

Mr. Close said he would apply for an amendment of the replication accordingly.

De Villiers, C.J., said that if a *prima facie* case was made out, he would grant the amendment, but in the present state of the case he could not do so.

The witness (continuing) said he dictated the letter Home about a new boiler at the request of Mr. Jackson.



He usually attended to matters concerning the machinery. The directors wanted further inquiries made with regard to a new boiler. The company did not up to that time repudiate the sale. It was only then—on the 21st August—that Mr. Jackson said: "Now, you have been so keen about taking back the boat, you can take it."

Cross-examined by Mr. Gardiner: Witness believed that if £50 was spent in repairs to the boat, the Harbour Board would license it. Witness paid for the cable which was sent Home regarding the boiler. The company refused to pay.

Mr. Gardiner submitted that the defendant could not press the claim for damages in reconvention.

Mr. Close having been heard in argument on the facts,

De Villiers, C.J.: At the time when the launch was sold the plaintiff gave a warranty that the launch was watertight, in sound condition, and its engine, boiler, machinery, etc., in proper working order. Now, the main question to be decided is: Was this warranty broken? It has been attempted to show on behalf of the plaintiff himself that before the sale took place the launch had been in such bad working order that she had continually to be repaired, to the knowledge of the defendant; but if this view is perfectly sound, then it is quite clear that the launch was not in proper working order at the time of the sale. Within a week after the sale the trouble began, and the defendant company did not at once rescind the sale, apparently because they wished to give the launch a fair and a proper trial. It would be impossible to say that the boiler and machinery were not in proper working order unless a full opportunity was given of testing them, and that was what the defendant company did; and it was only afterwards, upon discovery that it was hopeless to make anything out of this launch, that they finally decided to reject it, and to claim back their money. But in the meantime the plaintiff was not ignorant of the fact that the defendant company was not contented with the launch. They raised objections, and they say they did not at once repudiate it, because in terms of the warranty, it could only be ascertained whether it was in proper working order by actual working, and in this respect the case differs from all the other cases relating to warranty, which have been cited by Mr. Close. The warranty is a peculiar one. It would be impossible really from an inspection of the machinery to say whether it was or was not in proper working order. Now, I am quite satisfied from the evidence that in point of fact the launch was not in proper working order when this sale took place, and that in consequence the warranty was not complied with. Then

comes a further question, which really has not been raised upon the pleadings, but which I shall proceed to consider, and that is whether there was such acceptance by the defendants of this launch as to deprive them now of the right to rescind this sale. As I have said before, the defendants were quite justified in taking some reasonable time for ascertaining whether the machinery was in proper working order, and I consider in all the circumstances of the case the time was not unreasonably long. A great deal has been made about the letter which was sent, apparently written by the secretary of the defendant company, to manufacturers in Scotland, inquiring at what price a boiler could be supplied for this launch, but it now appears that that letter was really written at the dictation of the plaintiff himself, who was one of the directors of the defendant company, and I do not think that that letter could be held to have been written in such circumstances as to prove that there was actual acceptance by the defendant company of the launch. It is certainly a significant fact that when, on another occasion, the plaintiff made inquiries by cable as to the price at which a boiler could be obtained from England, he did so at his own expense, and he was not likely to do so if at that time he considered there had been such acceptance by the defendant company as to make them liable. Well, this being my view of the case, it is not necessary to consider all the different authorities which have been cited. The facts satisfy me that the warranty has not been complied with, and that, moreover, there has not been at any time such acceptance by the defendant company as to deprive them of the right to raise the defence that the launch did not come up to the warranty. The defendant has withdrawn his claim for damages, and has done so very properly, because, under the circumstances of the case, no Court would have granted damages, but the defendant is certainly now entitled to be put in the position as if no sale had taken place. The judgment of the Court will be for the defendant on the claim in convention, and the Court will order that the sale be rescinded, and that the plaintiff repay to the defendant company the sum of £38 on the defendant returning the launch, but the plaintiff must pay the costs of the action.

[Plaintiff's Attorneys: Reid and Nephew; Defendants' Attorneys: Dold and Van Breda.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL CASE.

BUX V. ABRAMS AND CO. } 1907.  
Feb. 8th.

This was an application in which the plaintiff claimed provisional sentence for £110 on an I.O.U., alleged to be signed by the defendant firm, or rather by one of the partners on behalf of the firm. On the day when the matter originally came on for provisional sentence, the defendant by affidavit denied the signature, the alleged signature on the I.O.U., and the Court ordered evidence to be taken to show that this was a genuine signature.

Mr. Alexander (with him Mr. Pohl) was for the plaintiff; and Mr. Benjamin (with him Mr. Struben) was for the defendants.

Evidence having been led, and Mr. Benjamin heard for the defence,

Maasdorp, J.: When the plaintiff in this case claimed provisional sentence, the defence was set up that the promissory note did not bear the signature of the defendants in this case, and consequently they were not liable. Thereupon, to-day was fixed as the day upon which the Court should go into the question whether the document was actually signed by the defendants. The first question that arises in the case is whether Cassim placed the signatures at the foot of this promissory note on behalf of the firm of Abrams and Co. Apparently, when the case was before the Court on a former occasion he denied that he had placed his signature on this paper at all. But that is not the defence which is raised in the present case. He now takes up the position that the signature which appears on the paper is actually his, but that it was not placed there at the foot of the promissory note, but on a blank piece of paper, and that this promissory note was subsequently filled in, and consequently it was not a valid note bearing his signature. I will take it now that that was the defence he would have set up if he had seen the document bearing his signature. But the extraordinary part is that a general denial was made of the validity of the note, without the parties taking the trouble to examine the document. There was no doubt now that the name of the firm, Abrams and Co., was written upon this paper by Cassim, because he admits it, but he states at the time he signed it there was no promissory note. I have called it a promissory note, but it is rather in the shape of an I.O.U., and I shall proceed to call it an I.O.U. I

have now to decide whether this I.O.U. was upon the document when the signature was placed there, and that may easily be disposed of by the evidence of Kerbel and Manoor, I shall not go into close scrutiny of all the evidence. I accept the evidence of Kerbel and Manoor as being truthful, consequently we have an I.O.U. purporting to have the signature of the firm of Abrams and Co., and we have the document that was actually signed by Cassim. The other question is whether, when that signature was placed there, Cassim was authorised by Abrams to place the name of the firm upon it in such a form as to bind Abrams. His Lordship, after reviewing the evidence on the point, held that the document bore the signature of the firm placed there by Cassim, with full power to act on behalf of the firm. Provisional sentence would be given, with costs, and the costs of the plaintiff as a necessary witness.

## THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. } 1907.  
Feb. 8th.

Mr. Toms moved for the admission of Hendrik E. B. Wahl as an attorney and notary.

Application granted, and oaths administered.

### PROVISIONAL ROLL.

HANAU V. PAPERT AND ANOTHER.

Mr. De Waal moved for provisional sentence on a certain lease for £160, four months' arrear rent. Counsel applied for judgment against the first defendant and for an extension of time, *sine die*, against the second defendant.

Order granted against the first defendant and extension of time until the 5th March granted against the second defendant.

FREEMAN AND CO. V. HANSON.

Dr. Greer moved for a provisional order of sequestration to be made final. Order granted.

### ILLIQUID ROLL.

IMMELMAN AND CO. V. KING BROTHERS.

Mr. Lewis moved for judgment under Rule 329d for £138 18s. for goods sold

and delivered, with interest from October 10, 1906, and for £7 la. 5d., collection fees.

Order granted.

"EAST LONDON DAILY NEWS" V. CRAGG.

Mr. Roux moved for judgment under Rule 329d for £25, being the final call on unpaid balance of 5s. per share due by defendant on 100 shares, which defendant had neglected to pay, with interest from June 6, 1906, and costs.

Order granted.

FRYER V. EXECUTOR ESTATE HOBKIRK AND ANOTHER.

Mr. Struben moved under Rule 329d for an order upon one of the defendants to join with her co-executor in lodging with the Master a true and proper account of the administration of the estate of Adam Hopkirk, and a similar order upon the other defendant in his capacity as executor dative in the estate of the late Janet M. Hopkirk.

Hopley, J., said that two people who were interested in different estates seemed to have been joined together in one summons. He did not think there was any precedent for such a course.

Mr. Struben submitted that the administration was practically the same in both estates.

Hopley, J., directed the matter to stand over pending authority being cited for two defendants being joined together in this way.

*Postea* (February 14th).

Mr. Struben again moved for judgment in the following terms: (1) That the defendants in their capacities may be ordered forthwith to join applicant in framing and lodging with the Master of the Supreme Court a full and true account supported by proper vouchers of the whole administration and distribution of the estate of the late Adam Hopkirk, the said Mary Jane Fryer hereby again offering, as she repeatedly has done, to do everything on her part to get the said estate finally liquidated; (2) that a like order may be made against the first-named defendant in his capacity as executor dative in the estate of the late Janet Margaret Hobkirk; (3) that the first-named defendant be specially ordered to render a full account, and to debate same before the Court, of all moneys received and disbursed by him, and in particular of (a) sum of £1,500, being the purchase price of certain erf No. 4 in Church-street, Colesberg; (b) the proceeds of sale of part of erven 5 and 7, Colesberg; (c) the cash and bank balance in the estate of Adam Hopkirk; (d) the settlement of certain outstand-

ings due to the first-mentioned estate by W. Jaffray; (e) the compensation claim of £504 due to the said estate, the said sums having been wrongfully and unlawfully detained by him for his own use and benefit, and that the said A. N. Hobkirk be ordered to pay over to the plaintiff all such sums as may be found to be due to her as heiress in the said estate, and in her individual capacity. (4) That the said A. N. Hobkirk, in his individual capacity, be further ordered to render a full account, and to debate the same, of all bonds and other securities handed to him for the purpose of protecting and securing the plaintiff's interest therein, to pay over to her all such sums of capital and interest as may be due thereon. (5) Interest *a tempore morae* on all amounts found to be due by the defendants or any of them. (6) Costs of suit. Mr. Struben said that the matter had been standing over for further information. A summons was taken out in the foregoing terms, and a declaration was about to be filed, but apparently there was an intimation that there would be no appearance, and the instructions for a declaration were withdrawn.

[Hopley, J.: What information did the Court want?]

Mr. Struben: As to whether there would be any prejudice by joining the two executors in one estate and the other executor in the other estate on the same summons. There has been no fresh question raised by the executors.

Order granted as prayed.

WARD V. WARD.

This was an action brought by Joseph William Ward, of Middelburg, against his wife, Adele Maria Ward, for restitution of conjugal rights, failing which a decree of divorce.

Mr. De Waal was for plaintiff; defendant did not appear.

Wm. Thomas Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, having given formal evidence as to the registration of the marriage,

The plaintiff said that he was a chemist and resided at Middelburg. He married the defendant in July last year, under ante-nuptial contract. Their married life was not happy. In the first month he found that his wife did not care for him at all. She said she desired to leave him, and she went to Cape Town in the following month. He asked her to return to him, but she had refused.

By the Court: The defendant, who was 36 years of age, had previously been divorced. She was now at Uitenhage. Defendant deserted him five and a half weeks after the marriage.

Mr. De Waal read a letter from defendant to plaintiff in the course of which she said that a kinder husband she could never wish for. She hoped he would get a wife worthy of his goodness and kindness. She was not and never could be his wife.

Decree of restitution granted, defendant to return to the plaintiff on or before the 1st May, failing which, to show cause on the 10th May why a decree of divorce should not be granted, and why she should not be adjudged to have forfeited the benefits under the ante-nuptial contract.

#### ABRAHAMS V. ABRAHAMS.

This was an action brought by Rosina Abrahams, of Worcester, against her husband, Manuel Abrahams, of Cape Town, for a decree of divorce, or, alternately, for restitution of conjugal rights.

Dr. Greer was for plaintiff; defendant was in default.

Formal evidence having been given as to the registration of the marriage,

Rosina Abrahams (the plaintiff) said that she was married to defendant at St. Paul's, Cape Town, on the 26th November, 1894. In 1905 she had a boarder named Mary Paulson, with regard to whom she had heard certain reports. Early one morning she awoke and on making a search she found defendant in the same room as Paulson. She spoke to the woman Paulson, who admitted that witness's husband had had improper relations with her. Witness continued to live with defendant, but their life was unhappy, as defendant ill-treated her and came home drunk very often. She went to Worcester in April, 1906, in order to take a situation. Defendant consented to her going. While away she became ill, and applied to her husband for assistance, but her letter was never answered. Defendant had been in German South-West Africa, but he had now returned to Cape Town. In 1904 she was paid £100 by the Cape Government Railways as compensation for an injury that she had received. Part of this money was expended in a property at Klipheuvcl.

Decree of restitution granted, defendant to receive plaintiff on or before 1st April, failing which, to show cause on 23rd April why a decree of divorce should not be granted, with forfeiture of the benefits and costs.

#### HOWES V. HOWES.

This was an action brought by Esther Maria Howes, of Cape Town, against her husband, George Percival Howes, said to be living in Johannesburg, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Pohl was for plaintiff; defendant was in default.

Formal evidence of the registration of the marriage having been given,

Esther Maria Howes (the plaintiff) said that she was married to defendant in October, 1903. They lived in Cape Town for about a year, and afterwards resided for a little while at Observatory-road. Witness then came to reside with her mother, and defendant went to live with his brother. While she was living with her mother the defendant deserted her in February, 1903. She had seen him once since that date, and on that occasion he did not speak to her. Defendant was now in Johannesburg. There was one child of the marriage, born a few months after defendant had deserted her.

By the Court: Witness was certain that defendant was aware of the proceedings that she was taking against him.

Decree granted, defendant to restore conjugal rights by the 1st May, failing which to show cause on the 14th day why a decree of divorce should not be granted, with custody of the child, and costs.

Mr. Pohl asked his lordship if he would make an order against defendant as to maintenance of the child.

Hopley, J., said that it was useless for the Court to make such an order, seeing that it could not enforce it. If defendant returned to the jurisdiction then an application could be made to the Court.

#### GENERAL MOTIONS.

*Ex parte* ESTATE JARVIS. { 1907.  
Feb. 8th.

Mr. Swift moved for certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

#### DRIESSEN V. DRIESSEN.

Mr. Roux moved for a certain rule *nisi* to be made absolute directing the respondent to deliver a certain child to the applicant, its father. It was alleged that the respondent had deserted the applicant, and had been living in adultery with one Easton in Cape Town. While applicant was away from his home at Kuil's River, respondent came and surreptitiously removed the child.

Respondent appeared, and said that she left her husband because he ill-treated her. She left the child in the custody of her mother, and applicant took it away. She (respondent) had supported it. When she took the child from applicant's house it was in a neglected state.

Applicant gave evidence. He denied that he had ill-treated the respondent. He desired to hand the little girl over to his sister, Mrs. Joliffe, who lived at Salt River. When he had come to see his child at respondent's house in Commercial-street, Cape Town, he had been driven away with sticks and stones.

Respondent said that she left applicant in 1903, because he assaulted and ill-treated her. She did not join Easton until about a year ago. She had had a child, of which Easton was the father. She removed the child of the marriage from a midwife's at Kuil's River, where it had been placed by applicant.

Applicant (in answer to the Court) said he would see that the child was properly looked after by his sister.

Hopley, J., said that the Court would order the respondent to deliver up custody of the child to the applicant, with right of access to the respondent. If the child were not properly treated, the respondent could make representations to the Court.

*Ex parte* LOURENS.

Mr. Toms moved for an order authorising transfer of remaining portion of a certain farm in the division of Swellendam.

Order granted as prayed.

*In re* COLONIAL BUILDING CORPORATION, LTD.

Mr. Douglas Buchanan moved for the confirmation of the second and final report of the official liquidator (Mr. Steytler). No objection had been taken while the report had lain for inspection. The liquidator asked for authority to destroy the various documents and papers of the company now in his custody, to deposit with the Master, one month after confirmation of the report, all unclaimed dividends, and to dissolve the company.

Report confirmed and the several prayers granted.

*Ex parte* RUSHTON AND ANOTHER.

Mr. Toms moved for an order authorising the Registrar of Deeds to register a certain ante-nuptial contract entered into between the petitioners. It appeared that the contract had been registered in the registry at King William's Town, but that it had been accidentally omitted by the petitioners' attorney to be sent to the Deeds Registry in Cape Town within the period prescribed by the Act.

Order granted as prayed.

*Ex parte* GREYLING.

Mr. Payne moved for an order authorising the partition of certain property in the Division of Barkly East, so as to give the parties interested defined shares instead of undefined.

Order granted as prayed.

*Ex parte* FERREIRA.

Dr. Rainsford again mentioned this matter, which was an application for the appointment of a *curator ad litem* to represent Ignatius Wilhelm Ferreira in proceedings to have him declared of unsound mind. Counsel now suggested that the Resident Magistrate of Willowmore should be appointed *curator ad litem*, and that the matter should be heard on motion and similar directions should be given as in the case of *Van der Vyver* (15 Cape Times Reps., 1,007).

Order granted appointing the Resident Magistrate of Willowmore *curator ad litem* of Ignatius W. Ferreira in proceedings to be instituted to have it determined whether he is of unsound mind and incapable of managing his own affairs, proceedings to be taken on notice of motion, all necessary affidavits to be served, as in the case of *Van der Vyver* (15 C.T.R., 1007).

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice LAWRENCE and the Hon. Mr. Justice HOPILEY.]

GAGELA V. GANCA. } 1907.  
Feb. 11th.

Mr. Gardiner moved for leave to the applicant to prosecute an appeal from a judgment of the Circuit Court at Cala, in which he had been ordered to pay damages for an alleged assault upon respondent. The case was heard on the 30th October last, and the time within which applicant could have proceeded with an appeal without a special order of Court, expired on the 30th January. He explained, however, that judgment



was given against him in the Circuit Court for £22, and after paying the costs and expenses in connection therewith he was left almost penniless. He had at that time noted an appeal. He had now obtained funds with which to proceed, but the time allowed had expired. Notice of the present application was given on the 1st February.

De Villiers, C.J.: I see that notice has been given to the respondent, and that no objection is raised, and seeing that a very short time expired beyond the period allowed, the Court will make an order. Leave granted to prosecute appeal next term, costs of this application to be costs in the cause.

HOTZ V. STANDARD BANK. { 1907.  
Feb. 11th.  
" 25th.

Promissory note—Illegal consideration—Stifling prosecution—Forgery.

*The plaintiff Bank, having discovered that certain promissory notes in favour of I., and by him indorsed to, and discounted with the Bank, had been forged by I., caused him to be ostentatiously watched, night and day, by the police and conveyed an intimation to the defendant, a brother-in-law of I., that the Bank would be willing to return the forged promissory notes to I. upon the defendant's substituting for them his own promissory note for the total amount of the forged notes. The defendant gave his note accordingly and the Bank returned the forged notes to I., but upon the other creditors of I. subsequently taking proceedings against him for forgery, the defendant refused to pay the amount of the note. I. was convicted of forgery. The Court of appeal having found, on all the facts disclosed in the case, that the object of the plaintiff and of defendant in substituting the defendant's note for the forged notes, was to stifle a prosecution for forgery:*

*Held, that the consideration for the note was illegal and that consequently the plaintiff*

*was not entitled to recover thereon.*

This was an appeal from a judgment of Mr. Justice Maasdorp, sitting as a Divisional Court of the Supreme Court in an action in which the respondent bank sued the appellant (Marcus Hotz, of Oudtshoorn) for judgment on certain promissory notes and a guarantee.

[For full report of the case in the Court below, see *Standard Bank v. Hotz* (16 C.T.R., 708).]

The reasons for the judgment in the Court below were as follows:

Maasdorp, J., said that the plaintiff sought to recover £3,378, balance due upon a promissory note made by the defendant in favour of Israelsohn Brothers, and endorsed by them, of which the plaintiff bank was the legal holder, and the plaintiff also claimed on a guarantee given by the defendant for the balance due on accounts between Israelsohn Brothers and the bank, which was subsequently discovered to amount to £890. The defendant admitted execution of the note, but alleged that it was the result of an illegal agreement between the plaintiff and himself. He alleged that it was known at the time the note was given that certain notes forged by Meyer Israelsohn were in the possession of the bank, and it was agreed that on the defendant taking up the forged notes, with his own note, the plaintiff would take no criminal proceedings against Meyer Israelsohn. It was not necessary, for such a defence to succeed, to establish by evidence that any express verbal promise was made by the person who undertook not to prosecute, because such a promise might be tacitly understood between the parties.

The Court had now to decide the question, whether the consideration for the note was such an express or tacit undertaking not to prosecute. The plea alleged that such an undertaking was given by De Kok, the manager, and Foster, the attorney acting for the bank.

Mr. Searle had approached the case from the point of view of the difficulties in which De Kok was at the time with regard to the forged documents, but he preferred to approach it, keeping in view the difficulties surrounding the defendant and the other relatives of Meyer Israelsohn in respect of the alleged forgeries. The promissory note and the guarantee were made on August 18th, and the question which now arose was, what was the state of affairs immediately before that date? It had come to the knowledge of Hotz that suspicious notes were in existence, relating to fraudulent transactions on the part of Meyer Israelsohn. How it had come to his knowledge was not quite clear from the evidence. Foster

admitted that it was possible that he might have received the information from him (Foster). What was likely to have occurred when such information first reached Hotz and the other members of the family? Naturally, they were greatly distressed, and it was clear that they anticipated then that if promissory notes forged by Meyer Israelsohn were in existence prosecution would follow; they were intelligent enough to anticipate that, and naturally desired to do their best to rescue him from that trouble. The first thing which would suggest itself to their mind would be to obtain possession of the forged documents. They would naturally suppose that if the parties who had a right to complain were at once satisfied, they would not go out of their way to put the law in motion, and they would also suppose that if once they could get possession of the forged documents there would be little likelihood of a prosecution; and they would come to that conclusion irrespective of any promise from interested parties not to prosecute. And they also knew that Meyer Israelsohn was in financial difficulties, and that if his estate were sequestrated everything would come to light at once; and it was that fact that made it important that sequestration should be prevented. That point was not so abstruse as to require any great wit to appreciate its importance, and their first wish would be to avoid sequestration, because its results would be disastrous. But their main object would still be to get possession of the notes. So the question arose.—Was anything else held out as an inducement to sign the promissory note? Was a promise held out by De Kok or Foster that, if the promissory notes were taken up and a guarantee signed, no prosecution would take place? The Court had to consider the question, whether, in spite of the circumstances pointed out, such an undertaking was given or not. What was Foster's position? A serious charge, that of compounding a felony, was made against him upon the pleadings, but now counsel seems to feel that the charge is not substantiated, and has urged very little upon that part of the case, but the Court had to look further into the evidence. It was suggested that Foster, as attorney for the bank, made promises for De Kok, but there was no evidence that Foster acted as attorney for the bank, and it was denied by both Foster and De Kok. Foster had said that he had previously done business for Hotz and the Israelsohns, and took an interest in the family, and that he brought certain suspicious documents to the notice of Hotz, that Hotz at different interviews had obtained from him information as to the position of the parties, but whatever advice he gave to Hotz was carefully guarded, and that he made no di-

rect promise, and gave no distinct advice to Hotz as to what he should do.

He believed that what Foster had said was true. Foster was a lawyer, and knew his position, and he would not baldly give advice as was stated by the witnesses for the defence. The charge against Foster was that he, on behalf of the bank, had attempted to compound the felony by informing Hotz that the prosecution against all three Israelsohns would be withdrawn if the promissory notes were taken up. The furthest the evidence went against him was that he said, "The bank is going to prosecute, I advise you to settle the matter." He was not then acting on behalf of the bank, and it was not unlikely that he might have informed Hotz that criminal proceedings would be taken, knowing that the bank was in possession of forged documents, without his being told so by the manager.

The charge against De Kok had reference to the interview on August 17th. When the case first came into Court the charge against De Kok was evidently not very strong on the evidence, and so when it was found that Foster had had some conversation with the witnesses he was brought into the matter. Foster, at any rate, was not acting for the bank, nor threatening prosecution, so whatever he said could not affect the subsequent agreement between the bank and Hotz, and the charge in the plea against Foster was not proved. De Kok was undoubtedly interested in escaping from certain financial difficulties with Israelsohn and Co., which threatened loss to the bank. He had disregarded advice from the head office in Cape Town, and would have been glad to escape from his difficulties.

But was he guilty of compounding a felony? Hotz knew what to do to get Israelsohn out of trouble. He went to look at the notes, and arranged a meeting to discuss the settlement of the notes. On the day of that meeting it was admitted that not a word was said about withdrawing the prosecution. It was said that that matter had been settled between Hotz, Isidore Israelsohn, and De Kok on the day before. From Foster's statement it would appear that he (Foster) had sent a notice to the bank the day before that Hotz had decided to give a promissory note, and so the matter had been settled without any reference to a prosecution. I find as a fact that no threats or promises were made by De Kok on the 17th August.

Mr. Searle had cited a case similar to this one, where parties were held to have compounded a felony without any express agreement, but in that case the guilt of the forger was admitted on all hands at the interview when the note was given. That circumstance was absent in this case. The suspicious docu-

ments were referred to Meyer, who gave explanations, with which De Kok was not satisfied; but was De Kok at that time prepared to lay a charge of crime against Meyer? It would have been a very rash thing to do to threaten an apparently well-to-do customer with criminal prosecution upon the bare allegation of the makers of the notes, which were emphatically denied by him. At the criminal trial very forcible and weighty arguments had been used by counsel to convince the jury that no crime had been committed, and these arguments had required careful consideration. In spite of that was the Court now to say that De Kok would at once have taken proceedings for forgery? De Kok certainly had suspicions, but he said he had not yet made up his mind, and he (Mr. Justice Maasdorp) believed him. Israelsohn was at that time considered a well-to-do customer, and De Kok had no intention of prosecuting him. The family had decided to obtain possession of the notes without reference to De Kok.

It was pointed out that De Kok had an idea of prosecuting, because he had employed the assistance of the police, but De Kok said that there was a charge in reference to a false balance-sheet, and it was in connection with that that the police came into the case, but that when the promissory notes were taken up and balance arranged for it was not necessary to consider that matter further. It was impossible now to import an undertaking he may tacitly have made with reference to the false balance-sheet into this case, but he was satisfied that De Kok never gave any undertaking not to proceed on the false balance-sheet. If it had been clearly proved that he had given such an undertaking then a judgment of absolution from the instance would have been given, and Hotz would have been allowed to set that up as a good defence; but no such undertaking was proved, and De Kok might have prosecuted even after those transactions.

Judgment would be for the plaintiff as prayed, with costs.

Sir H. Juta, K.C. (with him Mr. Searle, K.C., and Mr. Upington), for the appellant; Mr. Schreiner, K.C. (with him Mr. McGregor), for respondents.

No legal points were raised in argument.

Sir H. Juta, after briefly reciting the points raised upon the pleadings, said that the question was whether the defendant Hotz signed the promissory notes which were given in order to retire the promissory notes which had been forged, and when he did sign those notes, whether at that time there was a threat and a promise held out by Mr. De Kok, or by Mr. De Kok and Mr. Forster, that there would be no criminal proceedings taken. He

thought that upon the law there would be no question, and, indeed, Mr. Justice Maasdorp took the view of the law which he (Sir H. Juta) would submit was correct, that it was not necessary for such a defence to succeed to establish by evidence that any express verbal promise was made by the person who undertook not to prosecute, because such a promise might be tacitly understood between the parties. He felt that it was of no use approaching this case, where the evidence of the defendant's witnesses had been contradicted by that of the real plaintiff, De Kok. There was a considerable amount of evidence given for the defence, practically to the effect that this promise had been given by De Kok, but he quite felt that, in order to bring the case properly before the Court of Appeal, it would be far better for him simply to take the evidence of De Kok, and he thought, when one had taken the evidence of De Kok, there could not be any doubt in the mind of anybody that this transaction took place under circumstances from which both parties understood that if Hotz signed this promissory note, so that the forged bills should be withdrawn and the case withdrawn, nothing more would be heard about a prosecution. He would also point out on De Kok's evidence that in three material instances the learned judge drew what he would respectfully submit were very wrong inferences. He thought, with all due respect to his lordship, he did not attach due weight to the letters which De Kok wrote, and attached some weight to the evidence that De Kok gave, whereas they had also in evidence the letters which he wrote at the same time to the head office in Cape Town, and he did not think his lordship attached sufficient weight to those statements, because those letters, written by De Kok, he submitted, clinched the whole matter from the point of view of the defendant. Counsel proceeded to examine the evidence of Mr. De Kok in the light of the letters which he addressed to the head office, and submitted that it was clear that this idea of a false balance-sheet was an afterthought on the part of De Kok, and that there was a tacit understanding between De Kok and Hotz when the latter gave his promissory note and the former handed up the forged promissory notes, that there should be no prosecution. De Kok, it was said, wished to avoid the sequestration of the estate; it was the last thing in the world he wanted, because then the bank would lose everything. Clearly, the object of Hotz was to avoid a prosecution, this he was led to believe would result from his taking the liability. He submitted that that was the real transaction, and that all the parties understood perfectly well,

even though there was no direct language used, that if Hotz came forward the forged bills would be given up and destroyed, and there would be an end to the prosecution.

Mr. Schreiner said that in the Court below, he had not argued the case, as his lordship only heard Mr. Searle and then gave judgment for the plaintiff. The question for their lordships now to consider was whether the account of the conversation spoken to by De Kok and Foster was a true one, and if so, whether or not the law followed in favour of the plaintiffs. Counsel drew the Court's attention to a letter addressed by Hotz to the general managers of the bank, under date the 3rd February, 1905, and asked whether that letter was conceivably the letter of a man who believed such threats had been used and such promise held out as were working up the points afterwards brought before the Court at the trial? Not one word was said in that letter which would suggest that there was anything proceeding from the bank as a threat or as an inducement to Hotz to come forward in the way he did. He submitted that this story of Hotz's in regard to what the attitude of the bank was absolutely fell to the ground if they analysed it in the face of his own earlier and more to be believed statements to be found in his own letter. The evidence was perfectly clear that from the time the affidavit was made in the provisional case onwards De Kok never denied that he threatened Meyer with sequestration and that he would have him arrested if he absconded. His learned friend had glided away from the consequences of sequestration and the arrest upon absconding as if there had been no Insolvency Ordinance at all and as if there had been no serious and grave consequences to be anticipated from the discovery, if the sequestration had taken place, of the false balance sheet and of the fraudulent contracting of the debt.

Sir H. Juta having replied,

*Cur. Adv. Vult.*

*Postea* (February 25th).

De Villiers, C.J.: This is an appeal by the defendant against a judgment of a Divisional Court in an action to recover: (1) The sum of £3,378, being the balance alleged to be due to the plaintiff bank on a promissory note made by the defendant in favour of the firm of Israelson Brothers and by them indorsed to the plaintiff; and (2) the sum of £890 on a written guarantee given by the defendant to the bank for the payment of overdrafts of the firm. The plea to the declaration was in substance that the consideration for the note and guarantee was the bank's promise not to take criminal

proceedings against the firm or any member thereof for the forgery of certain other promissory notes made in favour of the firm and by them discounted with the bank and that, as such a consideration is illegal, the bank is not entitled to recover. The Court below held that no promise not to prosecute the Israelsons was ever given by the bank, and that as the plea had failed the bank was entitled to recover the full amount claimed.

There can be no doubt that Meyer Israelson, a member of the firm, had forged the notes, for which the note now in question was substituted, by fraudulently adding to the amounts payable thereunder, and that the consideration appearing on the face of the transaction was the return by the bank to the firm of the forged notes. That in itself would not necessarily be an illegal consideration, but, if it is clear that the object of the defendant was to the bank's knowledge, to stifle a prosecution of the Israelsons for forgery and that the bank assisted in the attainment of that object by first leading the defendant into the belief that there would be a prosecution unless he came to the rescue of the firm and then, upon receipt of the defendant's note, withdrawing preliminary proceedings which the bank had previously ostentatiously taken with the view to such prosecution, the transaction would undoubtedly be against public policy and wholly illegal. It is not to be expected, in such a transaction, that the maker of the note would candidly avow his object or that the indorsee would compromise himself by making a definite promise not to prosecute, but if the conduct of the parties is inconsistent with the existence of any other object or promise, then the unspoken words become as eloquent and convincing as the most persuasive speech.

The question whether a promise not to prosecute any member of the firm for forgery may or may not be fairly inferred from the admitted conduct of the parties, is one upon which this Court is in as good a position to decide as the Court of first instance. The chief witness for the bank was De Kok, the ex-manager of the Oudtshoorn branch, and, as his evidence seems to have been believed by the learned judge, this Court should, where there is a direct conflict with the evidence of the defendant's witnesses, accept his statements as correct, except, of course, in so far as they are in conflict with confidential reports made by him to the head office, contemporaneously with the transactions to which they relate. At the time of the making of the note now in question, the firm had considerably overdrawn their account with the bank, and the head office had apparently found fault with De Kok for the manner in which this had been



done. De Kok was anxious to reduce the overdraft, and arranged with Meyer Israelson, the senior member of the firm, that the defendant would sign for £1,000 as part security. The defendant, upon being applied to, refused to sign until he knew more about the firm, whereupon De Kok said: "If that is the case, I will have to sue the Israelsons for the overdraft in their books." After that De Kok again saw Meyer, who said that he was going to Port Elizabeth, where financial support had been offered him. The next De Kok heard of Meyer was that he had gone to Cape Town, from which place the head office telegraphed that Meyer was offering a compromise of 7s. 6d. in the £ to his creditors. In the meantime De Kok had sent notices to the makers of about twenty promissory notes in favour of the firm, and by the firm discounted with the bank, and had been informed that fraudulent alterations had been made in the notes. This information was confirmed as to some of the notes, at all events, by a close examination which De Kok made of the writing. On receipt of the telegram from the head office, De Kok telegraphed to the general manager: "Have his movements shadowed. Extreme measures not desirable at this stage." The general manager answered that he could not move without further particulars, to which De Kok replied by telegraph: "Prompt action must be taken to watch party's movements. Suspicious circumstances have arisen with firm's discount account, some makers repudiating amounts, and allege grave defalcations, which, unless satisfactorily explained by him, will lead to his arrest on criminal charge. Matter urgent." De Kok was informed by wire that Meyer had left for Oudtshoorn, whereupon De Kok requested the Chief Constable there to have Meyer watched, as the latter might be arrested for having committed some crime. What that crime was, clearly appeared from the telegrams to the head office. The Chief Constable accordingly detailed two men to keep Meyer under constant observation. The first watch started on the evening of the 15th August, and from that time a continuous watch was kept night and day, the men relieving each other every four hours, until the evening of the 18th, when De Kok requested the Chief Constable to discontinue the watch, "as it was not necessary to continue further." The Chief Constable stated in his evidence that it was common talk about the place that there had been forgeries, and certainly no pains were taken to conceal the fact of Meyer being watched from the defendant, or even from Meyer himself. The defendant, in his evidence, said: "I knew the police were watching Meyer. I could see the

special constable watching the place. I know that as soon as I signed the bill the watch was stopped." However untrustworthy the rest of the defendant's evidence may be, no attempt has been made to discredit these statements of his. I do not find that De Kok ever expressly informed the defendant of the watching, but in his affidavit, he said: "Shortly before the 18th August, 1904, the defendant and Isidore Israelson called on me, and urged on me to be lenient to the firm. Ultimately the defendant asked what form his assistance should take, and begged of me to be lenient." The form of assistance agreed upon, after a subsequent long interview, was that the defendant should give the bill in question, and De Kok showed his leniency by withdrawing the police and returning the forged notes as soon as the defendants' note had been given. As to Meyer, De Kok admitted in his evidence that he informed the former on the 18th of August that he was having him watched. Two days after the defendant's note had been given and the police withdrawn, De Kok, in his report to the head office, after reciting the telegrams already mentioned, said that he had obtained further cover for the unsecured overdraft, and added that he would "conclude this subject, which is lengthy, by next mail." Accordingly on the 24th of August De Kok transmitted a full account of the transaction, which is so important for the full understanding of its real nature that it cannot possibly be abridged. "With regard," he said, "to the defalcations hinted at in our wire 'brain' of 13th inst., we have to report that, towards the end of last month we sent notices of the firm's bill to the makers. This course had never been previously adopted by the branch, but, with a view of getting their liabilities reduced, it was resorted to. To our surprise, several of the makers of the larger bills, upon receipt of the notice, called on us to repudiate the amounts. While admitting the signatures, it was alleged that the amounts had been raised or written in after the bills had been signed. A close examination of the writing certainly, in some cases, confirmed the suspicion. However, we thus found ourselves in possession of a large amount of suspicious bills, amounting to over £3,500 (actually disputed by the makers), with the suspected culprit absent in Cape Town, and an overdraft of £2,900 only partly secured, which had also been obtained under false pretences. The partner of the firm, who was here at the time, could not explain, and referred us to his brother, Mr. Meyer Israelson, who had conducted the firm's finances. In the circumstances we felt that prompt action was necessary, and forthwith wired to you to have his movements shadowed in Cape Town in order



to prevent his absconding. Upon his return to Oudtshoorn we had him watched by the police, pending a satisfactory explanation, and it is doubtless due to this action that we are in a position to report a satisfactory solution of this unpleasant business. Upon being faced with the alleged defalcations, Mr. Israelson stated that though the farmers (makers) did not owe the amount, they had signed for his accommodation. This, in itself, was a confession of misrepresentation, as the notes had been presented to us as trade paper, and we insisted upon their immediate removal from our books. The firm was, of course, not in a position to retire them, but the partners' brother-in-law, Mr. M. Hotz, who is a customer of the Bank of Africa, and favourably reported on, came to their assistance by offering his own bill in place of those we suspected. The latter, amounting to £3,578, were, therefore, rebated, and Mr. Hotz's bill for the amount in favour of the firm discounted instead. We trust that you will confirm this action, which, in our opinion, presented the only way, without serious loss and troublesome litigation, out of the decidedly dangerous position we had been forced into. In conclusion, we may add that we are, of course, refusing all first transactions for the firm, for though we believe that two of the partners are honest men, we prefer to see the account liquidated and ultimately closed."

In the course of the argument it was contended on behalf of the bank that De Kok's main objection to the so-called "farmers' bills" was that they were not ordinary trade bills, but the report shows that this was but a secondary objection. The real reason why he wished to have them replaced was because he no longer believed in the honesty of Meyer Israelson, and had the strongest possible reasons for believing that Meyer had fraudulently tampered with the farmers' notes. De Kok, in his evidence said that he wrote this report, and that it explains his state of mind at that time. In another part of his evidence he said that the shadowing of Meyer had only to do with the false balance-sheet, which he had rendered to the bank, and the learned Judge seems to have accepted this statement as correct. It is, however, quite impossible to reconcile this statement with De Kok's telegrams and his own report, which admittedly explained the state of his mind, and was written at a time when the whole transaction was fresh in his memory. These documents make it perfectly clear that the "defalcations," in respect of which Meyer was being watched, related to the notes which had been repudiated by the makers, and to them only, and the statements of De Kok that the "defalcations" referred to the balance-sheet, and that the shadowing was in connection with that false

balance-sheet are, to say the least of them, whole disingenuous. Unless Meyer could satisfactorily explain these grave defalcations, he was to be arrested on a criminal charge. The only "satisfactory explanation" which induced De Kok not to proceed with the criminal charge was the substitution of the defendant's note for the "suspicious bills." After the substitution had taken place, De Kok ascribed this "satisfactory solution" to the action he had taken in having Meyer Israelson watched by the police. There surely could not be a stronger admission, short of making it in so many words, that he had obtained the defendant's note by working on the fears of Meyer and the defendant, and by leading them to believe that there would be no prosecution if the forged notes were replaced by the defendant's note. As to these forged notes, the learned Judge remarked that "it would have been a very rash thing to do to threaten an apparently well-to-do customer with a criminal prosecution upon the bare allegation of the makers of the notes, which were emphatically denied by him." In so far as the learned Judge found that such a threat was not made in express words, I feel bound to accept his finding, although I must point out that by the 18th August De Kok could hardly have supposed the Israelsons to be well-to-do customers, and that the notes themselves (one of which was exhibited to this Court) showed that alterations had been made in them. But a threat may be made by deeds as well as words, and I cannot conceive of a more forcible mode of conveying such a threat than by an ostentatious shadowing of the offender and by expressing a willingness to a near relative of the offender to accept his note in substitution for the notes which had been fraudulently altered. The shadowing was withdrawn as soon as the substituted note was obtained, the forged notes were returned to be dealt with by the Israelsons as they chose, and although criminal proceedings were subsequently taken—and successfully taken—against Meyer Israelson, it does not appear that those proceedings were in any way encouraged by the bank. The defendant, however, who never raised the question of the illegality of the note so long as no prosecution was taken, immediately raised the question when the consideration for which he had intended to give his note failed by reason of the prosecution being commenced. In regard to the promissory note, I am satisfied that the only consideration for which it was given was the return of the forged notes, and that there was a tacit understanding between De Kok, the defendant, and Meyer Israelson that, upon receipt of the note, De Kok would stay his hand and would not take the further criminal proceedings which, by his con-

duct, he had led them to believe he would take.

In regard to the guarantee of £890 given by the defendant, the connection between it and the forged notes is by no means equally clear. The note given by the defendant completely covered the amount of the forged notes, and the guarantee was given to partly cover an overdraft, as to the validity of which there is no question. No doubt the giving of the guarantee formed a part of the same transaction as the giving of the note, but unless this Court is perfectly satisfied that the consideration for which it was given was the stifling of a prosecution, the Court should not, in my opinion, disturb the finding of the Court below. Before the forgeries were discovered there had been communications between the parties as to the signing of a guarantee by the defendant for the firm's overdraft. The defendant at that time refused to sign, but Foster, his attorney, seems to have understooid that a promise to do so was given by him. Foster, in his evidence, said: "When the defendant signed the bill and guarantee, it is possible that I said, 'You are signing this guarantee because you have promised to do so.'" De Kok also, in his evidence, says: "When defendant took up his pen to sign the guarantee form, Mr. Foster said, he having first read it over: 'You are signing that guarantee form because you have promised to do so, Mr. Hotz?' and he replied, 'Yes.'" It is just possible, of course, that all this may have been said to give a show of legality to the transaction, but the charge against Foster that he acted in collusion with De Kok was not pressed on appeal. It is quite reasonable to believe that such a promise was given by the defendant quite independently of the staying of criminal proceedings. According to the declaration, the consideration for the guarantee was the allowing by the bank to the firm of certain banking facilities, and this statement is not denied in the plea, nor was it suggested in the course of the argument that such banking facilities were refused before the 23rd of the following month, when the estate of the firm was sequestrated. In the absence, therefore, of clear proof that the consideration for the guarantee was other than that expressed on the face of the document, I am of opinion that, upon the insolvency of the firm, the bank became entitled to recover the amount of the guarantee.

As to the defendant's note, the consideration was, for the reasons already stated, wholly illegal. In the case of *Harris v. Executrix of Krige* (2 Juta, 399), the plaintiff had obtained from one Marais a note made by the defendant in favour of and for the accommodation of Marais, and by him indorsed to the plaintiff. It was proved to the satisfaction of this Court that the note

had been so given by Marais, with the object, known to the plaintiff, of avoiding a disclosure of the forgery by Marais of certain other notes in the plaintiff's possession, and it was held by a full bench that the plaintiff was not entitled to recover. "Marais' sole object," it was said in the judgment, "to the knowledge of the plaintiff, was to avoid a disclosure of his crimes, and any undertaking, express or implied, to promote that object cannot be regarded as a legal consideration." The learned Judge in the Court below said, in regard to that case, that the guilt of the forger was admitted on all hands at the interview when the note was given, whereas in the present case that circumstance is absent. I do not, however, conceive that the learned Judge intended to convey the view that an arrangement to stifle a prosecution for forgery would be legal if the forger does not admit his guilt. In the present case Meyer Israelson denied his guilt, but the conduct of the defendant, as well as of De Kok, showed that they did not believe his denial, and the result of the subsequent criminal proceedings against Meyer, at the suit of some of his creditors, was to establish his guilt. Under such circumstances, the transaction entered into between De Kok, Meyer, and the defendant would be as much against public feeling as if Meyer's guilt had been admitted on all hands. As to the law of England, it is by no means clear that it would permit the bank to enforce its claim on the promissory note against the defendant. It is true that in the case of *Wallace v. Hardacre* (1 Camp, 45), Lord Ellenborough held that the indorsee may maintain an action against the acceptor of a bill of exchange, which the plaintiff had received from the indorser in lieu of another bill, also delivered to him, and indorsed by such indorser, who had forged the acceptance of a third person thereon, but Lord Ellenborough added that, if any bargaining could have been shown to stifle a prosecution for a criminal act, the action could certainly not be maintained. In the subsequent case of *Williams v. Bayley* (L.R., 1 E. and I.A., 20), it appeared that a son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes, with his father's name upon them as indorser. These indorsements were forgeries. The fact of the forgery was afterwards discovered, the son did not deny it; the bankers insisted (though without any direct threat of prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him. It was held by the House of Lords, affirming the decree of the Vice-Chancellor,

that the agreement was invalid. Lord Cranworth (L.C.), in delivering his opinion, said: "The parties were not standing in any fiduciary relation to one another, and if this had been a legal transaction, I do not know that we should have thought that there was any pressure that would have warranted the decree made by the Vice-Chancellor. But here was a pressure of this nature. We have the means of prosecuting, and so transporting your son. Do you choose to come to his help and take on yourself the amount of his debts—the amount of these forgeries? If you do, we will not prosecute; if you do not, we will. That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion, my lords, I am bound to go the length of saying that I do not think it is legal. I do not think that a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers." There are points of difference between that case and the present, but the object of the parties in entering into the arrangements, to stifle a prosecution, was equally clear in both cases. In one respect the difference between the two cases is against the present plaintiff, for, in the case before the House of Lords, the bankers had not taken any active steps which might lead the father to believe that they seriously contemplated taking criminal proceedings against the son. In the present case the pressure took the form of an ostentatious shadowing of the forger by the police, and, although the defendant was not forced into giving the note in question, it was intimated to him by unmistakable signs, that if the note, or something equivalent thereto, were not given, a prosecution would follow. The result is that, in my opinion, the appeal must be dismissed in regard to the bank's claim on the guarantee, and allowed in regard to the claim on the promissory note. There will, consequently, be judgment for the plaintiff on the guarantee of £890 as prayed, and for the defendant on the promissory note of £3,578 10s. 8d. The order as to costs in the Court below will remain, but the plaintiff bank will pay the costs of appeal.

Laurence, J., passed under review the salient facts of the case. Dealing with the action of De Kok in placing Meyer Israelsohn under police surveillance on his return to Oudtshoorn, he said that De Kok explained that this was owing to the erroneous balance-sheet signed by the firm, and certified by a local accountant, exhibited to him several months previously, and also owing to the alleged misrepresentations as to the character of the bills. He (the learned Judge), after full consideration, felt quite unable to accept De Kok's

explanation of the motive of his action. His Lordship continued: If we believe the evidence of Sydney, the representative of Kenner Brothers, who appears to be a disinterested witness now in the employ of Prince, Vincent and Co., De Kok at this time had told him the bills were forgeries. When asked by the witness whether it was a case of fraudulent bankruptcy, he said, "It is worse; it is a case of forgery." I pressed for an explanation, and he said that several bills discounted at the bank by Israelsohn Brothers had been forged. It was before Meyer returned." The Chief Constable, to whom De Kok had applied for the assistance of the police, says that "it was common talk about the place that there had been forgeries." Moreover, just before this, when Meyer was at Cape Town, we find De Kok telegraphing to the head office that "suspicious circumstances have arisen with firm's discount account, some makers repudiating amounts, and alleged grave defalcations, which, unless satisfactorily explained by him, will lead to his arrest on criminal charge. He subsequently explained that he was enabled "to do the needful at this end." What was the needful which he was enabled to effect? Clearly his idea when he sent that telegram was that, unless the alleged "grave defalcations" on the discounted bills were satisfactorily explained, Meyer should be arrested on that account, or, in other words, that he should be arrested for forgery. Clearly, too, it was from the same standpoint that he invoked the assistance of the local police, and his subsequent explanation about the balance-sheet, and other alleged misrepresentations, can only be characterised as a far from plausible afterthought. The learned Judge says in his judgment that "it would have been a very rash thing to do to threaten an apparently well-to-do customer with criminal prosecution upon the bare allegation of the makers of the notes, which were emphatically denied by him." But, with all respect, it must be observed that, whether or no Israelsohn, who seems at the time to have been hopelessly insolvent, could be described as a "well-to-do customer"; in any case, De Kok had very much more to go on than the "bare allegation" of the makers, strong as, even from that point of view, the cumulative effect of the consensus of allegations undoubtedly was. It was a case in which one might almost say, *res ipsa loquitur*, and its strength is shown by the significant fact that the Crown was afterwards able to obtain a conviction without producing the *pièces de conviction*, namely the forged documents themselves. It is not surprising to learn that, in such circumstances, there was a vigorous defence. "In spite of that," his Lordship continues, "was the Court

now to say that De Kok would at once have taken proceedings for forgery?" The real question, however, seems to be not whether he would actually have taken such proceedings, but whether, by his language or his conduct, he threatened to do so. In my opinion, it is proved beyond a reasonable doubt that it was on account of the alleged forgeries, or, as he puts it, "the grave delations which, unless satisfactorily explained, will lead to his arrest on a criminal charge," that De Kok had the man watched by the police. He admits having threatened to arrest him if he absconded, and that Meyer then asked him to stay his hand in order to enable him to get help from Hotz (affidavit, paragraph 16). He also admits having after this had three interviews with Hotz, at which the position seems to have been very fully discussed (affidavit, paragraphs 20-24). As a result of these interviews, Hotz agreed to give the bill, and, after further pressure (paragraph 22), to sign the guarantee. As soon as Hotz had signed the documents, De Kok went to the Chief Constable and told him to take off the police. In his report to the bank he states that "upon his (Meyer's) return to Oudtshoorn, we had him watched by the police, pending a satisfactory explanation, and it is doubtless due to this action that we are in a position to report a satisfactory solution of this unpleasant business." I cannot find that there had been any "satisfactory explanation," but the "solution" was doubtless "satisfactory" to the writer. He had acted in connection with this account in more than one respect, in a manner which was evidently regarded by his principals as irregular and reprehensible. If the conduct of an official in such a position merits censure, the best way in which he can hope to mitigate its rigour is by showing that he had succeeded in averting any resulting prejudice or actual loss. This, he thought, he had done, and the only conclusion at which, after much anxious consideration, I can arrive, is that he did, whether directly or indirectly, put pressure upon Hotz, that the engine which he employed was the menace of a criminal prosecution for forgery, that it was owing to such pressure that the bill and guarantee were signed, and that, such being the case, it would be contrary to public policy, and to the settled law on the subject, to hold that these documents were given for good and valid consideration, or that the appellant was liable thereon to the respondent bank. Owing to the exceptional features of the case, I have thought it my duty to review the facts in such detail and at a length which in most cases would be superfluous. I do not propose to say anything more with regard to the legal aspects. The law in point is clearly ex-

plained in the Supreme Court case of *Harris v. Krige*, and in the case in the House of Lords of *Williams v. Bayley*. As I remarked during the argument, it is certainly a curious coincidence that the passage in that case, then cited by my lord, was also quoted by myself on the last previous occasion on which I happened to be sitting in this Court, to deliver a reserved judgment in the Circuit Court appeal of *Van der Poel and Another v. Du Preez*, in which I had occasion to discuss the authorities at some length. The question now before us is: What is the proper inference to be drawn from the whole history of this transaction, giving due weight to all the antecedent circumstances and to the inherent probabilities of the case? On the whole, I have come to the conclusion, though I confess not without some reluctance, that the proper inference is that the plea has been substantiated, and that the appeal must therefore be allowed.

I only wish to add that I have felt, and still feel, great difficulty in drawing any valid distinction between the question of the appellant's liability on the guarantee, and that of his liability on the bill. They appear to have been treated as one issue throughout both in the pleadings and in argument. Both documents were given at the same time. Hotz very shortly before had refused to give a similar document, and I can find no sufficient reason for his changing his mind on the subject except the intervening discovery of the forgeries. In these circumstances, had I been sitting alone, I think I should have allowed the appeal without discrimination, but in view of the strong opinion on the subject entertained by the Chief Justice, and admitting as I cannot but admit that there is considerable force in his reasons, I am not prepared to dissent on this comparatively minor point, on which the case for the appellants is undoubtedly somewhat less strong than on the main subject of contention. As to costs, his lordship said he thought the order as to costs proposed by the Chief Justice was in all the circumstances one which might be properly made.

Hopley, J.: I agree with the judgments just delivered, and with the results. I only wish to say that, as regards the guarantee, I take the view expressed in his judgment by his lordship the Chief Justice.

[Appellant's Attorneys: Syfret, Godlonton and Low; Respondents' Attorneys: Fairbridge, Arderne and Lawton.]



**SECOND DIVISION.**

[Before the Hon. Mr. Justice MAASDORP.]

ABRAM AND CO. V. VAN DYK. { 1907.  
(Feb. 11th.

The declaration set forth that the plaintiff was Barend Abram, a merchant, carrying on business at Calvinia under the style of Abram and Co. The defendant was a carrier. On the 12th October, 1905, the parties entered into an agreement whereby the defendant agreed to sell and the plaintiff to purchase certain property at Calvinia for the sum of £900, upon certain terms and conditions contained in a deed of sale. The deed stipulated that the defendant agreed to take a mortgage bond for the full amount of the purchase price, on condition that the plaintiff improved the buildings on the property to the extent of £300, or erected buildings of that value thereon. Plaintiff had erected a new building of the value of £1,000. Plaintiff had always been ready and willing to perform his obligation under the contract, but the defendant had refused to pass transfer. Plaintiff claimed an order on the defendant to pass transfer, or for £1,000, the value of the improvements effected, and for £100 damages.

In his plea, the defendant said that he had always been ready and willing to perform his obligation in terms of the deed of sale, and the delay in passing transfer was solely due to the plaintiff's continued failure to pay the transfer duty, or to make the necessary deposit for costs of the transfer and of passing the bond. In reconvention, he claimed £100 damages.

In his replication, the plaintiff said he had always been ready and willing to pay the costs of the transfer and the bond, and now tendered to pay them.

Mr. Benjamin (with him Mr. Struben) was for the plaintiff; Mr. Burton (with him Mr. J. E. R. de Villiers), was for the defendant.

Mr. Burton said the issue seemed now to be a question of costs. The defendant withdrew his claim in reconvention.

Mr. Benjamin: It appears to be narrowed down now, my lord, to a question of whether we were ready to perform our obligation to pay the costs of the bond and transfer.

[Maasdorp, J.: The costs will depend upon who was in default?]

Mr. Benjamin: Yes.

Mr. Burton said it was not purely a question of costs. The matter of the payment of interest was involved.

Evidence was then led.

Maasdorp, J., said that in this case the plaintiff sued the defendant for specific performance of an

agreement under which defendant had sold plaintiff a portion of an erf, or in the alternative for damages for breach of contract. The agreement was for the sale of one-quarter share of the erf No. 4, Stiglinghstreet, Calvinia, "as bought by the said Van Dyk from Loubser" for £900. The purchase price was not to be paid in cash, but it was agreed that, upon plaintiff improving the property to the extent of £300, defendant would accept a bond for the whole amount of the purchase price. He erected a building, and he was entitled to receive transfer upon his performing his part of the agreement. The question arose whether he was prepared and able to carry out this agreement. A great deal of the delay after April, 1906, was accounted for by the fact that plaintiff wished the contract to be varied. He offered to pay a certain portion of the purchase price in cash if the defendant would take a second bond for the balance, and defendant was willing to agree to this if the plaintiff could arrange the matter. The negotiations that followed did not affect the case, as they did not culminate in a novation of the contract. The question was: Was the plaintiff able to perform his part of the agreement, i.e., to take transfer and to pass a bond for the full purchase amount. It was absolutely necessary for plaintiff to do that to obtain the assistance of conveyancers; it was not enough to declare his preparedness, but the assistance of a professional man was necessary, and he had to show that he had engaged such a man. Now, either he had engaged no conveyancer or agent, or he had engaged Mr. Marais. If he had engaged no one, then he was not entitled to succeed, and if he employed Marais, then Marais was his agent, and Marais said that the only difficulty was that plaintiff was not prepared to pay the transfer duty and costs of passing the deed and bond. The plaintiff could have removed the work out of Marais' hands, but he did not do that, and referred Marais to his partner or representative Cassim Vaely, who, however, did not furnish any money either, and Marais was not prepared to proceed. Consequently plaintiff's agent was not prepared, even up to date, to carry out plaintiff's part of the agreement. The plaintiff was now entitled to have transfer of the undivided quarter of the erf that was bought by Van Dyk from Loubser. The words were so plain that they required no explanation, but the plaintiff was not prepared to carry out the contract as it was interpreted by the Court, as he said that he was only prepared to take transfer of a divided portion. That was not, however, his agreement, which was to take transfer of an undivided share, and he was, therefore, not at all times able and



willing to fulfil the contract, and he was not entitled to claim transfer. There was, on the other hand, a claim on the part of the defendant for interest from November 1, 1905. Interest was generally considered as an equivalent for the possession and enjoyment of property, and as plaintiff had his possession and enjoyment, he was liable to pay interest. It was, however, a yearly interest, and could not be given up to date. In order to make it quite clear that judgment was refused because the plaintiff had not been prepared to carry out his part of the agreement, the shape of the judgment would be absolution from the instance on the claim in convention, with costs, and judgment on the claim in reconvention for the interest from November 1, 1905, to November 1, 1906, with costs. Defendant certified a necessary witness.

[Plaintiffs' Attorneys: Syfret, Godlonton and Low. Defendant's Attorneys: Le Roux and Wege.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

BIGGS V. COLONIAL GOVERNMENT. (1907. Feb. 12th.)

This was an action brought by George James Biggs, of Mowbray, against the Colonial Government to recover three months' salary in lieu of notice and arrear allowances for food and quarters.

Plaintiff, in his declaration, said that on or about the 11th June, 1903, the parties entered into certain articles of agreement whereby plaintiff engaged himself in the service of the defendants as a stocktaker in the refreshment department of the C.G.R. for two years from the date of his departure from England, which period the defendant was at liberty to extend by giving notice to the plaintiff. The salary was to be £23 per month, and it was also provided that the defendant should supply the plaintiff with quarters and food, or make him an allowance in lieu thereof. It was also provided that defendant should be at liberty to terminate the

agreement by giving plaintiff three months' notice, or paying him one month's salary and providing him with a second-class passage to England. Plaintiff entered upon his duties on or about the 7th July, 1903, and was paid his salary at the end of every month until the 5th May, 1906, the said period of two years specified in the agreement having been indefinitely extended by the defendant on or about the 2nd May, 1905. On or about the 5th May, 1906, defendant notified the plaintiff that his services were no longer required, and terminated the plaintiff's said engagement as and from that date. Plaintiff said that up to the 1st January, 1905, defendant had, in accordance with the said agreement, supplied the plaintiff with quarters and food, or made an allowance in lieu thereof, but from that date he had been obliged to find himself with both quarters and food, and had received no allowance therefor. He claimed £130 6s. 8d., being 17 months' allowance for food and quarters at the rate of £7 13s. 4d. per month and £92 salary in lieu of three months' notice.

Defendant, in his plea, denied the alleged agreement as to the allowance, and craved leave to refer to the agreement when produced at the trial. He said that from and after the expiration of the period of the contract plaintiff was re-engaged by the defendant to serve the Colonial Government at a monthly salary of £23. The said service was not included in the said agreement of the 29th May, 1903. At the date of the plaintiff's discharge he was paid one month's salary, £23, in lieu of notice. Defendant admitted that plaintiff was entitled to three months' notice as from the 5th May, 1906, and said that he had tendered such salary to plaintiff, together with taxed costs to date of tender, but plaintiff had refused the said tender. Defendant repeated the tender, and offered to pay the balance on the said salary, viz., £46, with taxed costs to date of tender. As to the allowance claimed by plaintiff, defendant said that the allowance was a temporary privilege while plaintiff's duties carried him into the country districts. On his transfer to the headquarters in Cape Town the said privilege was withdrawn.

Mr. Russell was for plaintiff; Mr. Howel Jones (with him Mr. Nightingale) was for defendants.

Mr. Jones submitted that the real question to be determined in this case was as to the construction of the contract, and that there was no question to go to the jury.

George James Biggs (the plaintiff) gave evidence.

Mr. Russell was about to lead evidence as to an arrangement which he said was come to between Mr. Simmons,

the manager of the refreshment department, and the plaintiff in regard to an allowance for food and quarters, when

Mr. Jones objected that the Government had had no notice of any contract beyond that which was to be produced at the trial, and it was not competent for his learned friend to seek by parole evidence to vary that contract. He took the further point that Mr. Simmons had no power to bind the Government.

Hopley, J., held that evidence could not be led under the circumstances for the purpose of varying the written contract.

In further evidence, witness said that he did not see anyone else in connection with the contract except Mr. Simmons. Upon his arrival in Cape Town he was allowed subsistence, and he subsequently went to Matjestfontein, where he was again allowed subsistence in place of food and quarters.

Mr. Russell read a circular issued by the Government in July, 1903, stating that employees not resident in Cape Town, and engaged under two years' agreement, were to receive 10s. a day for board and lodging, in addition to salary.

Witness (in answer to the Court) said that as long as he was not resident in Cape Town he received the subsistence allowance. In further evidence, witness said that he came back to Cape Town in October, 1903, at the request of the head manager, and assisted for a month at the head office, receiving the subsistence allowance. Later he was provided with quarters at Matjesfontein, and then at De Aar. He obtained his food at the refreshment rooms. When he had his quarters and food provided he only received actual out of pocket expenses. In December, 1904, witness came back to Cape Town, in answer to a letter, stating that it had been decided to abolish the district stock-taking staff, and directing him to return to Cape Town to join the head office stock-taking staff. He came to Cape Town about the 20th January, 1905. From that point he was away up-country for about sixteen days each month. He was not provided with quarters in Cape Town. While he was away travelling up-country, he took his meals at the refreshment rooms, and was provided with quarters. He put in a claim against the Government for subsistence in February, 1905, while in Cape Town. This was not entertained. In May, 1905, witness agreed to remain in the Government's service beyond the period of the contract. On the 5th May, 1906, witness received a letter from Mr. Simmons dispensing with his services, and enclosing a pay-sheet for £23, one month's salary in lieu of notice. Witness accepted the notice under protest. He took the £23 as salary for the month of May. He received a certificate from

Mr. Simmons as a "very competent stock-taker."

By the Court: Witness was now fighting the case on the question of subsistence allowance.

Cross-examined: Witness regarded clause 4 of the agreement as entitling him to expenses, whether he was travelling or not. Where there was no accommodation up-country he had to put up at hotels, and was reimbursed his expenses. He maintained that he had not been overpaid by the Government. He had taken the expenses allowed to stationmasters as the basis of his claim of £7 13s. 4d. He found that stationmasters were allowed expenses at the rate of one-third of their salary. While he was away the expenses of his room in Cape Town continued. It was usual in the trade to make a drink allowance of 3s. 6d. a day. He considered that he had been shamefully treated by the Government. He had made a statement to an official of the Government, named Mr. Hoale, in regard to an allegation against an attendant at a coffee-stall. The matter arose from a communication made to him by a commercial traveller, and he subsequently wrote saying that he withdrew the statement.

Mr. Russell closed his case.

Mr. Jones submitted that there was no case to go to the jury, and that the sole question was as to the construction of the contract.

Mr. Russell admitted that, as the case stood now, there seemed to be no question to go to the jury. They had, however, come into court to meet a case in which there were originally certain points to be determined by a jury.

Mr. Russell, in argument, submitted that the notice could not have been given by the defendant to the plaintiff on the 5th of the month. He contended that plaintiff was entitled to one month's salary over and above the tender.

Mr. Jones said that they had come into Court really to fight the question as to the large amount of subsistence allowance claimed by the plaintiff. It now appeared that his learned friend had abandoned that part of the claim. He contended that the Government were entitled to give plaintiff three months' notice, to run from the day on which the Government determined to give him notice.

By consent of counsel, the jury were discharged, His Lordship saying that there was no question of fact to be left to their decision.

Hopley, J.: In this case the plaintiff engaged himself to the Government on the 30th June, 1903, for a period of two years at a salary of £23 a month, with certain arrangements as to travelling expenses, and, though an attempt was made

in the course of the trial to import further evidence as to the meaning of that. objection was very properly taken, and one must keep to the agreement itself. The sixth clause, therefore, becomes the important one to adjust the rights of the parties, because just before the termination of the original agreement the plaintiff was asked by his immediate chief whether he wished to continue his services under the agreement. His answer was briefly that he did wish to remain in the service of the Government at the expiration of the original agreement. Thereupon it seems to me that the agreement was for an indefinite time, governed by the general clauses of the old agreement entered into, and it has been argued that that was an agreement for two years, but even if it were, clause six of the old agreement would still hold as to the termination of the agreement if it were wished to do so, by the Government at all events. Now, about a year after he had agreed to go on this service, some little friction seems to have arisen between plaintiff, Mr. Hoale, and Mr. Simmons, who is the chief of the refreshment department, with the result that on the 5th May, 1906, plaintiff's services were dispensed with and he was given a month's wages in lieu of notice. He accepted this amount under protest at the time, and he brought his action claiming not only the allowance of quarters, but also three months' wages in lieu of notice, as he was entitled to under the sixth clause of the agreement. The Government originally took up the position that he need not have three months' notice, but in their plea they seem to have abandoned that position, and they tendered two further months' salary. Their plea is that at the date of the plaintiff's discharge he was paid one month's salary in lieu of notice. In the 5th paragraph they say: "The defendant denies paragraph 7, he denies that the plaintiff was entitled to three months' salary in lieu of notice as from the 5th May, 1906, and on the 2nd July, 1906, he tendered such salary to the plaintiff, together with taxed costs to date of tender, but the plaintiff refused the said tender. Defendant now repeats the said tender, and is ready and willing and offers to pay the balance of the said salary, viz., £46, together with taxed costs to the 7th July, 1906." It therefore becomes necessary to settle whether the notice which was given terminated on the 5th August, as Mr. Russell contends, that such notice terminated on the 31st August, and he should be paid not only the sum of £23 which he received for the month of May, but £69 in addition to it, and we must, in order to arrive at a decision on that point, look at the terms of the agreement between the parties. Now, if this were an ordinary month to

month hiring beginning on the 1st of the month and ending on the 31st, as in the case quoted by Mr. Russell—*Pemberton v. Kessel* (1905, Transvaal Supreme Court, 174)—that case, it seems to me, has laid down a principle which will be followed by everybody in South Africa, because there is a great wish to have uniformity of decision, and as far as I am able to see, it lays down a reasonable rule, which I think one should follow. But in no part of this agreement, which is a written agreement, is it laid down that the appointment shall be from the beginning or any part of the month. As a matter of practice and convenience, plaintiff when he arrived in this country was paid at the end of the month, like every other Civil Servant and Government employee. But there is nothing in the agreement which makes it compulsory upon them to pay him on that day. On the contrary, if they had wanted, they could have paid him on the monthly return of the day he left England, that is, the 20th June. So that the argument founded on the construction of the agreement as being the end of every month seems to me under the agreement itself not to be well founded. But, as a matter of practice, he was paid at the end of every month, and it is now argued, because of that, his notice must terminate at the end of the month. The 6th clause of the agreement says: "In the event of the Government becoming desirous to terminate the engagement of the employee at any time during the currency of the same, it shall be at liberty to do so, on giving three months' notice, terminable at any period of the year, or on the Government paying him one month's salary, and providing him with a free second-class passage by ship or steamer to England." Now, what do the words "terminable at any period of the year" mean? Mr. Russell asserts that it must terminate at some known astronomical or other period of the year, something fixed by the calendar, as the end of the month. But it does not seem to me to necessarily mean that when it was put in the agreement, as it was not in the case of *Pemberton v. Kessel*. To my mind, it means that the three months may determine at any time during the year from the date on which the notice is given. If so, then there is only due to the plaintiff the sum of £69, but even so, the Government tender does not come up to the mark, and, in addition to the sum of £69, they ought to have tendered about £3 15s. or £3 16s. for the five days up to the 5th May. Therefore, in my opinion, there ought to be judgment in this case for the plaintiff for the sum of £46, with costs, as tendered up to the 2nd July, and for a further sum of £3 16s. Now, as to this amount of £3 16s., it

would be a hardship on the Government if I were to make the whole of the costs subsequent to the 2nd July tell against them. I think the equitable judgment would be for a further sum of £3 16s., and no order as to costs.

[Plaintiff's Attorneys: Van Zyl and Buissinué; Defendants' Attorneys: Reid and Nephew.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

JOYCE V. ALOSOROFF. ( 1907.  
( Feb. 12th.

### Horse—Negligence—Damages.

*The defendant's horse, which had previously been seen running wildly and recklessly on certain war department property, run over and injured the plaintiff's minor child.*

*Held, that there was negligence on the defendant's part in allowing the horse to run unattended on property which he knew to be frequented by children.*

*The child had not been permanently injured, but the plaintiff, as father, had incurred some expenses in the treatment of the child after the accident.*

*Held, that the plaintiff was entitled to recover the amount of such expenses, at all events, as damages from the defendant.*

This was an action to recover £100 damages, brought by the father as natural guardian of a child named Maria Joyce, who was alleged to have been knocked down and trampled upon by a horse belonging to the defendant.

The declaration set forth that the plaintiff was a plumber, employed by the Table Bay Harbour Board, and was the father of Maria Joyce, a child of three years. On the 20th April, while the child was playing on a certain piece of ground on the foreshore at the bottom of Coal Point-road, Simon's Town, where she was lawfully entitled to be, a certain horse which the defendant had negligently and unlawfully allowed to

stray about at random trampled on her, and caused her certain injuries. Plaintiff claimed £100 damages.

The defendant in his plea denied that he had unlawfully and negligently allowed the horse to stray. It was lawful for the horse to be there, and if any injury was done to the child, it was due to the plaintiff's own negligence in allowing the child to wander about alone on a piece of ground on which horses were in the habit of grazing.

Dr. Greer was for the plaintiff; Mr. Alexander was for the defendant.

Kalis Laman, a coloured labourer, said that Coal Point-road went over a piece of veld on to the foreshore. He saw the accident on the 20th April from his house. The horse galloped over the child.

Dr. Greer: Have you known that horse before?

Witness: Yes, it was a very wild horse. The witness added that people spoke of it as a wild horse. Witness, proceeding, said he called for assistance. He was afraid to go down himself, because the horse was so wild. Children often played on the ground. No one was with the horse. The piece of ground belonged to the military.

Cross-examined: Farmers' wagons went on to the ground.

Mr. Alexander: Horses are continually grazing there?

Witness: Horses never go alone there.

Would you allow a child of three to play on that ground?—The child ran away that morning.

How do you know that?—The mother told me.

Annie Lisbon said the child who was injured was staying with her at the time of the accident. She was told by the last witness of the accident. Witness went and picked the child up, and afterwards sent for Dr. Clarke. The child remained for three months in bed. The father paid witness 15s. a week for nourishment for the child during that time.

Dr. Greer questioned the witness as to her circumstances. He asked: Is your husband quite all right in body?

Witness: Yes.

Dr. Greer: Is he all right in body?

Witness: Yes; only his hand is off.

The witness said the horse was a wild one. She had herself run away from it in the street.

Cross-examined: Witness tried to prevent the child going on that ground. She could not keep the child from going there.

P.C. McKenzie said that Coal Point-road belonged to the War Department. On the top of the road there were stones, on which were the letters "W.D." The road was closed one day a year. Children usually played on this land. Sometimes a cart went down the road, but there was no re-



gular traffic. There was no grazing there; there were a few rough bushes. Witness did not consider it a dangerous place for a child to play in. Defendant's horse was a spirited one. Witness had spoken to the defendant about the horse about three months previously. The horse then broke away and galloped through the street.

Cross-examined: Witness would not have allowed a child of three to play on that ground unattended. Witness lived near this place; he had not seen any horses on the ground. He had seen the farmers' wagons in Coal Point-road.

In the course of further cross-examination, the witness said there was a poundmaster, but there was no pound at Simon's Town. For the last twelve months nothing had been done to stop children playing on that ground.

Re-examined: It was customary for children to play on the ground.

John J. Hines deposed to having witnessed the accident.

Dr. Greer: Supposing it had been an older child, could it have got out of the way?

Witness: No, I don't think so, not even if it had been a Springbok. Proceeding, the witness said he had complained to the police on two or three occasions about the horse careering about on the ground. It was usual for children to play on the ground. He considered the horse a dangerous one. He said the horse made a snap at his master one day. That was some months before the accident. Witness had one child of ten years who played on that ground. It was a common playground.

Dr. Clarke gave evidence as to the child's injuries. Two ribs were fractured. He attended the child for three months. Witness's fees were £4 10s. He had not yet been paid. The child now had a slight deformity in the ribs, which witness believed would be permanent. It would not, however, affect the child's health.

William Joyce, father of the child, said he had paid Mrs. Lisbon 15s. a week for three months. Witness's solicitor first sent a demand for £19 10s. for expenses.

Cross-examined: The only expenses he had incurred amounted to £13 10s. The child was two years and four months old at the time of the accident.

Mr. Alexander submitted that there was no evidence of negligence.

[De Villiers, C.J.: There is evidence that the horse had shown signs of viciousness before.]

Dr. Greer closed his case.

B. Arlosoroff, the defendant, was called. He said he had never had any trouble with this horse before. The stable was not far from the ground in question, and there was a little graz-

ing there. The horse had never snapped at witness. On the occasion Mr. Hines spoke of, witness called the horse, and when the horse came witness slipped and fell. The horse was like a dog. It took sugar from the neighbours' hands. Witness paid extra for it because it was a quiet horse.

Cross-examined: Witness never told the Magistrate at Simon's Town, in the course of a certain case, that he had sold this horse because it was vicious. Witness allowed his horse to go down from the stable to this ground. Mr. Albertyn allowed his horses to do so. The horse was not a terror to the neighbourhood, and was not known as Arlosoroff's wild horse. The girl Laman was spiteful. This was all made up to ruin him.

Samuel Hodson, a former employee of the defendant, said the horse was a quiet one. The children used to play in the same yard as the horse. Other animals were allowed to be on the ground.

Three other witnesses gave evidence to the same effect.

Dr. Greer, in argument, submitted that there was clear proof of negligence on the part of the defendant. There was nothing wrong in the child being on this piece of ground. It was a place so safe in its nature that it could not be held to be contributory negligence to allow a child to go there. Counsel contended that in this case there was more negligence than in the case of a horse left unattended on a public street, and which got into mischief in consequence. He cited authorities in support of the contention that in the circumstances there was negligence on the defendant's part.

Mr. Alexander contended that the plaintiff had not discharged the onus upon him of proving negligence. Plaintiff's own evidence did not lead to the conclusion that the horse was a vicious one. The negligence that gave rise to the accident was the negligence of leaving a child of tender years unattended in a place to which horses had access.

[De Villiers, C.J.: If a parent allows his child to play where horses are grazing, is it contributory negligence? He cannot suppose a horse would take it into its head to trample on the child. It is not the habit of horses to do so; a horse would give way to children.]

Mr. Alexander said that the nature of the injuries suggested that the child got under the horse's feet rather than that the horse deliberately kicked the child. Unfortunately, there was no evidence as to exactly how the accident happened.

The witness, Mr. Hines, recalled, said, in answer to the Court, he had seen the horse running along the road at full speed. The people had to run for their lives. They had to give way for the



horse. That happened sometimes twice a week. The horse became notorious in the locality. All the neighbours could prove that it was a dangerous horse.

P.C. McKenzie (recalled) said that on the occasion he had spoken to the horse was galloping along the main street. People had to get out of its way.

Mr. Alexander, in further argument, submitted there was not a tittle of evidence to show that this horse was a vicious animal.

De Villiers, C.J.: I quite agree with counsel for the defendant that the plaintiff is not entitled to succeed in the present case without proving negligence on the part of the defendant. The evidence of negligence consists in this: That this horse had been repeatedly seen upon the plot of ground in question tearing away at a furious rate, and scaring away from the place men, women, and children who were there lawfully on that place so far as the defendant was concerned. The police constable also stated that in the streets of Simon's Town he had seen this horse tearing away and driving people away from the street on to the pavement or even on to the stoeps. But the more important evidence is, of course, as to the conduct of the horse when he was upon the plot of ground in question. That plot of ground belongs to the War Department, but so far as the defendant is concerned, the plaintiff's child was lawfully there, and so far as the plaintiff is concerned, the defendant's horse was lawfully on that ground. The War Department could object, but no one else could object either to the horse being there or to the child being there. But, if the horse, to the knowledge of the defendant, was in the habit of running wildly so as to be a danger, more especially to the children, who, as he knew, frequented the place, then it was the duty of the defendant either not to have sent the horse there or else to have sent it there under proper care and supervision, so as to prevent it being a danger to the people who were upon that plot of ground. On the day in question this very small child, not much over two years, was there unattended, and this horse seems to have taken it into its head again to rush wildly about, and in the course of its wild career it ran over this child and hurt it. Fortunately, the child was not killed, but it was injured to the extent that some of its ribs were broken and some medical expenses had to be incurred. The most important evidence given in this case, to my mind, is that of Mr. Hines. I do not attach so much weight to the evidence of the first female witness, but Mr. Hines gave his evidence very fairly. There is nothing to show that he had any grudge or spite

against the defendant, and he states he has not only on previous occasions seen this horse rushing wildly over the place, but that he also witnessed this very accident, and according to him the horse's conduct was such that even if the child had been considerably older, or even if she was under supervision, she would probably have still been hurt. Well, if that is so, it is impossible for any Court to acquit the defendant of some degree of negligence, and the next question is whether there was any contributory negligence on the part of the plaintiff. Well, it is not a patent danger to the parents or guardians of this child that the horse might go rushing about and hurt the child. On the question of damages, His Lordship reviewed the evidence, and said he did not think any more damages were proved than £13 10s. With regard to the question of costs, all the witnesses were at Simon's Town, and it was a case which might well have been heard by the Magistrate there. Judgment would be for the plaintiff for £13 10s., with Resident Magistrate's Court costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

ADMISSIONS. { 1907.  
Feb. 12th.

Mr. Toms moved for the admission of Frederick Bernhard van Schanel as an attorney and notary, the oaths to be taken before the Resident Magistrate of Maclear.

Application granted.

Mr. Lewis moved for the admission of Jacob Frank as an attorney and notary.

Application granted and oaths administered.

Mr. P. S. T. Jones moved for the admission of Rudolf Seydell as a translator of the Supreme Court in the English and Dutch languages.

Application granted and oaths administered.

### PROVISIONAL ROLL.

ADLER AND FRANK V. SCHOLTZ.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £384, with interest and costs. The bond became due and payable on demand. Counsel also asked to have the property declared executable, and for judgment for £65 11s. 10d., under Rule 329d, for goods sold and delivered, less 12s. paid on account.

Granted.

## VAN REENEN V. WEINBERG.

Mr. Inchbold moved for provisional sentence on a promissory note for £59. Granted.

## MOGFORD V. BARLOW.

Mr. Toms moved for provisional sentence on a mortgage bond for £1,540, with interest and costs, and that the property be declared executable. The bond became due through non-payment of interest. Granted.

REHABILITATION. { 1907.  
( Feb. 12th.

Mr. M. Bisset moved for the discharge of Clifford Henry Dean Penny and Robert Dampier, formerly trading as Penny and Dampier, from insolvency. There was a consent by the creditors. Application granted.

## SUMMERFIELD V. SUMMERFIELD.

This was an action in which the wife Rachel Summerfield sued her husband Joseph John Shury Summerfield in *forma pauperis* for a decree of divorce, on the ground of the defendant's adultery.

The plaintiff resided at Somerset West. The parties were married in Bloemfontein, 1903, and there were two children of the marriage. On the 2nd December, 1904, defendant was sentenced to six months' imprisonment for fraud, and on the 31st October, 1905, the defendant went to live with one Mrs. Stegmann at Somerset Strand.

Mr. Palmer appeared for the plaintiff, and the defendant had been barred.

Rachel Summerfield, plaintiff, stated she was married in the Orange River Colony to the defendant in 1903. After her marriage the defendant and herself came to Cape Town, and subsequently went to Rhodesia. They never lived happily together. In December, 1904, her husband was sentenced to six months' imprisonment for fraud, and had not returned to her since. In October last year she heard for the first time of her husband living with a Mrs. M. Stegmann, of Somerset Strand. Subsequently she went to Mrs. Stegmann to have some clothes made for the children, and saw her husband there in the bedroom. Since then she had never been to Mrs. Stegmann's house. She asked for a decree of divorce, division of the common property, and custody of the minor children. She had no property, neither had defendant.

Robert John Henter, of Salt River, who was living at Mrs. Stegmann's house at the Strand, in October, 1905, said he gave up his room in that month at the request of Mrs. Stegmann,

and the defendant and Mrs. Stegmann occupied his room.

Decree of divorce granted, the plaintiff to have custody of the children, and defendant to pay costs of suit and the costs incurred by the plaintiff in suing in *forma pauperis*.

*Ex parte* ROBINSON. { 1907.  
Feb. 12th.  
„ 28th.

Charge upon property—Fraud—  
Liquidator.

This was the return day of a rule *nisi* calling upon Hillyard Home Drummond to show cause why an order should not be granted declaring a certain deed of charge and powers of attorney set aside.

Mr. Watermeyer for applicant.

Counsel said the allegation was that these documents were obtained by Drummond from the petitioner by fraud.

The respondent appeared in person.

Mr. Watermeyer said the allegation was that the petitioner, who came out here, was entitled to a certain reversionary interest under his father's will of property in England. He went to Home Drummond, who said he would advance the petitioner some money. Drummond advanced him £4. Then Drummond suggested that the petitioner should advance to the Assets Realisation Company the sum of £100. The petitioner said he would obtain £100 from England, and advance it in order to obtain a high rate of interest. Drummond induced him to sign certain documents to carry out the agreement. He now discovered that the first document he was induced to sign was a deed of charge on the reversionary interest, and the other document was a general power of attorney which was not annexed, but Drummond now seemed to claim to act under this general power, and sell and dispose of the reversionary interest in England. Later the petitioner endeavoured to obtain this money in England. Drummond said he would advance, or the Assets Realisation Association would advance, £100 to the petitioner. Then another document was put before applicant by one MacDowell, then Drummond's clerk, and the petitioner signed this, and now it turned out to be a power of attorney. Drummond claimed to act under the first or second power, and sell the reversionary interest. Petitioner wanted to sell his interest, but Drummond was trying to stop the sale.

[Maasdorp, J.: I suppose a man who gives a document to another knows what he is giving. Mr. Robinson must know what he signed?]

Mr. Watermeyer: The company has been wound up, and the official liquidator, Mr. Wyndham Bishop, has agreed to accept £7 in full settlement

of any claim which the company may have.

[Maasdorp, J.: Where are the documents?]

Mr. Watermeyer: I think in the possession of Drummond.

[Maasdorp, J. to respondent): What position do you take up?]

Respondent: Permit me to say that the facts put forth by counsel for the applicant are nothing more or less than pure fiction. But I will make an application to your Lordship. If any fraud exists in this matter, the fraud is on the part of the present applicant. The man accepted valuable consideration, and he is being assisted or aided with the object of having this power declared null and void, for the simple reason that the person to whom the power of attorney was granted is in gaol. I submit if that sort of thing is going to occur, if people are going to get rid of their liabilities simply because the mortgagee is in gaol, it will be an extraordinary thing. I was served with these papers on the 7th of this month, when I was at Tulbagh. I applied to the Magistrate for permission to peruse these papers in order to prepare my affidavit in reply, but the Magistrate informed me he would have to submit the application to the Colonial Office. Meantime I made application to appear in court to-day. I only arrived from Tulbagh yesterday, and have had no time to peruse the affidavits served on me, and I have had no opportunity to file my replying affidavit. I will ask your lordship for a postponement in this matter until such time as I have an opportunity.

[Maasdorp, J.: Where are the papers?]

The powers of attorney were sent to my solicitor in London.

[Maasdorp, J.: Meanwhile no action must be taken.]

I am quite willing not to take any action.

[Maasdorp, J.: What are your agents doing in England?]

Matters seem to be at a standstill in England, as well as here, because representations have been sent to England that I have been arrested on an attempt to get £2,000 by false pretences. This man Robinson was induced to make a criminal charge in the first instance, but the Attorney-General declined to prosecute.

[Maasdorp, J.: Do these papers belong to the company or you?]

They belong to me. The man gave me a power of attorney in my own name as far back as May last year. Where counsel for the applicant is confusing the issue is this: At the time this man gave me the general power of attorney which by oversight retained the words, "In Cape Colony," the man received his due consideration

for the mortgage, and he knew perfectly well it existed, because he wrote to his solicitors in England asking for an advance. They said he could not have any advance so long as this mortgage existed. When the man came for another £100 I was arrested. I shall be able to put the copies before the Court, that is if I have time to peruse the documents.

[Maasdorp, J.: I can understand if you only received notice on the 7th, and in the position you were in you could not be ready now. What time will you require?]

If your lordship would give instructions that I should have further facilities—I am now confined to the Breakwater Convict Station—if your lordship adjourned the matter until the last day of term I shall be ready.

[Maasdorp, J.: What is the property?]

Mr. Watermeyer: Some £2,000 or more.

[Maasdorp, J. The matter may stand over to the last day of term; in the meantime, the respondents' affidavits must be served in a week.]

Mr. Drummond: I am entirely in the hands of the Superintendent of the station. The only papers I have got here are the papers served on me. My other papers are in the hands of Mr. Brady.

[Maasdorp, J.: You will be entitled to this, that Mr. Brady shall have access to you, and there is no doubt the authorities will allow him to see you at reasonable and proper times. There must not be much delay on the ground of any future excuse. You must do your best and get proper information before the Court in a week's time, and then they can answer your affidavits and the matter will be heard on the last day of term.]

Mr. Watermeyer: The applicant is at present without money, and I would ask whether your lordship will not make it a little earlier.

[Maasdorp, J.: It is only about a fortnight's time. On Thursday, 28th, the Court will hear the motion. (To Drummond): Your affidavits must be in by a week's time, and then they will have an opportunity of answering your affidavits. The two points that you have to answer are: Whether you are entitled to the documents personally, or whether the company is entitled to them.]

Mr. Drummond: I would remind your lordship of the remarks you made in my criminal case, that it was an extraordinary thing that the liquidator never applied to me for any information about the winding-up of the company. Since then I have never heard anything from the liquidator at all. He is willing to hand over a mortgage for the sum of £100 for the sum of £7 without consulting me.

[Maasdorp, J.: He takes the responsibility. You have your affidavits in the hands of the other side in a week's time, meanwhile you are interdicted from dealing with the documents in question.]

*Postea* (February 28th).

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Mr. Alexander (with him Mr. Watermeyer) was for applicant; respondent, who was under the charge of a prison warder, appeared in person.

Respondent, in an answering affidavit, declared that he had been wary, but perfectly straightforward in his dealings with Robinson, while the latter had conducted the proceedings throughout with fraudulent intent, and had been aided by "the irrepressible Stanley Jones." He had a cession from the Assets Realisation Association of the mortgage.

[De Villiers, C.J.: Where does the cession appear?]

Respondent: On the original mortgage, which has been sent Home.

[De Villiers, C.J.: There is no minute in the minute-books of the Assets Realisation Association to that effect.]

Respondent: No, my lord, that is a point which will arise. In the first instance, the applicant says there was no money advanced to him, yet in the minute-book of that company, which was kept by the secretary, it appears that it was resolved that the money should be advanced. There has been a conspiracy from beginning to end. First of all, the secretary disappeared. Now, the gentleman who made application to this Court upon a perjured affidavit has disappeared.

[De Villiers, C.J.: Who is that?]

Respondent: Seccombe.

De Villiers, C.J. (to Mr. Alexander): Was there an endorsement of the cession on the original mortgage?

I am instructed that there was not. The original is in London.

Respondent proceeded to wander into side issues concerning his relationships with the Assets Realisation Association, when

De Villiers, C.J. (interposing) said that was not the question the Court had now to determine. There were two questions to be dealt with: (1) Whether this was a valid mortgage; and (2) whether there was a cession upon that mortgage.

Mr. Alexander read a replying affidavit by the applicant, in which he denied that he had received money from the respondent as alleged, and declared that he had been cruelly victimised by respondent. Counsel also read an affidavit by Mr. Bishop, liqui-

dator of the Assets Realisation Association.

Respondent submitted that the matter could not be dealt with on motion, and that the applicant should be ordered to proceed by action. He repeated that £107 had been advanced to Robinson in order to enable him to go into a moneylending business. It was absurd for Robinson to say that he had only received a loan of about £4. He claimed that he should be allowed an opportunity of cross-examining the applicant.

[De Villiers, C.J.: How much do you say you advanced to Robinson?]

Respondent: £107.

[De Villiers, C.J. (to Mr. Alexander): How much do you say the applicant received from the association?]

The liquidator is satisfied that Robinson only got £4, but he signed an acknowledgment to pay back £7. He actually received £4 12s. 6d.

Having heard Mr. Alexander further, De Villiers, C.J.: In this case the important question to be decided is whether a certain charge upon his property made by the applicant in favour of the company was a valid charge or not. It is really, in the first instance, a question between the company and the applicant. I am satisfied upon the evidence that the charge was not such as any Court of law would maintain, and that the liquidator of the company was quite justified when he discovered the true nature of the transaction in entering into an arrangement with the applicant by which the charge was released, upon payment by the applicant of the full sum of money which he had received from the company, viz., the sum of £7. In point of fact, he said he had only received £4, but £3 was added by way of commission, etc. The agreement entered into between the liquidators and the applicant under date 12th December, 1906, is one which, in my opinion, should at once be sanctioned by the Court. I think the applicant would have been better advised if, in the first instance, he had applied for that sanction, because, if that were granted, the rest of the present application would follow as a matter of course. Although not exactly in the form in which the application is made, the liquidator, I understand, wishes for the sanction of that deed, and the Court will now, as a preliminary to the further order, sanction the deed executed on the 12th December, 1906, between the liquidator and the applicant for the release of certain charge given by applicant in favour of the company. Well, then, coming to the specific relief which is sought in the present case, it follows that, if the original charge was fraudulently given, any cession would confer no rights whatever upon the cessionary, and, therefore, the Court will declare

any cession made by the company of the said charge, or any powers of attorney given by the applicant, to be of no effect on such charge, and null and void. In that view it would perhaps not be necessary to express any opinion on the question whether a cession ever was made of that charge, but I would indicate my opinion to this extent that, seeing that the respondent in his correspondence with the agents in London, after the date at which he said he had obtained this cession—I say, seeing that in that correspondence he speaks of the company as being still entitled to that charge and does not refer to himself personally as having obtained the cession of that charge, it seems to me extremely unlikely that if the case should ever come into Court he would be able to prove that a valid cession had been made to him. But that seems to me now a matter of minor importance, seeing that, upon the evidence, it is quite clear that the original charge was fraudulently obtained, and that, consequently, any cession, whether valid or not, would fall to the ground because the cessionary cannot have any greater rights than the cedent of the document. No order as to costs.

VAN EYSEN V. HEROLD.

Mr. J. E. K. de Villiers, for the applicant, moved for the discharge of an interdict in this case.  
Application granted.

KOCK V. COHEN.

Mr. Douglas Buchanan moved to have a rule nisi made final. The rule restrained the respondent from parting with any goods in a tailor's shop, pending an action.

The interdict was extended, pending further order of court, the respondent to pay costs.

*Ex parte* VAN WYK.

Mr. Burton moved for an order authorising the sale and transfer of certain property to the petitioner's minor sons.

A rule nisi was granted, returnable on the 28th inst., calling upon the children of the petitioner to show cause why the application should not be granted.

HUTCHINSON V. VILLIERS-  
DORP MUNICIPALITY. { 1907.  
Feb. 12th.  
" 28th.  
Mar. 6th.

Water — Distribution — Municipality — Act 45 of 1882 — Servitude.

*More than 60 years ago the owner of a certain farm sold certain erven, with the view to establishing a village on a portion of the farm. One of the conditions of sale was that the purchasers of these erven were to allow the C. river, which flows through the village, to continue freely to flow, but that they should have the right to take water therefrom, each in proportion to the extent of his land. About 44 years ago it was agreed that certain of the erf-holders might take water from the M. river, which borders the village on one side. At the time when these erf-holders found it necessary to enforce these latter rights, a Municipality had been constituted, and this Municipality made all necessary arrangements with the owners of the land. The said Municipality thereafter became defunct and was not reconstituted till 1881. At that time water was conveyed to a portion of the village from the C. river by means of an open furrow, and subsequently was delivered in a very impure condition. The reconstructed Municipality recently proceeded to construct a dam in the C. river and to arrange for the conveyance of water therefrom by pipes. Applicant, an erf-holder, now applied for an interdict to restrain the Municipality from prosecuting this scheme.*

*Held, that as respondents had not shewn any prescriptive right varying the original conditions of sale, and as the erf-holders could not by allowing the Municipality to distribute the water enlarge their powers under Act 45 of 1882 as against the servitude to*



*water enjoyed by the successors in title to the original erf-holders, the latter were entitled to insist on the observance of the original conditions of sale and to an interdict as prayed.*

This was an application made by William Tell Paschond Hutchinson for an order calling on the respondent to show cause why an interdict should not be granted in terms of the petition. The petition set out that the applicant was the largest ratepayer in the Municipality of Villiersdorp, and one of the largest landed proprietors. The erven at Villiersdorp were laid out about 1844 by the late P. H. de Villiers, who granted the erven a right of water from the Commissie Kraal River, with a further right that should the same prove insufficient, occupiers would have the right to claim one-quarter of the water from the Molen River, on the farm Raydn, of which latter river one-quarter was also granted to a certain Jacobus Petrus Pretorius and Wessel Pretorius, occupiers of one-quarter share of the farm Zeekoekraal, with a further right should the water prove at any time inadequate they should have the right of the night water from the Commissie Kraal River. About 44 years ago, owing to the inadequacy of the water supply of the Commissie Kraal River, and the consequent disagreement of the owners as to the division thereof, the then existing Municipality, at the request of the erf-holders, at a public meeting, resolved to claim, and did claim, a quarter share of the Molen River water, in terms of the agreement with the late P. H. de Villiers, and divided the said water, and the water from the Commissie Kraal River among the erf holders, giving those to the west the water from the Commissie Kraal River, and those to the east the quarter share of the water from the Molen River, which quarter share here exceeds in volume the water from the Commissie Kraal River. In pursuance of such arrangement, the water has been used ever since up to the present time, a period of over thirty years, without hindrance. The then existing municipality subsequently fell through, and for eight or ten years there was no governing body, but the use of the water continued. In 1881 the municipality was reconstituted, at the instance of petitioner, who was Mayor for fifteen years, when the right was given to the Council to arrange the order of water leading according to the rights of erf-holders. The water from the two streams was utilised also as drinking water. On more than one occasion there had been insufficient water to properly irrigate

the ground entitled thereto from the Commissie Kraal River. A majority of the erven-holders depended for a living on the produce of their gardens, and they would be seriously prejudiced by any decrease in the supply from the Commissie Kraal River. Early this year the Municipal Council evolved a scheme further providing a system of water supply for domestic purposes and for the whole village, by means of pipes laid from the Commissie Kraal River. They called a meeting of ratepayers to sanction the petition of the scheme. Petitioner was not aware of the meeting at which some twenty-four ratepayers gave their assent, but no names were mentioned, and with the exception of two or three, they were all ratepayers drawing water from the Molen River. Later petitioner and several others, at a meeting, voted against the scheme, but the Council continued the work. The scheme would mean that the ratepayers would now draw from the Commissie Kraal River its domestic supply at the expense of the petitioner and other ratepayers. Petitioner claimed a prescriptive right, jointly with several other erf-holders, of the water from the Commissie Kraal River. If the Council was permitted to go on, petitioner's property would be seriously diminished in value. He claimed an order restraining the Municipal Council from prosecuting such a scheme, and using the water of the Commissie Kraal River as stated.

The Municipality claimed that the water was vested in them, and they had the right to deal with it. By this scheme a certain portion of the water which ran to waste during the night-time would be retained in a reservoir which they proposed to construct.

Sir H. Juta, K.C., was for the applicant, and Mr. Burton was for the respondent Municipality.

Sir H. Juta said it would appear that De Villiers, who was the owner of land, in which the applicant as an erf-holder entered into a contract with certain erf-holders, which appeared to be in the transfer. The Municipality, he contended, had no right to touch a drop of this water, and the fact that a municipality was situated within a certain area did not give the municipality the right to deal with water which a number of erf-holders had got the right to. He would like to see the legal authority for the proposition that if a man laid out certain erven, and having water in the land, made a contract with certain persons who bought portions of his land that they should be entitled to have the use of portion of the water, and thereafter a municipality was constituted, that it could interfere in water rights which was created by contract between the parties. It could make regulations as to water under its management,

but the initial point was, who gave it the control and management of this water? He failed to find any late regulations that professed to deal with the distribution of such water. If the Court required more information should be obtained in regard to the erven, and as to the way this village had grown up he would be quite willing to let the matter stand over for that, but as the matter stood now there was no authority that the Municipality as a municipality could interfere with this water.

Mr. Burton said it would be extremely inconvenient to the Municipality if there were to be a further postponement in the matter, but if his lordship desired further information he would not detain the Court.

Maasdorp, J., ordered the matter to stand over until the last day of term, each side to endeavour to procure further information.

*Postea* (February 28).

Sir H. Juta said this matter came before his lordship a little while ago as an application by Mr. Hutchinson, restraining the Municipality from diverting certain water in the river called the Commissie Kraal River. It appeared that the village was laid out some years ago by Mr. De Villiers, and after the village had been laid out, the erfholders were to have water from the Molen River if there was not sufficient from the Commissie River. Lately the Municipality placed a dam in the Commissie Kraal River, and made a reservoir, and by means of pipes brought the water to the village, and they were supplying water to places which had no right to water. The matter then stood over for further information in regard to how the village was laid out. There had been affidavits filed, but they did not carry the case much further. Counsel said it was clear from the affidavit with the conditions of sale attached that these erven were sold with a right to the water. The municipality had no right to interfere with the registered servitude. He could not find anything which showed that a municipality had the right to deprive the owner of an erf of water who had got a registered servitude in his favour. In the Municipal Act 45 of 1882, which was the Municipal Act under which this Council was now regulated, provision was made for the vesting of certain property in the Council, namely section 159, but it did not vest in them water. There was no principle upon which the municipality could interfere with a man's private servitude registered on his title-deed. There was nothing in the present regulations by which the professed to deal with the water, but under the old regulations there was one, No. 17, which was as follows: "That the Commissioners shall, whenever necessary,

cause the owners of erven to exhibit their transfers and conditions of sale in order that the Commissioners may be in a position to fix the hour of water leading to each erf, and for the purpose of obtaining the knowledge as to who is entitled to water. There they acted quite properly. They did not profess under that regulation to take away people's right.

Mr. Burton pointed out when the municipality in 1844, the predecessors of the respondents, at the request of the erf-holders, claimed one-quarter share of the water from the Molen River there was no question of rights there by title deeds. The applicant did not suggest that people on the west were allowed the Commissie Kraal water because it was on their title deeds. Counsel submitted that the applicant must show some prejudice before which the Court would hesitate to stop the whole of this supply. The plaintiff had had ample opportunity of objecting in good time. Unless the action of the municipality was going to deprive the applicant of his share, how could he complain; and the evidence went to show that the action of the municipality would not so deprive him.

Sir H. Juta having replied,

*Cur. Adv. Vult.*

*Postea* (March 6th).

Maasdorp, J.: Some time prior to the year 1844 one P. H. de Villiers, the owner of the farm Radyn, laid out a plan for a village upon the farm, and proceeded to sell the erven so laid out. A stream called Commissie River flows through the village, which is skirted on the east by another stream called Molen River. The following were amongst the conditions under which the sale of the village lots took place: The buyers were to allow the flow of the Commissie River through their land as it appears upon the plan, and each erf shall have a proportionate right to the river running from the mountain to the village. The river here referred to is the Commissie River. By a further agreement certain rights were conferred on the erfholders by the owner to water from the Molen River. At the time when it was found necessary by the erfholders to make use of their rights to the water of the Molen River the requisite arrangements were made through the instrumentality of the municipality. And again when erven, which were laid out in the original plan, were sold later, the required redistribution of water was effected by the municipality through their secretary. Under the latest arrangement for the distribution of the water the erven lying to the west of the Commissie River were irrigated by means of a furrow taken from that river, and those to the east were irrigated by water

from the Molen River. For some time the inhabitants of the village have experienced much inconvenience and discomfort from the impure state of the water running in open furrows, and the necessity of carrying water from a distance according as irrigation goes on in different parts of the village. To rectify these evils the municipality set about constructing a dam in the Commissie River, and bringing pure water in pipes from the mountain to De Villiersdorp. To this the applicant and some other owners of erven object. There is some dispute as to the manner in which and the time when their objections were raised, but it is enough to say that nothing has happened to debar them from now setting up any legal rights they may possess to object to the action of the municipality. In my opinion, no prescriptive right has been proved by the respondents which would have the effect of varying the rights he held under the original conditions of sale, nor has the conduct of the erfholders in allowing the municipality to make arrangements from time to time in respect of the water supply enlarged the powers conferred upon that Corporation by the Municipal Act of 1882. The applicant is entitled to use the water of the Commissie River proportionately with the other erfholders, and when they availed themselves of the services of the municipality to have a distribution made in proportion to the extent of the erven, they made use of a very convenient expedient, but the powers of the Municipality continued the same. Under the Act the Council may make regulations for the supply and distribution of water under their control and management, but it is quite clear that the water of the Commissie River is subject to rights of servitude in individual erfholders, and is not under the control of the Municipality for the purposes of distribution. Even if the Council had in some way the power to see that the rights enjoyed by the erfholders in general were exercised for their mutual benefit, it could certainly not interfere with any vested rights. The erfholders are entitled to prevent anything which will interfere with their proportionate use of the Commissie River, and there is certainly a large body of evidence to prove that the diversion of the water in pipes will materially affect the flow available in the erven during part of the year. It is easy to understand of what vital importance it is to the village to obtain a supply of pure water, and a more convenient supply for domestic purposes, but this must be brought about without infringing any person's legal rights. It may still be possible, by mutual concession, to attain that object. In the meanwhile, the applicant is entitled to an interdict. An order is granted interdicting the Muni-

cipality from diverting water from the Commissie River by means of pipes, but leave will be reserved to respondents to bring an action if so advised to set aside the interdict, costs to be paid by the respondents.

[Applicant's Attorneys: Van Zyl and Buissinné; Respondents' Attorneys: Dempers and Van Ryneveld.]

#### CORDER V. UPTON.

Mr. Upton was for the applicant, and Mr. Burton was for the respondent.

This was an application calling upon the respondent to show cause why he should not be required to furnish security for costs. An affidavit had been filed on behalf of the respondent applying for a postponement of the case on the ground that his affidavit in reply to the applicant's affidavit had been posted, and would not reach here until the 15th or 16th inst. In case he did move for a postponement counsel was not instructed to oppose it, but he would submit that the time should not be long.

Mr. Burton said that the respondents wanted a postponement.

The matter was ordered to stand over until Wednesday next, the question of costs to stand over.

#### LEVY V. NASH.

This was an application on notice of motion, calling on the respondent to show cause why he should not be removed from his position as trustee in the insolvent estate of Eugene Dapino, or why he should not be ordered to sign a power with the applicant to enable the latter to take proceedings against the Automatic Pit Company in the interests of the estate. At a meeting of creditors petitioner and respondent were appointed joint trustees in the estate. Petitioner found a cession to the insolvent, and a certain patent which had been duly registered in the Patent Office of this colony. The patent was claimed by the Automatic Pit Company, a firm in which the respondent was directly interested. Petitioner considered this patent an asset in the estate, but was prohibited by the respondent from taking counsel's opinion. The Master subsequently advised him to take counsel's opinion, and Mr. W. P. Schreiner, K.C., gave it as his opinion that the patent was an asset in the estate.

Mr. Burton was for the applicant, and Sir H. Juta, K.C., was for the respondent.

Sir H. Juta read a replying affidavit, which set out that the respondent had no objection to the proceedings if the creditors he represented were protected.

The case submitted by deponent to Sir H. Juta, K.C., said that the patent was not part of the assets. In view of the creditors being averse to his risking a law suit, and as he was not able to obtain an important annexure from Messrs. Sauerlander and Kruger, he was not justified in joining in the proceedings. He denied that he prohibited the applicant from taking counsel's opinion.

Maasdorp, J.: It appears that there are two trustees in the case, Mr. Levy and Mr. Nash. Mr. Levy is under the impression that the trustees have a good cause of action in respect of certain patent, which he claims to be the property of the insolvent. Mr. Nash, on the other hand, does not take such a favourable view of the prospects of such an action. Mr. Levy is, however, desirous of instituting a suit to recover the benefits of this patent, and he suggested to Mr. Nash that proceedings should be taken. Mr. Nash refused to join him in his suit, upon the ground that he should require an indemnity from the creditors represented by Mr. Levy to the creditors represented by himself, because he was not very hopeful as to the result. That is the objection raised by him in the first instance, and he also questioned the right to the creditors who had elected Mr. Levy as having no claims upon the estate at all. Upon these two grounds he refused to join Mr. Levy in this action. Now, it is quite open to the trustees to bring an action without obtaining the sanction of the creditors, but where they have any doubt in the matter the question is generally referred to the creditors. It being in the discretion of Mr. Nash to proceed without receiving the approval of the creditors, Mr. Levy was quite justified in supposing that that was not what was required by him, but that it was merely the indemnity. If Mr. Nash has suggested that it was not only the question of the indemnity and the doubts as to the claim of Sauerlander and Kruger, but also the fact that he had not yet the sanction of the creditors, that stood in the way then, that difficulty could have been removed. He could have removed that by referring the matter to a meeting of the creditors, and Mr. Levy was quite justified in supposing that he would have done so if the other difficulties were removed. Now, Mr. Nash raises the other point, which was not anticipated at the time by Mr. Levy. He now sets up the position that the matter ought, considering the difference of opinion on the subject, be referred to a meeting of creditors. If he had raised that point before it could have been rectified by Mr. Levy, then requesting him to join him in having such a meeting called. The position taken up by Mr. Nash

was quite unjustifiable. On the other hand, when Mr. Levy found that Mr. Nash differed from him as to the management of the estate upon this particular point, he should have requested him to have a meeting called to decide the question between them. He knew that it might be advisable to refer this matter to a meeting, and he himself set about calling a meeting, the resolutions of which in the result were illegal, because the meeting was not called by the two trustees jointly. On the other hand, therefore, Mr. Levy is wrong in coming to this Court to force Mr. Nash to take up proceedings. The proper resort should have been to have a meeting of creditors. The Court will grant no order, each party to pay his own costs.

#### SOMERSET EAST MUNICIPALITY V. BROWN.

Mr. Benjamin was for the applicant; Sir H. Juta, K.C. (with him Mr. W. P. Buchanan), was for the respondent, and Mr. Howel Jones was for the Government, who put in an appearance at the invitation of the applicant.

This was an application on notice of motion calling on the respondent to show cause why the applicants should not be allowed to enter on the respondents' farm, Glen Avon, through their engineers or other persons, for the purpose of getting information as to the leading of water to the town of Somerset East.

It was the intention of the municipality to introduce a Bill into Parliament asking for power to utilise certain reserved water and bring it into the town for the use of the inhabitants, and it was necessary that the engineers should take certain gaugings and measurements. Applicants applied to the respondent, and permission was granted, but afterwards countermanded.

The respondent, in his answering affidavit, denied there was a servitude in favour of the Colonial Government in existence, same having lapsed by non-user. The applicants therefore had no *locus standi*.

Unless the applicants complied with reasonable stipulations, deponent would be placed at a disadvantage in meeting the claim of the applicants.

Counsel having been heard in argument on the facts,

Maasdorp, J.: The application in this case is founded upon an alleged right derived by the applicants through the Government. The right is said to allow the Government to go upon the farm of the respondent and to take water over the land when it is considered expedient to the lands of the township of Somerset East. That right is disputed by the respondent, and it is impossible upon



the affidavits now before the Court to decide that question. It will be necessary first to take proper procedure, to have a declaration of rights in respect of the claim that is set up by the applicants, and until that right has been established it is impossible to base upon it another right to go upon the lands of the plaintiff for the purpose of exercising a doubtful and disputed right. The Government has not taken any steps to establish such a right, and so far from appearing here to support the applicant in his claim the Government has been brought before the Court as a respondent by the applicant for the purpose of compelling the Government to take steps to allow him to establish his claim. The Government has taken no steps to support his position, and consequently no right is established that he is now entitled to go on to the farm of the respondent to exercise this right. Though this right is not claimed through the Government, but as one inherent in the municipality itself, it is necessary for the municipality to take steps to have the right declared. There is no proof before the Court that such right exists in the municipality or the Crown, consequently the application must be refused with costs of both respondents.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MILLER V. CYSTER.      { 1907.  
Feb. 13th.  
" 14 h.  
" 15th.

Mission lands—Right of occupation—Cession by occupier.

This was an action for ejectment, for an interdict restraining defendant from trespassing upon certain property, and for £50 damages for trespass and assault.

The declaration set forth that the parties reside at the Paarl, and plaintiff was the occupier of certain ground at the Paarl Mission Station. About May, 1903, the defendant hired from the plaintiff a certain lot of ground and erected thereon a carpenter's shop. He continued in occupation, and in 1903 and

1904 paid rent to the plaintiff. In August, 1905, defendant broke open a gate and took possession of other land belonging to the same erf. He claimed it as his own and refused to pay rent. A fence was also broken down, and while plaintiff was removing a tree, defendant assaulted him, knocking him down.

The defendant, in his plea, said that the plaintiff had no right or title to the erf in question. He claimed that it was acquired by one Gabriel van Wyk from his deceased parents, and that he (defendant) purchased it from Van Wyk. The payment that had been made was for work done and not for rent.

Mr. Burton (with him Mr. J. E. R. de Villiers) was for the plaintiff; Mr. McGregor (with him Mr. W. P. Buchanan) was for the defendant.

Johan Frederick Stegman said he was a missionary of the Apostolic Union. He was administrator of the Pniel Institution, which was a religious institution to teach children and to bring them up to agricultural pursuits. Witness came there in 1843, and was the first administrator. Witness stated that his age was 82. He was intimately acquainted with everything connected with the institution. There were 700 inhabitants, but only 80 members of the church. If a farmer came to the institution to ask a plot they gave a portion for a garden and a house. The house, lands, and garden were separate. He had to pay 3s. monthly. The ground was not sold, but let. The regulations were read to him, and the ground was to be held subject to these regulations. They had to go on paying 3s. a month till they paid £18. Afterwards each plot-holder had to pay 1s. 10d. per month for the support of the missionary. The missionary received £108 a year. If the man died his widow came into occupation. If the father and mother both died, then the children succeeded, subject to the consent of the administrator. No written transfer was ever given, only the right to occupy. He had a book in which he kept the names of the occupants, and in which he kept a record of the various payments. A man A. in possession could transfer his rights to B. only with the consent of the administrator. The rules of the institution were printed about three years ago, which gave in detail the obligations witness had set forth. In the manuscript copy of the rules which he had written out himself there was no mention of the rule relating to transfer, but it was absolutely understood.

In reply to his lordship, witness further stated that no one could erect any cottage or building of any sort unless he first had the consent of the administrator. Proceeding, the witness said that Gabriel van Wyk, senior, the grandfather, had the ground in 1845. Gabriel van Wyk, his son, succeeded him, and rented another erf, which was the one



in dispute. To this there was attached a piece of garden ground in another part of the institution. On the death of the old man, there was a substantial sum owing in respect of the ls. 10d. a month. He was about thirty years in arrear and owed about £77. Some years back, before the old man died, the plaintiff and his wife came to live there. After the death of Gabriel, these two erven belonged to his wife. Mulder and his wife took possession of both erven with the consent of the mother and, of course, with witness's consent. That was before the old man's death. Gabriel made over the erven to plaintiff and his wife about two years before his death. Young Gabriel, therefore, had no rights. The latter said he did not wish to have anything to do with it; that he did not want to live at Pniel. For years previously he had lived at Wellington. Young Gabriel gave his consent to the rights being made over to Muller. The mother (Mrs. Van Wyk) and her sister came to ask witness's consent to the property being made over to Muller. The latter and his wife had for some time been making payments off these arrears. Muller supported the old couple after the transfer up to their death. Muller paid off the arrears until August, 1905, when the whole £77 had been paid, and witness gave a receipt for the whole amount. He had in the meantime given Muller receipts as he paid from time to time. Witness remembered the defendant coming to ask his permission to hire part of the erf. Witness saw Muller, who agreed to let it, and witness consented, leaving the conditions to Muller. Witness made the general condition that, as the church was near, there must be quiet during divine service. He consented to a carpenter's shop being put there. About two years ago, defendant made a claim to the property. He came to witness with young Gabriel, Van Wyk and a man called Kynoch. They wanted one of the erven for Gabriel van Wyk. Witness told Van Wyk to call Muller and his wife. Cyster said Van Wyk was a son of old Gabriel, and had a claim to the ground. Witness told them the ground was made over to Muller. Subsequently witness heard they had gone to the Paarl, and later on the gate was broken. Witness went to see defendant, who was digging on the ground. He asked defendant how he could do such a thing, and Cyster pushed witness away, and said he had a claim to the ground. He (witness) was never asked to consent to the hiring of the ground by Cyster from the old widow. Witness considered that the value of the building erected on the erf was about £45.

Cross-examined by Mr. McGregor: The plaintiff was not a member of the church. There was many

erf-holders who were not members. Cyster was not a member. Muller had paid the support money in full, that was, the ls. 10d. a month. Witness had heard a rumour that young Gabriel had sold to Cyster. It was common talk. When witness gave the receipt for £77 to Muller, Cyster had already told him that he claimed the property. The names of the new erf-holders were read out at the meetings for the first few years, but this had not been done since 1846. Only the names of those in arrear were read. Muller's name was not read out, as he paid regularly. Old Gabriel's name was read, because he was in arrear. People had transferred their erven to other erf-holders without witness's consent. The witness was further cross-examined at some length with regard to entries in the books, and with regard to the circumstances surrounding his consenting to the transfer to Muller.

Susannah Muller, wife of the plaintiff, said she was the daughter of the late Gabriel van Wyk, who died in 1903. Her mother died in the following year. Witness and her husband went to live at Pniel in 1896, and had lived there ever since. Witness's brother Gabriel left Pniel twenty years ago. Witness and her husband went and lived with the old people, and witness took care of her father and mother, her husband providing for them. Witness's father possessed property at Wellington, which she understood he made over to Gabriel. At any rate, Gabriel was in possession of it. Witness and her husband paid off the arrears to the missionary. Her father said if they did so he would make over the two erven to them. On February 16, 1903, witness's father sent her mother and her mother's sister to Mr. Stegmann. Her mother, on returning, said it was all right. The witness, in the course of further evidence, deposed to defendant having come to her husband and hired part of the erf from him. He paid witness £1 16s. in advance for the first year. That was on May 15, 1903. Witness gave Cyster a receipt. The next year Cyster asked for a little more ground. He was allowed more, and that year he paid £2. Defendant did not pay in 1905. In August of that year, Cyster broke open the gate and took another part of the erf without permission. Cyster, when spoken to about it, said it was his ground. There had previously been a conversation between witness, Mr. Stegmann, Cyster, Kynoch, and Gabriel, at which Cyster said he would take Gabriel's part.

Cross-examined by Mr. Buchanan: Witness let the place to Cyster, and not her mother. The property had been previously made over to witness and her husband.

James Allan Muller, the plaintiff, said he went to live at Pniel in 1896. He

heard the evidence given by his wife on the previous day, and so far as he was personally aware of the circumstances of the matter, he confirmed her evidence. Witness was not present when old Van Wyk asked his wife and sister to go and see Mr. Stegman about the erven, but he knew of what occurred, and thereafter he and his wife regarded themselves as the holders of the erven. Witness remembered Cyster coming to ask for a piece of ground. Witness obtained Mr. Stegman's consent to letting a piece of ground to Cyster, and the thing was fixed up. Old Mrs. Van Wyk had nothing to do with that matter; witness and his wife arranged it all. Cyster made the first payment to witness's wife. In 1904 witness let part of the same erf to a man named Luckie, who paid witness rent.

[Hopley, J.: Is Luckie still there?]

Mr. Burton: No, the defendant took possession of the whole property, and turned Luckie off.

Witness (proceeding) deposed as to the incidents of the breaking of the gate by Cyster and the interview Mr. Stegman had with defendant. Subsequently Cyster cut a hole in witness's wire-netting on the property, in order to carry a fence through. He put up a fence between witness's other property and the erf in question. Witness reported the matter to the police. In December, 1905, witness wrote to Cyster, and the latter, when witness delivered the letter, said: "You won't frighten me with this letter." Next day witness went down to the erf, and Cyster said: "You won't put your foot on the property, or blood will flow." Subsequently witness brought an action in the Magistrate's Court. In March, 1906, while witness was cutting down some trees, Cyster came and told him he must get off the property. Witness said it was his land, whereupon Cyster caught hold of him and threw him to the ground. Witness had been prosecuted for assault, and he was found guilty and reprimanded. Cyster had remained in possession of the property up to the present time. The building Cyster had put up would not cost much to take down and re-erect elsewhere. Witness considered the building to be worth £30 or £40.

In cross-examination, the witness said Cyster was his son-in-law, having married witness's daughter by his first wife. Kynoch married witness's wife's sister.

Evidence was given by a number of other persons, bearing out the statements made by previous witnesses. A son of the plaintiff said that in 1903 Cyster asked him if his father would sell the ground. Upon his father refusing, Cyster asked if Muller would

let the ground. Muller agreed to do so.

Among the witnesses called for the plaintiff was an aged coloured man named David Hontong, who, questioned as to his age, said he was not certain what his age was, but he thought he was about 80 years old. He spoke as to the practice at Pniel in regard to transferring erven. In every case of transfer the superintendent's consent had to be obtained. That rule was well known to everybody at the station.

Mr. Burton closed his case.

Jacobus Cyster, the defendant, said he was a carpenter. His first wife was a daughter of the first Mrs. Muller. She died in 1903, and witness married again in 1904. She hired the land in question from old Mrs. Van Wyk, not from the plaintiff or Mrs. Muller. The old man used this ground for fruit growing. Witness first of all tried to get an adjoining piece of ground whereon to erect a carpenter's shop and furnish him with additional ground, but was unsuccessful. He saw plaintiff's son, who said he had seen his father and grandmother about letting him have a piece of the erf, and that they would see him about it. Afterwards witness saw Mr. and Mrs. Muller, and the plaintiff said he had seen his mother-in-law about the matter, and he thought that she would let witness have a piece of the erf. Subsequently the old woman, together with Muller and his wife, came to the shop. Witness asked the old woman if she would let him have a piece of the erf. There was some conversation, and eventually the old woman said witness could have a piece of the erf for 3s. a month. Witness said he contemplated building, and that he could not take it by the month. She said, thereupon, he could have the land for five years or ten years, as witness wished. Witness asked for a document, but the old woman said he could take her word as her bond. Witness put up a building. The first year's rent was paid for by work which witness did to the Van Wyks' house. The following year—1904—witness paid Mrs. Van Wyk's son Gabriel the rent, and got a receipt from him. That was after the old woman died. Later on young Gabriel asked witness if he would not take over the erf. Witness asked him what he would take for it, and he said he would take £25. After considering the matter for some days, witness went to see Gabriel at Wellington and told him that he would buy the erf. He gave Gabriel £5 and gave him a promissory note for the balance. Witness went and told Mr. Stegman of the transfer. Gabriel went with witness and told Mr. Stegman that he had sold his right to witness. Mr. Stegman said it would be all right. There was a conversation afterwards regarding the ownership of the

house in which the Mullers were living. Mr. Stegman sent for the Mullers, and when they came he told Gabriel that he did not think he had any right to the house in which the Mullers were living. Witness understood then that he had bought the erf in question. The building originally cost £161, and £25 had been since spent in additions. Witness denied that he had broken the lock of a gate. The gate was not locked. Witness simply opened the gate. On the occasion of the alleged assault, witness saw Muller chopping down trees on his (witness's) erf. Witness objected and spoke to Muller, who refused to desist. Witness caught hold of him and pulled him away from the tree. He fell against one of the branches of a tree. Thereupon Muller and another old man who was with him went away.

Cross-examined by Mr. Burton: The superintendent's consent was not required to the transfer of an erf from one resident in the station to another resident. It was necessary only in the case of strangers. Mr. Stegman never told witness that old Van Wyk had parted with his rights to Muller.

Counsel were then heard in argument on the facts.

Hopley, J., reviewed the evidence, and said it seemed to him that the defendant had never any right upon this place save as to the piece leased to him by the Mullers, of which fact he appeared to have tried to take advantage to turn his lease into possession of the whole, using the weak-minded Gabriel as a tool in the matter. It was quite possible he may have thought Gabriel had a right to the erf. It was a very significant thing that the defendant had not called young Gabriel van Wyk. Gabriel had been in court, and could have been called, but the defendant had not called him. Of course, it was obvious that Gabriel had taken money from both sides, but at the same time one would have expected that he would have been put in the box to enable one to determine whether this was a transaction in regard to which he could bear the ordeal of cross-examination. Plaintiff had clearly established the case that he and his wife had acquired the rights to these erven from old Van Wyk, and that the transfer was sanctioned by the missionary, and it seemed to him that the plaintiff's case was a perfectly good one on every ground. That being so, he must give an order against the defendant, and the Court would order that the defendant give up peaceable possession of this erf to the plaintiff within two months. With regard to the buildings, defendant had erected on the erf, his lordship did not regard them as being in the nature of immovables, and it would be ordered in reference to this that defendant remove them from the ground, or that, if he allowed them to

remain, he be paid the sum of £50 as compensation by the plaintiff. For the assault and trespass, defendant would be ordered to pay £10 damages, and he would also have to pay the costs. Plaintiff was certified a necessary witness.

[Plaintiff's Attorneys: Walker and Jacobsohn: Defendant's Attorneys: Buchanan and Boyes.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX V. PAPALLANASOPULO. } 1907.  
Feb. 13th.

This was an appeal from a judgment of the Resident Magistrate's Court, Wynberg. The appellant had been charged with contravening section 6 of Act 13 of 1870, by carrying on a trade without the requisite licence. The summons set out that on the 17th January, at Wynberg, George Papallanasopulo wrongfully and unlawfully, in the Main-road, Wynberg, exercised and carried on the trade of a general dealer, as defined by section 3 of Act 38 of 1887, by exposing for sale sweets, chocolates, biscuits, and nuts, not being the growth and produce of South Africa, without having taken out a licence. He was found guilty, and fined in £5. When the policeman told the appellant that he would be summoned, the reply was that he did not intend taking out a licence. He added that he had taken advice, and meant to test the case.

The Magistrate, in his reasons, said the defence was that the defendant was absolved from the necessity of taking out a general dealers' licence by Ordinance 11 of 1846. But it appeared to him this was inconsistent with section 3 of Act 38 of 1887, and it should be considered repealed by section 1 of the last-named Act.

Mr. Lewis was for the appellant, and the Crown did not oppose.

Counsel said section 8 of Ordinance 11 of 1846, which set out that it shall be lawful to sell fruit, vegetables, milk, eggs, firewood, cakes, or confectionery without taking out a licence for the privilege of so doing, was the only unrepealed section, the rest of the Ordinance was repealed by Act 3 of 1864.

[De Villiers, C.J.: These articles, you say, are confectionery?]

Mr. Lewis: Yes, I say they all fall under confectionery and fruit. The Ordinance provides that you can sell confectionery and fruit without taking

out any licence. Act 38 of 1887, section 3, defines a general dealer as follows: "A general dealer means any person who carries on the trade or business of selling, or offering or exposing for sale, barter, or exchange, any goods, wares, or merchandise, not being the growth, produce, or manufacture of South Africa." The Magistrate reading that and section 1 of the Act, which provides that inconsistent and repugnant laws are repealed, concluded that Ordinance 11 of 1846 was repealed. But he omitted to look at section 4 of the Act of 1887, which provides: "nor shall anything in this Act contained be taken to affect the provisions of any of the following laws," etc. It specially mentions section 8 of the Ordinance 11 of 1846, and we say that section 8 of the Ordinance of 1846 is still in force, and therefore the conviction was wrong.

De Villiers, C.J.: It is clear in this case a mistake was made by the Magistrate through his overlooking the provisions of the 4th section of the Act 38 of 1887. The section contains the proviso: "Nor shall anything in this Act contained be taken to affect the provisions of any of the following laws," and amongst these laws is the 8th section of the Ordinance 11 of 1846, which is still in force. That section reads as follows: "From and after such and such a day it shall be lawful to sell in Cape Town, and from and after the taking effect of this Ordinance it shall be lawful to sell in all places in this colony fruit, vegetables, milk, eggs, firewood, cakes, or confectionery." The appellant in the present case sold fruit, cakes, and confectionery, and consequently he was not liable to take out any licence for the privilege of so doing. The appeal must be allowed, and the conviction quashed.

KADONGA V. NONDIVI. { 1907.  
{ Feb. 13th.

Writ of execution—Attachment  
—Interpleader.

*The respondent brought an action in a Magistrate's Court for the return of certain cattle alleged to belong to the plaintiff or payment of their value. Judgment was given for the plaintiff, and a writ of execution issued ordering the attachment of the defendant's property. In execution of the writ the cattle in dispute were attached, but were claimed by the appellant as being his property. It was proved on the trial of an interpleader*

*issue that the appellant had bona fide purchased the cattle from the defendant without any knowledge of the dispute between the plaintiff and defendant.*

*Held, that as the appellant had been no party to the action for the recovery of the cattle, and that as the cattle had been attached as belonging to the defendant, the appellant was entitled to succeed on the interpleader issue.*

This was an appeal from a decision of the A.R.M. for the district of Stockenström in a certain interpleader suit in which Tom Kadonga was plaintiff, and Sannah Nondivi was defendant.

The plaintiff claimed certain movable property, to wit, one cow and calf, attached on the 24th January, 1906, by the Messenger of the Court. The Court of the A.R.M. declared the cattle executable, and ordered the plaintiff to pay the costs, and stayed execution pending appeal.

It appeared that an action was brought in the Magistrate's Court for the return of these cattle, or their value, and they were attached in the possession of Kadonga by the Sheriff. Kadonga bought the cow and calf from one Peacock, and at the time he bought the cattle he did not know of the civil case coming on for the recovery from Peacock. The Magistrates' reasons for judgment were as follows: Two cows and a calf were given by one Jantje Jacob to Sannah Nondivi, as dowry for her daughter, whom he carried away. This daughter subsequently returned to her mother, and Jantje Jacob accompanied by his brother, Peacock, went to Sannah Nondivi's kraal, and took away the cattle without her consent. On the 11th June last a summons was served on Jantje Jacob, calling upon him to return the cattle or pay their value, £20. This summons was at the instance of Jonas Nondivi, son of Sannah Nondivi, and the case fell to the ground, because it was admitted that the mother and not the son was the owner of the cattle. She therefore instituted proceedings for the recovery of the cattle or their value, £20, and judgment was given in her favour as prayed. Upon attachment being made by the Messenger, two of the cattle—a cow and a calf, the subject of the present action—were claimed by Tom Kadonga as having been sold to him on the 12th June last, but the evidence shows that Peacock had no right or title to the property in question. It would appear that originally he purchased the cow



from the witness, George Winkworth, but he forfeited his right of ownership by permitting his brother Jantje Jacob to deliver the stock to Sannah Nondivi. This was done with his knowledge and consent, in fact, he was present, and took an active part in the transaction. Now the Court came to the conclusion that this cow and calf were liable to execution, as they belonged to Sannah Nondivi, from whom they had been spoliated, and if Peacock had no right to sell them he could not, therefore, give Tom Kadonga a valid title. This appears very much like an attempt on the part of Jantje and Peacock to defeat the claim of the judgment creditor.

Mr. Buchanan (for appellant) submitted that the Magistrate had no authority to issue a judgment in that form. He cited *Meitje v. Matsile* (13 J., 392). The cattle were not removed by force or stealth. Peacock sold them *bona fide* to the appellant. The transfer of the cattle to Sannah was bad on the ground of want of consideration. A marriage contracted in this colony by native custom was illegal. He quoted *Ngquobela v. Schele* (10 J., 346).

[De Villiers, C.J.: But that man took the law into his own hands.]

Mr. Buchanan: The cattle were his. The Magistrate seems to have assumed that they belonged to Sannah. He cited *Voet* (43, 16, 5).

De Villiers, C.J.: In this case it appears that Sannah brought an action against Jantje for the recovery of certain cattle or payment of £20 as the value. Judgment was given for the plaintiff as prayed, whereupon a writ of execution was issued ordering the Messenger to attach the property of the defendant Jantje for the purpose. I presume, of paying £20. Thereupon the present appellant, Kadonga, set up a claim that he was the owner of the cattle, that Jantje was not the owner, that Jantje had sold the cattle to him after he had taken them from Sannah's Kraal, and the sale was clearly proved. If there had been evidence in the present case that Kadonga was a party to any attempt to defraud Sannah Nondivi, no doubt Kadonga would not be entitled to succeed, but there seems to be nothing against Kadonga. As far as one can judge, he bought the cattle and paid the money to Jantje. If Jantje is to be treated as the owner, as he was in the warrant of execution, he being the owner could make a lawful sale to a *bona fide* purchaser, and he could effect a *bona fide* transfer. The Magistrate does not find that Kadonga was not a *bona fide* purchaser. He finds that Peacock, a man who first of all assisted the defendant, and the defendant Jantje were in league, but the Magistrate found nothing against Kadonga. I see nothing on the record to show that Kadonga was anything but a *bona*

*fide* purchaser. If so, the defendant, whose cattle these were, would not, according to the record, have lost his ownership of the cattle, but he could give a valid transfer to Kadonga, and Kadonga was not obliged to allow these cattle to be attached in a suit against Jantje. It is not necessary to consider the question whether the Magistrate was right in giving the judgment in the first instance at the suit of Sannah. It seems that the cattle had been delivered to her as dowry cattle, but upon Jantje's wife deserting him, Jantje had gone to Sannah's kraal and taken away the cattle. It is not quite clear, so far as I can judge, not having read the whole of the record in the previous case, whether the cattle were taken away under circumstances which would amount to spoliation, but Kadonga was no party to that action. According to the record the cattle belonged to Jantje, and if Jantje was the owner Jantje could sell to a *bona fide* purchaser, and as Kadonga was a *bona fide* purchaser he was entitled to retain the cattle, and the Magistrate could not have ordered the execution against these cattle after Kadonga had honestly bought them. For these reasons the appeal must be allowed, with costs in this Court, and the Court below, and the cattle declared not to be executable.

[Appellant's Attorney: C. Friedlander. Respondents in default.]

#### BLOEM V. AURET.

Magistrate's Court—Promise to pay—Liquid debt.

*The plaintiff sued the defendant in a Magistrate's Court on the following document addressed by the defendant to the plaintiff: "Dear Sir,—I undertake to pay you the amount of £38 on the 3rd December next for 8 tollies at £4 15s., bought from you by Mr. Priest."*

*Held on appeal, that the document was a liquid one and that the case fell within the jurisdiction of the Magistrate.*

This was an appeal from the Resident Magistrate's Court for Graaff-Reinet. An exception had been taken to the summons, which called upon the defendant to show cause why he should not pay to the plaintiff the sum of £28 10s., which the plaintiff claimed was due to him by virtue of a written undertaking made and signed by the defendant, for the sum of £38, being the price of eight tollies bought from plaintiff by one



Thomas Priest. The difference in the amount now sued for was due to the fact that only six tollies were sold and delivered. An exception was taken to the jurisdiction of the Court on the ground that the document sued upon was not a liquid document. The exception was upheld, and absolution from the instance was granted, with costs. The Magistrate, in his reasons for judgment, said the plaintiff sued the defendant for £28 10s., which he complained the defendant owed him by virtue of a certain written undertaking signed by the defendant. From the face of the document and the reading of the summons, it was impossible to give a provisional judgment without outside evidence as to the sale of the tollies, the amount for which they were purchased, and the number delivered. He founded his judgment principally on the doctrine laid down in the cases of *Wallace v. Wood* (3 E.D. Reports) and *The Colonial Government v. Whitear* (3 Juta, 242). If, on the other hand, the document was looked upon as a guarantee, then his jurisdiction was also ousted.

Mr. Benjamin was for the plaintiff, and Mr. Bisset was for the respondent.

Mr. Benjamin said that Auret had made himself personally liable upon the document. He cited "Anson on Contract" (p. 62), and *Birkmyer v. Drennell* (1 Sm. L.C., 310). Further, the document was really a promissory note, or, at any rate, it was a liquid document. The cases quoted by the Magistrate did not apply.

Mr. Bisset said that the document could not be a promissory note, as it was not stamped. From the summons it appeared that there had not been a complete delivery. The onus was therefore thrown upon the seller to show that the purchaser accepted a partial delivery, and extensive evidence would be required to show that the plaintiff had not performed his contract. In any event, the undertaking was in the nature of a guarantee; otherwise the words "bought from you by Mr. Priest" could have no meaning. He cited *Holtz v. Supiero* (20 S.C., 426). If the document was an out-and-out undertaking to pay more, there was no consideration for the promise.

De Villiers, C.J.: The plaintiff sued the defendant in the Magistrate's Court of Graaff-Reinet upon the following acknowledgment: "To Mr. D. Blom.—Dear Sir,—I undertake to pay you the amount of £38 sterling on the 3rd December next for eight tollies, at £4 15s., bought from you by Mr. T. Priest.—Yours truly, T. Auret." I am quite satisfied that this is not in the nature of a guarantee or suretyship. It is an out-and-out undertaking on the part of Auret to pay to Blom the sum of £38, the consideration stated being eight tollies bought from Blom by Priest. The considera-

tion, no doubt, was given by Blom to Priest, but that is sufficient consideration for the purpose of entitling Blom to sue upon the note. The only other question is whether this is such a liquid document as to entitle the plaintiff to provisional sentence. If there had been a statement in the summons that £10 had been paid in part payment, and the defendant Auret had been sued for only £28, that would not have disentitled the plaintiff to sue. But although there has been no part payment the plaintiff gives credit to the defendant for part of the debt, and claims only the balance. The defendant is sued here for less than the amount of the document, and the fact that the defendant is sued for less than upon the face of the document cannot give him a right of exception. In my opinion, there is no ground for the exception that this is not a liquid document. The consideration is a certain number of tollies bought from the plaintiff by Priest. If it had said for value received, the defendant would have been liable, and the fact that the consideration is more particularly specified here does not entitle defendant to raise the objection he has raised. It is a written acknowledgment of debt without any conditions. The plaintiff gives credit for a certain amount and he claims only the balance. The appeal must be allowed with costs in this Court, and the case remitted to the Court below to be decided on its merits.

[Appellant's Attorney: G. Trollip;  
Respondent's Attorney: Not on record.]

KRUGER V. HYMAN. { 1907.  
Feb. 13th.

Magistrate's Court—Summons—  
Copy of document on account—10th Rule of Magistrates' Court.

*The plaintiff having sued the defendant in a Magistrate's Court for the price of goods sold and delivered, annexed to the summons an account, one item of which was a certain sum on "an account rendered;" the exception was taken by the defendant on the ground that there had not been a compliance with the 10th Rule of Magistrates' Courts, whereupon the Magistrate gave absolution from the instance with costs.*

*Held, that if particulars of the first item had really been rendered, there could have been*

*no prejudice to the defendant in those particulars not being repeated in the account annexed to the summons; and that the summons ought not to have been dismissed without giving the plaintiff the opportunity of giving such particulars.*

This was an appeal from a decision of the Resident Magistrate of Prieska. The plaintiff (applicant) sued the defendant on an account for goods sold and delivered. There were three items mentioned in the summons, and the first was for £2 9s. 9d., the second for £9 12s., and the third £24 16s. The last two items were fully explained, but the first item was for account rendered.

The defendant's agent took exception on the first item that the defendant was prejudiced in his defence, and the Magistrate, without hearing rebutting evidence, upheld the exception and gave absolution from the instance. In his reasons the Magistrate said the agent for the defence took exception in that his client for a number of years had had business transactions with the plaintiff. He thought the defendant would be prejudiced unless it was specified what the first item was.

Mr. Gutsche was for the appellant, and Mr. Benjamin was for the respondent.

Mr. Gutsche said that the appeal was brought on three grounds: (1) That the Magistrate was wrong in his interpretation of rule 10, schedule (b) of the R.M. Court Act; (2) that the wrong procedure was adopted; and (3) that the Resident Magistrate ought to have gone into the other items of the account. He said that it had been frequently laid down that a defendant should not take technical exceptions when there was no chance of his being prejudiced, and quoted *Yates v. Elliot* (10 E.D.C.).

Mr. Gutsche having been stopped in his argument, Mr. Benjamin said that he could only resist the appeal on the ground that no particulars had been tendered.

De Villiers, C.J.: The plaintiff sued the defendant in the Magistrate's Court at Prieska, for £63 17s. 9d., being the price of goods sold and delivered, as will appear more fully from the account annexed, and annexed to the summons is a fairly long account giving all the details of purchases made by the defendant from the plaintiff. But in regard to the first item of the account, simply states, to account rendered £29 9s. 6d. On the face of it, therefore, there is a statement here that an account for that amount has been rendered. If the defendant had asked the plaintiff before the summons to give full particulars of the £29 9s. 6d., then it would have been the duty of the

plaintiff to have given them. But this is not the course pursued, and when the case comes to the Magistrate an exception is taken under Rule 10 of Act 20 of 1856, and the exception is sustained. This is all that appears on the record: "Judgment, absolution from the instance, with costs." It does not appear that the plaintiff had any opportunity given him of giving the full details of the account rendered, and the case is dismissed. The Magistrate apparently proceeded under the 10th Rule of the Magistrate's Court Act, but that rule only provides that "no case shall be dismissed for or on account of the omission to deliver a copy of any such document, account, or bill as aforesaid in case it shall appear to the Court that such omission has not, in fact and in truth, prejudiced the defendant in respect of his defence." But there is no inquiry whether the defendant was prejudiced. The mere fact that the item simply states account rendered is taken as proof of prejudice. But it is not proof of prejudice, because if it be true that a full previous account was rendered the defendant would not be prejudiced by this portion of this account being omitted. It is clear that the Magistrate erred in this case, and the appeal must be allowed, with costs in this Court, and the case remitted to the Magistrate to be tried on its merits.

[Appellant's Attorney: G. Trollip.  
Respondent's Attorney: Not on record.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

MOGFORD V. ROSENBLATT. { 1907.  
Feb. 13th.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### TRIAL CAUSES.

#### TOWNSEND V. TOWNSEND.

This was an action for divorce.

Dr. Rainsford (for plaintiff) said that he did not see either his attorney or his client in the precincts of the Court, and he had to apply for a postponement of the case until later in the day.

Maasdorp, J., said that his attention had been drawn to the fact that there had been no publication in the "Gov-

ernment Gazette" in this matter, as required by the Rules of Court.

Dr. Rainsford: I think the order was one publication in a Transvaal paper.

Maasdorp, J., said that the point had better be inquired into by counsel.

Later on Dr. Rainsford applied for an extension of the return day to enable publication to be made in the "Gazette."

Return day extended until the 15th April, personal service to be effected, if possible, failing which publication to be made in the "Gazette" in the meantime.

#### COLLINET V. LESLIE.

##### Seduction by minor.

*C., a minor, had seduced L. on a promise of marriage, without having obtained the consent of his natural guardian to the making of that promise.*

*Held, that C. was nevertheless liable in damages.*

This was an action in which the plaintiff claimed £500 damages for seduction.

Mr. Pyemont was for plaintiff; defendant did not appear.

Mary W. Collinet (the plaintiff) said that she was 19 years of age in June last. She had known defendant for the past two years. Defendant promised to marry her before any intercourse took place between them. He was 20 years of age. Witness had given birth to a child on the 7th January, of which the defendant was the father. The affair had caused a split in the family, and in consequence her brother had decided to go to Australia. She asked for maintenance of the child at the rate of £3 a month.

Mary Helena Collinet (mother of the plaintiff) also gave evidence. She said that after she discovered her daughter's condition she went to the gaol at Wynberg and saw the defendant, who was then a convict guard. She taxed him with the matter, and he admitted it, and said that he would marry the plaintiff. Arrangements were afterwards made for the marriage, but the defendant would not marry the plaintiff. Witness also had an interview with the defendant's father, who, however, said that he washed his hands of the affair. For about 25 years witness had been living in Wynberg. Her late husband had held a good position in Wynberg. The position of the family had been seriously affected by this affair.

By the Court: Witness did not know anything as to the means of defendant or his father.

Wm. J. Roberts, of Cape Town (uncle of the plaintiff), said that in November last he went with Mrs. Collinet to the house of defendant's father. Witness spoke to defendant's father, and explained the position of affairs. Defendant said that he was prepared to do what witness suggested. Witness told him that he ought to marry the plaintiff. Defendant's father said that the son had brought this trouble upon himself. Defendant admitted that he was solely to blame for the girl's condition. Later on defendant called at Mrs. Collinet's house, and said that he would marry the girl by special licence in Cape Town. It was necessary that the consent of defendant's father should be obtained. Witness spoke to a subsequent interview which he had with the Chief Justice, and to preparations which were made to frame a petition. He also went to the defendant with a view of getting his signature to the petition. The latter said that he had thought the matter over, and he had decided not to marry the girl, and would rather take the consequences. Defendant added that it would always be a slur upon him that he had half-caste children about him. A letter was received subsequently from the defendant's father in which he said that under the circumstances he should not, as natural guardian of his son, withhold his consent to the marriage. Mrs. Collinet's son went to Australia yesterday solely on account of this occurrence.

This concluded the evidence.

Maasdorp, J., asked counsel if he had any authority as to the responsibility of a minor in case of seduction.

Mr. Pyemont said that he had no authority with regard to a minor not being responsible.

Maasdorp, J., said that there did not appear to have been any lawful promise of marriage before the seduction, because defendant was a minor, and the consent of his guardian had not been obtained.

Mr. Pyemont said that that was so.

Maasdorp, J.: Nothing has been clearly proved as to the means of the defendant. He is described as being a railway porter, and, as to his financial position, no evidence has been given, but I take it that the result is that he is not a man who is likely to be able to pay any very heavy damages. That will be taken into consideration with the other circumstances. In awarding the amount of £400, I take into consideration that that would cover, so far as the claim of the mother is concerned maintenance of the child. The Court will allow her £350 for the maintenance of the child, and £50 for further dam-

ages. Judgment will be for plaintiff for £400, with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant: In default.]

### REHABILITATION.

Mr. Louwrens applied for the rehabilitation of Charles Buttrum.  
Granted.

### GENERAL MOTIONS.

*Ex parte* GABRIEL. } 1907.  
Feb. 13th.

Mr. Palmer moved on behalf of petitioner, who resides at Diep River, for leave to sue her husband, Stephanus Gabriel, *in forma pauperis*, for divorce by reason of his alleged adultery with a Malay woman. It was stated that petitioner had been unable to obtain an affidavit by two householders, residing in the district, as she did not know two householders. She, however, presented affidavits by two labourers.

Maasdorp, J., ordered the matter to stand over until applicant should appear personally before the Court.

*Ex parte* SPRONG.

Presumption of death—Absence.

*The Court will not presume the death of any person merely because he has not been heard of for 7 years. It must be shown on affidavit that all possible efforts had been made to trace him, and the application must be made to the Court by some person directly interested in the inheritance.*

Mr. Lewis moved for an order authorising the Master to assume the death of Carel Christian Frederick Sprong, petitioner's nephew. Petitioner said that Sprong had certain moneys deposited with a company at Malmesbury. In 1899 he left Malmesbury to join the Boers in the late war, and all efforts to trace him had failed.

Maasdorp, J., said that the petitioner was not the heir of the missing man.

Mr. Lewis said that the heir was the man's brother in Germany.

Maasdorp, J., said that there should be some proof of more active steps being taken by those immediately inter-

ested in the estate of Sprong. He also asked for authority for assuming the death of a person who had not been heard of for seven years. Almost the whole of the affidavit on which the application was made was hearsay as to the efforts which were alleged to have been made to trace the missing man.

Mr. Lewis having been heard further, Maasdorp, J.: It is a very serious presumption that the Court is expected to make in this matter as to the death of Carel Sprong. The Court will want the very fullest information of facts before any inference can be drawn. If the necessary facts which clearly point to that inference were sworn to, then the Court would be in a position to say whether under the circumstances it ought to be presumed that Carel Sprong is dead. The affidavit before the Court contains nothing but hearsay evidence. The first step necessary is to make the fullest inquiries for the purpose of tracing Sprong from the time when he was last seen, and the strongest efforts must be made to follow him up to the place whither he was about to proceed. A very bald statement is made that, that place being the Transvaal, a police officer has made every effort to trace him. That is wholly insufficient. The Court will want the strongest evidence as to the efforts that were made, and that evidence must be on oath, and given by the people who make those efforts. That is a very important defect in this application. But another very serious matter is this, that the lady who applies now is not herself directly interested in the inheritance. It appears that there are others more closely related to the deceased who could take up the matter if circumstances of a more convincing character can be placed before the Court. It will still be open to them to make the necessary inquiries to get facts put before the Court on oath, and get such facts proved as would irresistibly lead to the conclusion that Carel Sprong is dead. The application must be refused. If at any future period the parties directly interested wish to bring the matter before the Court, they can do so again. No order will be made.

*Ex parte* ETTMAN.

Mr. Roux moved for an order directing that a certain period during which petitioner had been absent from service of his articles of clerkship should count as service. Petitioner was articled to a Cape Town attorney, and he had been absent from the office from August 22, 1906, until January 14, 1907, a period of 145 days. The reason of his absence was that he was advised to go up-country by a doctor. He asked that a

period of 90 days should be included in his service.

Maasdorp, J., pointed out that the doctor's certificate as to the petitioner's condition should be on oath.

Mr. Roux relied on the case of *ex parte Fraser* (21 Supreme Court Reports, 272).

Order granted directing that 90 days of the period of absence count as portion of continuous service.

#### *Ex parte* ESTATE SLABBERT.

Mr. Howes moved, on behalf of the executrix testamentary in the estate of the late J. J. Slabbert, for leave to mortgage certain property to pay estate debts.

Order granted as prayed.

#### *Ex parte* FOURIE.

Mr. Upington moved for the appointment of a *curator ad litem* to represent petitioner's youngest brother, Petrus Jacobus Fourie, of Calitzdorp, in proceedings to have him declared incapable of managing his own affairs. Counsel suggested the appointment of Mr. Johan S. F. Brink, attorney, Calitzdorp, as curator.

Order granted appointing Mr. Brink as *curator ad litem* for the purpose of the inquiry, citation to be returnable in the Circuit Court, Oudtshoorn, at its next sitting, and to be served on Mr. Brink and the respondent, and Mr. Brink appointed provisional *curator bonis* meanwhile.

#### MEHAFFEY V. BRADY.

Co-executors — Distribution account — Executors' commission.

This was an application upon notice calling upon respondent to show cause why he should not, in his capacity as co-executor in the estate of the late Henry Watson, forthwith file and lodge with the Master the second and final liquidation and distribution account in the estate, and take all the necessary steps to finally wind up the said estate, applicant tendering a sum of £18 14s. 8d. due to respondent as his half-share of executors' commission.

It appeared that the parties were co-executors under the will of the late Henry Watson, hotelkeeper, Salt River. Mrs. Mehaffey is sole heiress under the will. The first account had been lodged by respondent in October last, but he refused to lodge the second and

final account, claiming that he was entitled to payment of the whole of the executors' commission, and not to the one-half share tendered to him by applicant. Respondent said that practically the whole of the administration had been carried out by him under a power of attorney given by applicant, and that it was agreed by applicant that he should receive the whole of the commission. The final account had been prepared, and had been signed by both applicant and respondent as correct. The whole of the moneys in the estate had remained in the applicant's hands.

Mr. J. E. R. de Villiers was for applicant, Margaret J. Mehaffey; Dr. Greer was for respondent, Christopher Brady, attorney, Cape Town.

Affidavits having been read and counsel having been heard in argument on the facts,

Maasdorp, J.: In this case it was the duty of the applicant and respondent, who are executors in the estate of Henry Watson, to lodge with the Master of the Supreme Court a final liquidation and distribution account. It appears that the account is practically completed, except as to an item in reference to which there is a dispute between the parties, and the account cannot be wholly completed until that dispute is adjusted. The applicant now asks for an order of the Court upon the respondent to complete and file the account. He raises the objection that the account is not completed until he receives the commission as executor. He claims to be entitled to all the fees due to executors as his commission, and he claims it by virtue of a power of attorney, which was granted to him by the respondent on the 17th April, 1906. She, on the other hand, alleges that after the power of attorney was granted she changed her intentions with reference to the administration of the estate, and that the power was subsequently withdrawn. Now, it appears that Henry Watson died on the 14th April, and that there was a subsequent agreement between the applicant and the respondent that the whole of the administration of the estate should be left in the hands of the respondent, and after that agreement was made this power that is now put in was given by applicant to respondent. It is also quite clear, upon the affidavit of the respondent himself, that in certain respects the applicant changed her mind. Having resolved at first to refrain from taking out letters of administration, she subsequently informed him that she intended to withdraw her renunciation in that respect, and to take out letters of administration, and the position therefore was wholly changed, and the effect was this: There is a power put in by Margaret J. Mehaffey, otherwise Margaret J. Watson. This is a power given by her



in her private capacity, and not in her capacity as executrix. What the legal effect of such a power may be it is not now necessary to decide. When she took out letters of administration, this power, in my opinion, ceased to have any force. After she took out letters of administration, the only authority of hers that would have had any legal force would have been an authority given by her as executrix. Having become executrix, she was bound to carry out her duties as executrix, and in case she wished to place those powers in the hands of respondent she must do so as executrix. She has not done so, consequently the respondent never had any power at all without her consent to administer the estate after she took out letters of administration. She says that when she discovered, upon its being pointed out to her by a friend, that she had given powers that were altogether too large, she intended to curtail those powers, and informed the respondent of it. Respondent was aware that she was going to give this power to some one else. A power was granted by her to Mr. Powis and Messrs. Michau and De Villiers, and they notified to the respondent that they were prepared to take her part in the administration of the estate. She took her part as far as she was called upon in the administration of the estate, and afterwards Messrs. Michau and De Villiers took over her duties in that respect. It appears from the affidavits they did their duties as far as it was necessary for them to perform them, and they took part in the framing of the account. The conclusion I come to is that this power was not an authority after the applicant accepted letters of administration, and that the respondent is not entitled to commission for any work done by him after that date. The Court will therefore order the respondent to take the necessary steps to complete and lodge the second and final liquidation and distribution account with the Master, upon applicant paying to him £18 14s. 8d., respondent to pay costs.

[Applicant's Attorneys: Michau and De Villiers; Respondent's Attorney: C. Brady.]

*Ex parte KOCH.*

Mr. Douglas Buchanan moved, as a matter of urgency, for an order of arrest against one Aaron Cohen, of Wynberg, pending his providing security for a claim which petitioner had against him. Petitioner had obtained an interdict against respondent restraining him from removing his goods in a tailor's shop, pending an action to be brought for £41 6s. 6d., rent. Petitioner

also had a further claim against Cohen for purchase price of certain land. Information had come to petitioner that it was the intention of respondent to leave the Colony this (Wednesday) afternoon, and that he did not intend to return.

Order granted for the personal attachment of respondent.

KITLEY V. COLONIAL SECRETARY.

Mr. Struben moved for an order authorising amendment of an entry in the Marriage Register describing petitioner's wife as a "spinster" by substituting the word "widow." Counsel said that Mr. Birch, from the Colonial Secretary's Office, appeared to consent. The parties were married in 1897, and the error had been discovered as a consequence of an application by petitioner to be placed on the fixed establishment of the C.G.R.

Order granted authorising amendment of the entry as prayed.

LESTER V. LESTER.

Mr. Palmer moved for an order with regard to the hearing of this case, in which applicant had obtained leave to sue her husband by edictal citation and *in forma pauperis* for restitution of conjugal rights. It appeared that publication had been given in a New Zealand newspaper, and that owing to an error the respondent had been summoned to appear on a *dies non*, viz., Saturday, February 16. It had been impossible within the return day to publish in the "Government Gazette," and a fresh publication had therefore been made, but in that notice respondent was called upon to appear on the 26th February. In view of the confusion which had arisen as to the return day, counsel sought relief on behalf of the petitioner.

Maasdorp, J., said that he would sit on Saturday next, and if the respondent did not then appear, an application might be made for a further postponement until the 26th February.

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and a Jury.]

EVANS V. BUCKNALL STEAM-SHIP LINES, LTD. { 1907.  
Feb. 14th.  
" 23rd.

Personal injury — Negligence —  
Accident — Sea-worthiness —  
Responsibility of shipowners  
— Latent defect — Costs.

This was an action brought by William Cook Evans, an engineer, to recover £2,000 damages from the defendants by reason of injuries sustained while in their service on board the S.S. Ready.

The declaration set out that the plaintiff was a first-class engineer, duly certified as such by the Board of Trade, and that he resided at Cape Town. The defendant company was the owner of the S.S. Ready. In 1905 the plaintiff and defendant executed a certain written contract of service, whereby the defendant employed the plaintiff for remuneration to perform the duties of first-class engineer, and on February 11 he was appointed engineer of the Ready, and proceeded on a voyage from Cape Town to Angra Pequena and elsewhere on the West Coast of Africa. It was the duty of the defendant, under the provisions of sections 457 and 458 of the Merchants' Shipping Act of 1894 to use all reasonable means to ensure that the ship was in a seaworthy condition, and to keep her in a seaworthy condition during the voyage. The ship was sent to sea in an unseaworthy condition, the machinery being in a defective and dangerous condition, to the knowledge of the defendant and the master of the steamship. On the 12th February the machinery was in such an unseaworthy state as to endanger the life of the plaintiff. On the 12th March the bottom and bolts of the low-pressure engine and the connecting rods broke, and struck the plaintiff on the head and on the leg. The plaintiff sustained serious injuries to the head, and a fracture of the leg. He had suffered great pain, and had been put to great expense for medical attendance, and had suffered permanent injury to his bodily health. He had sustained damages in £2,000.

The defendants in their plea said they used all reasonable means to ensure that the ship was sent to sea in a seaworthy condition, and to keep her in a seaworthy condition. Defendants ad-

mitted that on the 12th March the crank pin bolts of the low-pressure engine broke, and in consequence plaintiff was injured. The accident, for which they were in no way responsible, was not due to any failure on their part to use such reasonable means as were by law required to ensure the ship being in a seaworthy condition. The injuries were admitted, and that the plaintiff was unable to serve further under the contract. He was left in the hospital at Port Nolloth, and thereafter he was taken to the hospital in Cape Town. It was denied that the plaintiff was put to great expense for medical treatment, the defendant having voluntarily paid the sum of £162 6s. in settlement of medical expenses incurred by the plaintiff, although they were not legally liable to pay the same. The injuries were caused to the plaintiff through a pure accident.

Mr. Upington (with him Mr. Sutton) was for the plaintiff, and Mr. Schreiner, K.C. (with him Mr. Watermeyer) was for the defendant company.

William Cook Evans, plaintiff, stated he was a duly qualified marine engineer of considerable experience. When he first visited the ship Ready he found the engine-room in a filthy condition. There was a fitter at work removing a pipe. The ship went to sea next morning, and she had not gone far when he found the engine in a faulty condition. He had the ship stopped and removed a defect. The ship proceeded to Angra Pequena, but the engine continued to "knock." He examined the engine on arrival at Angra Pequena, and found there was no lead and other faults. He adjusted the valve at Angra Pequena, and the ship ran much better. They then proceeded to Ichaboe Island, and left the island on the 12th March. About six o'clock in the morning, as he was passing the high-pressure engine, he was knocked unconscious. He lay on deck for a couple of days and suffered great pain. On the 15th he was removed to the engine-room skylight, from where he directed what should be done. The steamer went into Port Nolloth, and he was in the hospital from March to August. Then he was sent to the New Somerset Hospital, Cape Town, where Dr. Fuller opened his leg and extracted an old bone on the 20th September. Up to this time the defendants had paid his medical expenses. Subsequently he had an interview with Captain Clunie and another gentleman, and witness was advised to see a specialist at Home. Witness saw a doctor in Cape Town, and as a result declined to go Home. Then the defendants refused to do anything further. As a consequence of the accident, witness's one leg was shorter than the other, and he could not follow his occupation.

Cross-examined by Mr. Schreiner: Besides what the defendants had paid,

witness was out of pocket for medical expenses. When his attorneys sent a letter of demand a year after the accident he was aware that the defendants were considering his case from a sympathetic point of view.

Dr. Fuller gave evidence as to the injuries the plaintiff was suffering from when he was brought to the New Somerset Hospital. In his opinion, plaintiff would never again be able to perform the duties of a marine engineer with any degree of safety.

Corroborative evidence was given by Dr. Bonenberg and Dr. France.

Thomas Perkins mate of the *Ready* stated he heard a peculiar noise made by the engine on a previous voyage to Port Elizabeth, when a Mr. Caye was engineer. The noise continued when they made the voyage to Angra Pequena until Evans, who was then engineer, did something to the machinery that modified it. Witness described the accident and the condition in which the plaintiff was afterwards found.

John Smith, fireman, who joined the *Ready* shortly after the plaintiff, stated when he first went to the engine-room he found it in a dirty condition. Witness started to clean the engine, and noticed the "knocking" when the ship got out to sea. There was no medicine chest aboard the ship.

Robert John Stewart, who holds a first-class certificate from the Board of Trade, stated he had considerable experience of marine engines. Witness gave evidence on a diagram as to the working of the engine in question.

Mr. Schreiner said that all that was cast upon the defendants under the Act was to take reasonable means to ensure that the vessel was seaworthy. There was no guarantee of seaworthiness, and he did not see by the evidence that there was a failure to take steps. It was a question for the Court to consider whether there was from time to time a case of non-using of reasonable means by the owners of the ship.

De Villiers, C.J., said he was not prepared to say there was no evidence to that effect.

Mr. Upington closed his case.

Captain Thirst, master of the *Ready*, stated that he had been in the employ of the defendant company since 1899. Witness proceeded on the voyage round to Port Elizabeth, and the subsequent trip round the West Coast. A correct log was kept on the voyage. On the way to Port Elizabeth, the then engineer complained of the engine "thumping." The engine had since been overhauled, but she continued to "thump." Any serious report he would put in his log. He did not consider the "thumping" of sufficient importance to enter it in the log. The engineer on the trip to Algoa Bay took his discharge at Port Elizabeth. When the plaintiff arrived at the ship small

repairs were being done to the engine by Messrs. Cunningham and Gearing. Before the accident the plaintiff said that the engine had been carelessly looked after, but the plaintiff never warned witness that the engine was in a dangerous condition. As far as witness knew the ship was seaworthy.

Cross-examined by Mr. Upington: The *Ready* broke down again after the repairs by Messrs. Cunningham and Gearing, and the accident was in the same place as before. The former engineer was very careless about his room. The plaintiff told witness the engineer did not satisfy him. The ship went much better after the plaintiff's repairs at Angra Pequena. On the passage from Angra Pequena to Ichaboe the *Ready* ran so well that witness complimented him. The plaintiff was a most careful and competent engineer. The plaintiff might have told witness that the engine was a "bag of tricks." There was no medicine chest aboard the ship.

George R. Berman, superintending engineer for the Union-Castle Co., stated that in September, 1903, the Assistant Port Captain, Captain Price, approached him with regard to the *Ready*. The vessel had received damages on her way from Port Elizabeth, and was on the slips. Witness and Captain Price made an examination of the vessel. Witness thoroughly overhauled the engines. The repairs were done by Messrs. Cunningham and Gearing, and witness then gave a Lloyds' certificate.

Thomas Smith Price, Assistant Port Captain, stated he acted in 1903 as Lloyds' agent, when Captain Stevens was away. In 1904 the vessel was overhauled, and a Lloyd's "L.C.M." certificate was given.

Cross-examined by Mr. Upington: When she left on this voyage another examination was about due.

Re-examined by Mr. Schreiner: The vessel was not overdue for survey.

Captain Joseph Walter Cook Marter, superintendent of the Canadian and South African Line, stated that the special machinery survey of the *Ready* became due towards the end of 1905. The practice with owners to maintain seaworthiness was to have vessels surveyed according to Lloyds' requirements, and in a great measure they looked to their engineers to report anything that went wrong.

Sydney Gearing, of Messrs. Cunningham and Gearing, Cape Town, stated he had worked on the *S.S. Ready* in 1903. A new propeller was put in, and the cranks and bolts would be surveyed in the course of that work. Just before the ship went on the voyage in 1905, witness's firm was doing some repairs on her. After the accident the broken bolts were sent to witness, and a man was sent up to Port Nolloth to provisionally repair the damage. The material in the bolts was good: the break-

age might have been caused by the screwing of the nuts too tight, or the bearings becoming hot.

After further evidence had been led for the defendants,

Mr. Upington, in argument, dwelt upon the considerations that led the Legislature to pass the Merchant Shipping Act of 1894, which, he said, made an express stipulation that all reasonable means must be used for ensuring that a ship should be sent to sea in a seaworthy condition. Prior to that Act, it had always been possible for the owner of a vessel to escape his liability by what they might call a technical legal point, that he did not warrant the seaworthiness of his ship by his contract with the seaman, and that the seaman went on board the ship and he must take the risk. The idea of the Legislature was to protect a very large working-class and a class exposed to many perils in the service of other people. The two issues of fact which the jury had to consider were these: (1) Was the *Ready* in a seaworthy condition on the 12th February when she put to sea; and (2) were all reasonable means used by the defendant company to ensure her being sent to sea in a seaworthy condition, and kept in a seaworthy condition during the remainder of the voyage. Now, "seaworthy condition" had been defined in *Headley v. Pinkney S.S. Co.* (Appeal Cases, 1894, p. 222), to mean that the ship must be "in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage." On the first point, they had the clearest possible evidence as to the unfitness of the engines. The *Ready* had not proceeded beyond Saldanha Bay when it became apparent that the engines were in a defective condition. Plaintiff managed to get the boat to Angra Pequena, and then he effected repairs which made the engines go better than before, but eventually the inevitable happened, the engines smashed, and the plaintiff was injured. Mr. Upington characterised the defence as "impudent." The defendants pleaded that they had used reasonable endeavours to see that the ship went to sea in an seaworthy condition, and that whole thing was a pure accident. After sundry smashes, the engine broke down, and was brought back to Cape Town for repairs. After the repairs recommended by Mr. Clifford Jones had been carried out the engines had not broken down since. He submitted that it was clear that the defendants had not discharged the duty imposed upon them by the Act to see that the ship was sent out in a seaworthy condition. Counsel dwelt upon the serious character of the injuries plaintiff had sustained, injuries which would deprive him of again earning his livelihood by his profession as a marine engineer, and

he submitted that the damages claimed—£2,000—were not excessive.

Mr. Schreiner said that this was a mixed question of law and fact. He would like first to refer to the law of the case. The law did not, by any means, cast upon shipowners, as the jury had been led to believe, the extraordinary and impossible duty of warranting the seaworthiness of the ship. The Merchant Shipping Act of 1894 did not put such a duty upon the owners. Parliament recognised that the seaman followed a risky avocation. The seaman took his risks in different ways, and the engineer took his risks particularly in the engine room, and there was nothing more required by the Act from the owners than that all reasonable means should be taken to ensure the seaworthiness of the ship for the voyage at the time when the voyage commenced, and to keep her in a seaworthy condition during the continuance of the voyage. The question was: Did the owners of the *Ready* send her to sea, having taken all reasonable means to secure that she was in a seaworthy condition?

Counsel drew attention the fact that the ship was built in 1896; the engines were made in 1896, and the ship stood well in her class at Lloyd's. Her engines had to be subjected to a special survey every four years. The last special survey was made in 1901, and the next special survey was due in 1905, a little while before the incident or accident, whatever they liked to call it, occurred in February, 1905.

Mr. Upington (interposing) said that he understood the defendant's attorney had Mr. Clifford Jones's report in his possession, and he applied for its production.

The report was handed in, and was found to contain a theory that the accident to the engines had occurred through there being too much or too little cushion on the upward stroke of the engine.

Mr. Schreiner said that this report had no bearing upon the present case. It dealt with an accident which occurred some considerable time after February, 1905. It was miraculous how the theory advanced by plaintiff as to the cause of the accident in February corresponded with that given by Mr. Jones as to the later accident.

De Villiers, C.J., said he did not think there was anything miraculous about the fact that two engineers were agreed as to the cause of an accident.

Mr. Schreiner said it was very significant that defendants heard nothing of an action against them for damages until after the second accident had happened in December. The subsequent accident had just made it strong enough apparently to found an action against the defendants. Counsel suggested that the present action would not have been



heard of but for Mr. Jones's report on the second accident in 1905. Great stress had been laid on the fact that the Ready's engines thumped, but the thumping of the engines was no indication of unseaworthiness. Unseaworthiness was one thing; the thumping of the engines was another. What the jury had to decide was whether the company had failed to take reasonable means to ensure the seaworthiness of the ship. It was difficult to see what more they could have done to ensure the seaworthiness of the Ready. There was nothing to show that the responsible officers of the Ready saw anything more that was reasonably necessary to be done to ensure seaworthiness. Had the ship-owners taken reasonable means? He submitted that they had. It was not cast upon the owners to warrant or guarantee the seaworthiness of the ship. Touching on the question of damages, counsel characterised the claim for £2,000 as somewhat extortionate. Again referring to the case of *Headley v. Pinkney S.S. Co.*, he said that case went to show that, where a ship started apparently quite seaworthy, some non-use of equipment on the voyage by a fellow-employee would not give rise to an action. In that case the whole of the law under the Act of 1876 was discussed. The section in the Act of 1876 was embodied in the Act of 1894. He urged that plaintiff could not have any greater rights against the company than another hand could have, seeing that he was the engineer in charge. There was no indication that the company or the master in any way overlooked doing what was reasonably required to be done to secure the safety of the ship during the voyage. There was nothing to indicate that there was a defect in the adjustment of the sliding valve. On the point of latent defect, counsel cited *Redhead v. Midland Railway* (20 Law Times, 628). He also quoted Kay on the Law of Shipmasters and Seamen (2nd edition, pp. 466-7).

De Villiers, C.J., said that a wide issue had been raised by Mr. Clifford Jones's report. That report could not have been put in as evidence. The report related to a subsequent accident, which might have been caused from totally different causes. The question of whether Evans might have seen the report was quite irrelevant. His Lordship warned the jury that they should not be guided in their judgment by sympathy with the plaintiff in an unfortunate accident. What they had to do was to find whether defendants were liable in law. Plaintiff's case was that the Ready was sent to sea in an unseaworthy condition. It was said that there was thumping in the engines before the boat left Cape Town, but thumping was not proof of unseaworthiness. If there were a latent defect the owners could not be held responsible.

Plaintiff had an opportunity of inspecting the engines, he was a competent engineer, and if he attached any importance to it one would have thought he would have made some entry in the log. It was surprising that no examination was made at Angra Pequena of the parts of the engine which were alleged to have caused the mischief. The theory as to the cause now brought forward was not in any of the correspondence. His Lordship thought the log ought to have great weight with the jury.

After an absence of an hour, the Foreman of the jury stated that, by a majority of seven to two, they had found for plaintiff for £500, each party to pay their own costs.

[De Villiers, C.J. (to the jury): You need not find anything as to costs. The Court decides the question of costs.]

Mr. Schreiner: That appears to be a verdict that could be accepted. I was going to put it to your lordship that the jury had better retire to consider the question of the costs, because in the view that each side should pay their own costs, it would not be just to my clients.

[De Villiers, C.J. (to the jury): You see, gentlemen, the question of costs is entirely in the hands of the Court. The Judge will consider the question of costs. If you think that £500 is too much to award, and that the costs should be deducted, then you can reconsider your verdict. You see, if the Court gives judgment for £500, with costs, the result would be that the plaintiff would pay no costs whatever. If each party paid their own costs, then the plaintiff would get less than £500 no doubt.]

The Foreman: That is what the jury intended.

[De Villiers, C.J.: Then, on the other hand, the defendants would pay more than £500. They would have to pay £500 and half the costs.]

The Foreman: Exactly, that is what the jury intended.

[De Villiers, C.J.: The court could treat the finding of the jury in the matter of costs as a recommendation, but it could not be bound by it.]

The foreman said the jury felt that, under the circumstances, they would like to retire again to consider their verdict.

The jury again retired, and after a brief absence, returned with a verdict for the plaintiff for £400.

Mr. Schreiner: May I ask if this also is a majority verdict?

The Foreman: By a majority of seven to two.

Mr. Upington moved for judgment for plaintiff for £400, with costs.

[De Villiers, C.J.: I think the costs should follow the result. Judgment will be for plaintiff for £400, with costs.]



Costs of preparing the diagram of the machinery were also allowed by the Court.

[Plaintiff's Attorneys: Dold and Van Breda; Defendants' Attorney: G. Trolip.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

#### PROVISIONAL ROLL.

GUTHRIE AND THERON V. ( 1907.  
ESTERHUYSEN. ( Feb. 14th.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £250, with interest from 1st January, 1906, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

GRAAFF V. SCHOLTZ, AS EXECUTOR OF ESTATE SCHOLTZ.

Mr. Gardiner moved for the final adjudication of the defendant estate as insolvent.

Order granted.

MILITARY EQUIPMENT CO., LTD. V. BATHURST.

Mr. Alexander moved for a decree of civil imprisonment, with costs, to be suspended upon payment of £1 per month, first payment on March 1, with leave to plaintiff to apply again. The proceedings were brought upon a judgment for £40, for goods sold and delivered, less £18 paid on account, and for £8 16s. 6d. taxed costs.

Order granted.

ROSENBLATT V. MCFARLANE.

Mr. M. Bisset moved for provisional sentence on three promissory notes for £70 15s. 8d., £54, and £128 16s., with interest from due dates of notes and costs.

Order granted.

GOTZE V. ZIEHL.

Mr. Payne moved for provisional sentence on a mortgage bond for £1,000, with interest at the rate of 8 per cent. from the 1st January, 1907, and £7 odd, premiums of insurance paid; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### REHABILITATION.

Mr. Sutton moved for the rehabilitation of Tom Walters under the 17th section of the Insolvent Ordinance.  
Granted.

### GENERAL MOTIONS.

*Ex parte* CROZIER. { 1907.  
{ Feb. 14th.

Dr. Greer moved for leave to petitioner to sue her husband, James Crozier, by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. Petitioner, who resides at Salt River, said that respondent deserted her about February last, saying that he intended to go away, and would do no more for herself and the family. He had been heard of in Scotland last year.

Rule nisi granted, returnable on the 15th April, personal service, if possible, failing which publication in the "Government Gazette" and the "Scotsman."

*Ex parte* WOUTERSEN. { 1907.  
{ Feb. 14th.  
{ Mar. 8th.

Will—*Fidei commissum*—Failure of fidei-commissory heirs.

*L. had instituted as her heirs inter alios the children of P. W. and S. W. with fidei commissum to their children per stirpes upon whom the inheritance was to devolve free and unencumbered. All the issue of the said fiduciaries had died without issue. P. W. was now 65 years of age, and it was proved to the satisfaction of the Court that he was now impotent.*

*Held, that he was entitled to receive his share of the inheritance free and unencumbered.*

Dr. Greer moved for an order declaring that petitioner, who resides at Caledon, is entitled to receive his share in certain estate free and unencumbered by a *fidei commissum*. Petitioner said that by her last will and testament, dated February 13, 1902, Maria Magdalena Johanna Loedolff instituted as the heirs to one-half of the residue of the estate the children of Pieter Hendrik Woutersen and his wife Sophia Woutersen (born Cloete), but burdened the said inheritance with a *fidei*

*commissum*, so that the interest only should be paid to such children, the capital devolving free and unencumbered upon the descendants of the children of Pieter Hendrik Woutersen by representation and *per stirpes*. Petitioner was a son of the late P. H. Woutersen and his spouse. He was married, and was now 65 years of age. There had been five children of the marriage, but all had died in their childhood, the last having been born 17 years ago. An affidavit was also sworn by a medical man in support of the application. Dr. Greer submitted that petitioner under the will had taken a fiduciary interest in the estate, and it had vested in him, and there had been a failure of the *fidei commissary* heirs. According to the evidence before the Court, there appeared to be no possibility of future issue to the petitioner. Counsel quoted Voet 36, 1, 26 (McGregor's Translation, pp. 64 and 65), but said that he had been unable to find any direct precedent for the present application.

[Maasdorp, J.: I should like to look further into the matter, and if you can find further authority you may mention it. At present the application will stand over for further consideration. If the Court wishes to hear further argument, you will be notified.]

*Postea* (March 8th.)

Maasdorp, J.: Maria Ludolff, by her last will, appointed the children of Pieter Woutersen and Sophia Woutersen heirs to one-half of the residue of her estate, "with the proviso that these inheritances shall severally be burthened with *fide commissum*, as I do hereby burthen them, so that the interest only shall be paid to such children, the capital devolving free and unencumbered upon their descendants by representation and *per stirpes*." The applicant, Pieter Woutersen, is one of the heirs above mentioned. He was married in 1875, and had five children, all of whom died in their childhood. He is now 65 years of age, and says that for the last 17 years he has suffered from acute attacks of rheumatism and gout, which have rendered him sexually impotent, and incapable of procreating any more children. Upon the ground that there is a total failure of *fidei commissary* heirs, he now claims to be entitled as fiduciary heir, to his share of the residuary estate, free and unencumbered. The statement made by the applicant concerning his physical condition was supported by medical testimony, but in view of the fact that the Court always requires very clear evidence of such physical incapacity, I directed that further evidence on that point should be adduced. Such evidence has been furnished, and I am

satisfied that the permanent impotency of the applicant has been proved. The question now arises whether he is entitled to receive from the executors his share of the inheritance free and unencumbered. The executors do not oppose the application, but are prepared to submit to the judgment of the Court. The only passage in the text-books dealing with a similar question, that I have been able to discover is the following (Voet, 36, 1, 15): "But it is agreed that the mere fact that the male and female fiduciary are not in the nature of things capable of procreating children, whether by reason of age in the female, or a physical impediment in the male, does not make it obligatory on the fiduciary to restore the trust property left subject to the condition, 'if he die without children,' for it is not merely the absence of children which is involved in the condition and ought to be an existent fact, but also the death of the fiduciary." From this passage it may be inferred that if only the absence of children formed the condition, then the fact that a man has no children, together with satisfactory proof that he cannot possibly have any because of physical defect, would establish that condition. In the case mentioned by Voet the children stood between *fidei-commissary* heirs and the fiduciary, in the present case the children stood between their father, the applicant, and his full and free enjoyment of the property. The death of the children that were born and the impossibility of the procreation of any more children by the applicant amounts to a total failure of *fidei-commissary* heirs. This is not a case like the one cited above where upon the presumed absence of children there arose a conflict of rights between the fiduciary and others. The only person interested in this case upon the failure of children is the applicant, and I am of opinion that he is entitled to receive his share of the inheritance free and unencumbered. The cases of *In the Estate of Meyer* (13 Supreme Court, 2) and *Van Reenen v. Estate of Vink* (15 Cape Times Reports, 324) cited at the bar have some bearing upon this case, but are not directly in point. In terms of the prayer of the petition, the Court will declare that the petitioner is entitled to receive from the executors his share of the estate of Maria Ludolff, free and unencumbered with the burthen of *fidei commissum*.

[Applicant's Attorney: J. C. de Korté.]

*Ex parte* INDWE MUTUAL BUILDING SOCIETY. 1907. Feb. 14th.

Mr. Louwrens moved for a certain rule nisi to be made absolute calling upon

the respondent (Gert Johannes Botha) to show cause why transfer of the property mentioned in the rule should not be granted in favour of the applicants. Substituted service of the rule had been given, efforts to communicate with respondent in Johannesburg having failed.

Rule absolute.

*Ex parte* ESTATE VAN DER WALT.

Mr. Pohl moved on the petition of the trustees in the insolvent estate Van der Walt, of Philip's Town, for a commission to issue to examine the insolvent and others as to his transactions since his marriage.

Order granted appointing the Resident Magistrate of Hopetown as commissioner to examine the witnesses named in the petition.

RYNHOUD V. RYNHOUD.

This was an application brought by Mary A. Rynhoud against her husband, George William Rynhoud for payment of £50 to enable applicant to institute proceedings against him for divorce on the grounds of his adultery, or, alternatively, for judicial separation on the ground of his cruelty, neglect, and abusive language.

The affidavits were to the effect that applicant is a nurse at Robben Island, and respondent is employed as a car conductor by the Tramways Co. The parties were married in community. The applicant alleged that respondent had been guilty of misconduct with servants and others. She said that respondent had endeavoured to induce her to become a prostitute. Applicant said that she was without means with which to institute her action. Respondent denied that he had been guilty of improper behaviour, and made counter allegations against his wife's conduct. He said that he was not in a position to pay £50 or any sum whatever to enable applicant to bring her action. In her replying affidavit, applicant said that the allegations made by respondent in regard to her conduct were false.

Mr. Alexander was for applicant; Mr. J. E. R. de Villiers was for respondent.

Mr. Alexander argued that the Court should order respondent to pay over to the applicant a sum of at least £10.

Maasdorp, J.: The point the Court has to consider in this case is whether an order granted for the relief of the applicant in this case would be of any use to her. The respondent says that he is not in a position to contribute anything whatever towards the cost of the action contemplated by his wife. His bare statement to that effect would not have been sufficient, but it appears that it is corroborated by the fact that there are

now two writs of civil imprisonment against him, the execution of which have been suspended pending the payment by him of certain instalments. If anything is now done by the Court to prevent the payment of these instalments to these creditors, the result will be that the writs of civil imprisonment would be executed against the respondent, and then he would be in a wholly hopeless position. He seems to earn something like £3 a week, but out of that he is supporting three children, and if he were now ordered to pay any substantial amount to the applicant it would be to the injury of the children, and he would be unable to support them. The only reason why the application is refused now is that it appears clear that the respondent could not obey any order made by the Court for contribution towards his wife's costs of the action. There is a reference made to an estate that he might be entitled to in the near future. There is no information before the Court as to its value, and he himself says that it is likely to be of very little value, if not entirely worthless. There is not sufficient information before the Court now that the respondent has sufficient means to do anything for the applicant in the matter. If at any future time it should appear that the estate is of any great value, then further application may be made, if at that time a further application would be the proper course to take. If the applicant has no means to carry on her action, there are other provisions of the law which she might take advantage of, if the Court considers that she is entitled to do so. Application refused, no order as to costs.

JAMIE V. ADAMS.

This was an application brought by a Malay widow against one Abaas Adams, to have him removed from office as executor testamentary in the estate of the late Machomet Jamie, after filing an account of his administration, and also to have him interdicted from disposing of the harness factory at Mowbray, belonging to the said estate.

Several affidavits were read, in which it was alleged that respondent was totally unfit for the duties of his office, and that he was not properly looking after the interests of the widow, who enjoys the usufruct, and after the interests of the heirs. Respondent denies these allegations.

Mr. Alexander was for applicant; Mr. Pohl was for respondent.

After hearing Mr. Alexander in argument on the facts,

Maasdorp, J.: One portion of the application is with reference to the removal of the respondent as executor. It is therefore, necessary for the applicant to put

forward sufficient grounds for such removal, and I am not satisfied that the grounds upon which the Court would consider it proper to remove the executor have been placed before the Court. Amongst these it might be proved that the respondent has been guilty of misconduct. Well, there is a good deal of conflict upon the evidence on that point. He is certainly charged with misconduct by the applicant, but the question is, whether, upon the affidavits, the Court will accept it that misconduct has actually been proved. One thing is perfectly clear, at one stage of the proceedings, when he found he was not quite capable of administering the estate without advice, he consulted Messrs. Herold and Gie, and actually gave them a general power of attorney to act for him in the matter. He, therefore, took what he considered to be a step to secure good advice for the administration of the estate, and from the affidavit of Mr. Herold, it would appear that the attorneys were perfectly willing at all times to aid him in administering the estate properly. A question has been raised as to whether the respondent is not really incapacitated from carrying on the administration of the estate, and the contention of counsel, based on the affidavits, amount to this, that he does not appear to be a very good man of business, but he has not the incapacity that is referred to in law, or in the cases that have been cited. If a man is capable of managing his own affairs, and he is selected by the testator as a fit and proper person to manage his affairs, then such a person is not incapacitated from doing the business, although it may be proved that he is not a good business man, and although it may be proved that he is not quite capable of carrying on some complicated matter in which the estate may be interested, in a very business-like manner. Executors are always expected to take advice in matters in which they find they cannot safely use their own judgment, and if an executor is removed simply because it is alleged that he cannot manage the whole of the administration of the estate, there are many executors that are appointed daily in this country who would have to be removed under the circumstances; therefore, the application for the removal of the executor will be refused. Then there is a further application that this executor be prevented from disposing of a certain business which belonged to the testator. In a case of this kind the executor must do his duty and deal with the assets of the estate in a proper manner, using his own judgment. It is quite true that there may be property of such a character belonging to the estate that in law the executor may not be at liberty to dispose of it, and there may even be property which the

Court may prevent him from disposing of when it appears that there is nothing to be gained, and that it may be to the loss of the heirs, but here there is a business, and the question arises whether that business shall be continued. It is impossible for the Court to become a party to conducting a business which the executor may consider it better to dispose of in the interests of the estate. If the Court were now to grant an order that that business should be carried on it would be taking upon itself the responsibility of seeing that the business was properly carried on in the future, and it is impossible for the Court to do that. The executor thinks it will be advisable to cease carrying on that particular business, and he has taken advice, and the advice seems to agree with his opinion. The only question now is whether the applicant is likely to suffer any detriment by the conduct of the respondent in selling this property. The applicant can protect herself by securing the business if she wishes it carried on. If the applicant were the only party interested, then she would have the right to claim that she should be allowed to carry it on in her own interests, but she is only the usufructuary, and the executor has to protect the *fidei commissary* heirs. It is stated now that before the sale takes place, if it is still thought advisable on the tenders that come in not to carry on the business, the applicant will be communicated with, and she will be in a position to protect her own interests by taking over the business or making any other arrangement which she and the executor may then think fit to be made. The application must be refused, and, under the circumstances, it must be refused with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BURGER V. COLYN. } 1907.  
Feb. 15th.

This was an action brought by the plaintiff to have the defendant ordered to remove a certain kraal erected on the plaintiff's land, and for an interdict re-

straining the defendant from erecting a kraal on any portion of the land other than on that appointed by the plaintiff, and for £50 damages, with costs.

The declaration set out that the plaintiff was a farmer of De Doorns, in the division of Worcester, and the defendant was a butcher residing on the same property. In May, 1902, the plaintiff sold to the defendant a certain portion of the farm, and it was agreed between the parties, in consideration of the sale the defendant should have certain privileges over a certain portion of the farm of the plaintiff, one being a kraal for his cattle. Transfer was passed in October, 1902. About November, 1905, the defendant began to construct a kraal on the plaintiff's land at the point marked "XX" on the sketch. There were two suggested positions for the kraal; the plaintiff said it should be at "X," and the defendant said it should be at "XX." The plaintiff objected to the construction of the kraal at that point, whereupon the defendant requested the plaintiff to point to another spot for the purpose of his kraal. The defendant did not demur to the point "X" pointed out by the plaintiff. Shortly afterwards he broke down the kraal and proceeded to erect one in spite of plaintiff's protest at "XX." Plaintiff contended that the defendant was bound according to the agreement to accept the point for the kraal at "X," and that he was not entitled to insist upon a passage to the main road over plaintiff's land.

The defendant in his plea said that at the time of the conclusion of the agreement there was in existence a kraal at the point marked "XX" on the plan. The plaintiff about the same day pointed out the stand or kraal to be used by the defendant in terms of the agreement. In 1902 the defendant let this kraal to T. D. Colyn, who used it until 1904, when he (Colyn), with the defendant's knowledge, partially destroyed the said kraal. In 1904 the defendant took possession of the kraal, and in 1905 he was compelled to accommodate certain live-stock, and thereafter he proceeded to complete the kraal at "XX." Defendant consented to the erection at "X" on condition that he had access to the road, and plaintiff agreed. In March, 1906, the defendant proceeded to erect a kraal at "X," and while there engaged the plaintiff repudiated the agreement, notwithstanding several demands made by the defendant. The defendant thereupon reconstructed the kraal at the point "XX." He denied the plaintiff had any right to point out a kraal at "X."

Mr. Russell appeared for the plaintiff, and Mr. J. E. R. de Villiers appeared for the defendant.

Evidence having been heard, and counsel heard in argument on the facts, Maasdorp, J.: The plaintiff takes up

the position that the defendant is a trespasser on a portion of his land, shown on the plan annexed to the declaration, and prays that he should be removed from that land. The defendant states that he entered into an agreement of sale whereby, amongst other things, the plaintiff granted him the right of a stand for his cattle on plaintiff's property, and he says that after that agreement was made the spot "XX" shown on the plan was assigned to him as the place where he was to erect his stand. Now the main question is whether that spot was actually agreed upon by both parties as the one upon which the servitude with reference to the stand should be exercised. This assignment is alleged to have taken place some little while before the surveyor came to survey the farm, which was towards the end of the year 1902. The defendant says on that occasion he asked the plaintiff what spot he would assign to him so as to settle that part of the agreement, and in answer he states that the plaintiff said he could use that spot then occupied by his brother. This is denied by plaintiff. The decision will depend upon the conclusion which the Court arrives at on the evidence as to what occurred at the interview, and that will settle the whole matter. There is a conflict here between the plaintiff and defendant on the question as to whose evidence should be accepted. In cases of this kind, the Court will always inquire upon whom the burden of proof lies, and then, if that question has been decided and the question of the facts remains doubtful, then the person upon whom the burden of proof lies must necessarily fail. In this case it is the desire of the defendant to establish a servitude over the property of the plaintiff, and, in my opinion, the burden of proof lies upon him to establish it as against the ownership of the plaintiff. If, as a result, the question remains doubtful whether the defendant or plaintiff has given the correct version of what took place a little while before the survey took place, then the defendant, in my opinion, must fail. It was stated in evidence that the kraal now in dispute is one that was constructed by defendant's brother and constructed in circumstances having no reference to the defendant himself. The defendant's brother states that he made a separate agreement with the plaintiff whereby he acquired special rights for himself, and at the time when he made the agreement he asked the plaintiff for a place to erect a kraal, and that it was in consequence of that agreement that the kraal came into existence. One thing is perfectly clear, that the defendant himself had nothing to do with the construction of the kraal, whether it was constructed in May, 1902, or before that. The defendant himself never took part



in that construction. When the spot was selected, he had no interview with the plaintiff, and when the spot was taken possession of by his brother, it was not assigned to him as a spot to be used under the servitude. For some little while his brother occupied this spot after purchase, and he never troubled himself to inquire where he could make his kraal. The brother continued to use that kraal, and the defendant himself seems to have thought, notwithstanding that when he had an interview with Mr. Burger, that Mr. Burger would assign him another kraal. So up to that time that particular spot had not been settled in either plaintiff's, defendant's, or his brother's mind as the spot to be set aside for a kraal. Upon that point there is some corroboration of defendant's evidence, in the fact that the surveyor's attention was called to this kraal, and the surveyor actually, at the request of the plaintiff, gave some indication of the position thereof upon the plan. There may be something in that, but it is not conclusive. His Lordship (continuing) said he was not prepared to accept the evidence of the defendant and reject that of Mr. Burger and of the defendant's brother. The Court at present had not to decide what spot would satisfy the defendant. He (his lordship) might express the view that that spot which is sufficient to serve the purposes of the servitude, and one that was the least inconvenient to Mr. Burger, would comply with the agreement. That spot must be on plaintiff's land, and even if it abuts upon defendant's ground, it may satisfy the condition of the agreement.

Judgment was given for the plaintiff, with costs, under "A" of the declaration. Plaintiff was also allowed his personal expenses as a necessary witness.

### THIRD DIVISION.

[Before the Hon. Mr. Justice LAURENCE.]

*Ex parte* INSOLVENT ESTATE ( 1907.  
VAN DER WALT. ( Feb. 15th.

Mr. Pohl moved for an amendment of an order granted yesterday in the matter of the application of the trustee in the insolvent estate of Van der Walt for a commission to examine certain witnesses. Mr. Justice Maasdorp had appointed the Resident Magistrate of Hope Town as commissioner, and counsel now said that it would be more convenient for the witnesses generally if the Magistrate of Philip's Town were appointed commissioner, and he asked that the latter be substituted.

Laurence, J., said that the Registrar would mention the matter to Mr. Justice Maasdorp, and if he acquiesced the order would be amended as desired.

### PROVISIONAL ROLL.

WICHT V. HARRIS

Dr. Greer moved for a provisional order of sequestration to be superseded. Provisional order superseded.

CLARKE AND BORNE V. LEVI.

Mr. Lewis moved for a provisional order of sequestration to be discharged. Provisional order discharged.

HOFFMAN V. TRUSTEES GOOD HOPE FUNERAL ASSOCIATION.

Dr. Greer moved for provisional sentence on two mortgage bonds for £400 each, £27 3s. insurance premiums, bonds due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Mr. Close (for defendants) said that he did not oppose provisional sentence, but he had to apply for execution to be suspended, the association having petitioned the Court for a winding-up order.

Dr. Greer said that he should appear on behalf of one of the largest creditors and contributories to oppose the winding-up, and he should have to ask the Court to allow a postponement.

Provisional sentence granted, and property executable, execution to be suspended until the application for the winding-up of the respondent company is disposed of.

### ILLIQUID ROLL.

PRINCE, VINCENT AND CO. ( 1907.  
V. DE BRUYNS ( Feb. 15th.

Mr. Howes moved for judgment under Rule 329d for £259 19s. 11d., balance of account for goods sold and delivered, with interest *a tempore morae*, and costs. Order granted.

BAWOO V. SHAMSODIEN.

Mr. Close moved for confirmation of a writ of arrest granted under Rule 8 on the 13th instant. Plaintiff said that defendant was indebted to him in two sums of £8 and £16, moneys lent and advanced on the 12th June, 1905, and the 27th September, 1905, respectively, for which no security had been given. The defendant was arrested when he

was about to leave the Colony, and he had been released on a bail bond, but had not entered appearance. Counsel submitted that he was now entitled to formally apply for confirmation of the writ, defendant having entered into a bail bond.

Laurence, J., however, ruled that the merits of the case must be gone into.

Dr. Greer (for defendant) read an affidavit, in which his client admitted that he had intended to leave the Colony, but said that he was only going away for a holiday, and that he had arranged for his business in Woodstock to be continued in his absence. He denied that he was indebted to the plaintiff in the sum of £24 or any other amount.

Mr. Close having been heard in argument.

The case was ordered to stand over until Thursday next, plaintiff to file replying affidavits not later than Tuesday next, question of costs to stand over.

Subsequently the case was withdrawn by consent, each party to pay his own costs.

#### GENERAL MOTIONS.

##### ALIE V. MAKWENA.

Mr. Douglas Buchanan moved for a certain rule nisi to be made absolute calling upon respondent to show cause why an order of ejectment should not be granted against him in respect of certain land at Uitenhage.

Rule absolute as prayed.

##### *Ex parte* LIQUIDATOR, SOUTH AFRICAN GENERAL WORKERS' UNION.

Dr. Greer moved, on the petition of the liquidator, for leave to sell certain articles on the premises occupied by the company. The sole assets of the company were cigarette machines, a motor, a quantity of cigarettes, and tables and benches, and, by reason of their remaining on the premises, further rent was accruing. The rent now owing was £119. Petitioner asked for power to sell the articles or deal with them in such manner as may seem to him meet. The return day of the rule placing the company under winding-up order has been fixed for a date in April.

Laurence, J., said that he could not grant such large powers on the present application, but he reserved leave to petitioner to apply to Mr. Justice Hopley, before whom the original application was heard. No order at present.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice LAURENCE.]

NOLTE BROS. V. KRAMER. { 1907.  
Feb. 18th.  
" 27th.

#### Sale and delivery—Repudiation—Acceptance.

*The defendant sent an order to the plaintiffs for chaff to be delivered immediately on a railway truck at R. siding for conveyance to Pretoria. The plaintiffs agreed to execute the order, but delayed for five days in delivering the chaff in the truck and then informed the defendant that the chaff was being so delivered. The defendant in reply complained about the delay, and intimated that there would be unpleasantness between him and the real purchasers at Pretoria, but he did not repudiate the sale. The plaintiffs accordingly took no steps to stop the conveyance of the chaff to Pretoria. Seven days after the delivery the purchasers at Pretoria informed the defendant that they refused to accept the chaff, whereupon he also repudiated.*

*Held, that although the defendant might, on being informed of the delivery five days after the sale, have refused to accept the chaff, yet that, having allowed the chaff to be delivered on the truck and conveyed to Pretoria without definitely repudiating the sale, it was too late for him, after hearing from the purchasers at Pretoria, to repudiate, and that the plaintiffs were entitled to recover from him the price of the chaff.*

This was an appeal from a judgment of Mr. Justice Buchanan, sitting as a

Divisional Court, in an action brought by appellants against defendants to recover a certain sum upon an order for the supply of chaff.

[For a full report of the case in the Court below, see 16 C.T.R., 819.]

Mr. Justice Buchanan's reasons for his judgment were as follows:

The plaintiffs and the defendant carry on different businesses as produce dealers, and in so doing take orders for the despatch of produce to persons in the Transvaal and elsewhere. The plaintiffs and defendant had had many dealings together before the one involved in this action, all of which seem to have been satisfactory, and which at the time of this dispute left a balance of £3 13s. 3d. in favour of plaintiffs. This amount forms the first item of the account sued upon. There is no dispute on this item, as defendant before action tendered payment, and now pleads the tender, and for this amount judgment was given for plaintiffs.

The dispute between the parties is as to the second item of the account, for £24 16s. 10d. for 330 bales of chaff, alleged to have been sold and delivered by plaintiffs to defendant on the 31st October last.

The circumstances attending the transaction between the parties is to be found recorded in the telegrams and letters put in. On the morning of the 26th October defendant in Cape Town telegraphed to plaintiffs at Somerset West respecting a truck-load of chaff ordered to be sent to Prieska: "Has chaff been despatched," and then added: "Can you forward another bogie immediately? Reply sharp. Will instruct." To which plaintiffs replied: "Forwarding chaff now. Can forward another bogie. Instruct to-day."

On the same morning defendant replied. "Forward bogie chaff Hirschowitz and Co., Pretoria. Very urgent." (This is the load of chaff in question in this suit.)

And in a letter written at once confirming the telegram he wrote: "Hoping to have advices of despatch at latest by Monday next."

These communications passed between defendant at Cape Town and plaintiffs at Somerset West.

Plaintiffs had a produce store at Rust Siding on the branch line to Moorreesburg, and on the same day one of the plaintiffs at Somerset West, who had received defendant's order, forwarded the same to another of the plaintiffs at Rust Siding. On the 27th October plaintiffs wrote to defendant: "Your order for a further bogie chaff will be attended to at once. We have already given our representative at Rust Siding instructions to forward on same sharp."

On the 28th defendant replied: "I trust that the order I gave you yesterday" [should have been day before]

"to Pretoria has been despatched." No answer was given by plaintiffs. On the 30th, in a letter to plaintiffs, defendant wrote: "I hope that you have forwarded the chaff to Hirschowitz and Co., Pretoria, as I have no further information from you in regard to its despatch." At the foot of this letter appears a pencil memo., stated to have been written by defendant's clerk, as follows: "If you cannot do the chaff please wire at once."

Up to this date the plaintiffs had no chaff on hand to fulfil the order, but on that day, which was Monday, one of the plaintiffs went to Moorreesburg to try and buy chaff, and on 31st October he bought a load from Stark and Co., which he loaded on a truck the same day. There was telegraphic communication with Moorreesburg, though not with Rust Siding. On the 31st October plaintiffs wrote from Somerset West: "We have just received telegraphic advice that Hirschowitz and Co.'s chaff is being loaded." This letter reached defendant on the 1st November, when he at once wrote: "I am very much disappointed to learn that the truck of chaff for Hirschowitz has not yet been despatched, as when I gave you the order I wished it to be sent off at once, seeing that the conditions were from Hirschowitz and Co. that the chaff was only to be forwarded if it would have immediate despatch. It is now several days since I gave the order and I am afraid that it will cause some unpleasantness between Hirschowitz and Co. and myself." The railway consignment note states that the chaff was loaded on the 31st, and was consigned by plaintiffs direct to Hirschowitz and Co., Pretoria. The consignment note is signed as received by plaintiffs on the 4th November, and was sent on to defendant. On the 7th November defendant telegraphed to plaintiffs: "Hirschowitz wires refuses acceptance chaff owing delay forwarding wire instructions sharp." Thereupon further correspondence ensued. It was not disputed that Hirschowitz and Co. were justified in refusing to accept the chaff, and the question was whether, under the circumstances, defendant should be compelled to pay for the same.

I held that defendant was justified in coming to the conclusion that his order had been executed at once, especially as no answer was sent to his repeated letters in which he assumed that the chaff had been despatched. There was nothing in the nature of an acceptance of delivery by defendant though I have little doubt that both plaintiffs and defendant had hopes that the chaff might be accepted by Hirschowitz and Co.

The plaintiff's first telegram might be read as an intimation that they were in a position to despatch the chaff on the 26th, the day of order, and it was

their duty, when they discovered they had no chaff to deliver, and had received the repeated communications from defendant, to have let defendant know the true state of affairs.

They did not do so, and it was only after they had loaded the chaff and consigned it to Pretoria that they informed defendant, who at once intimated that unpleasantness might result. I accordingly on this item of the account gave judgment for defendant with costs.

Mr. Burton was for appellants (Nolte Bros.); Dr. Greer was for respondent (R. Kramer).

Mr. Burton said that the plaintiffs, who were produce dealers at Somerset West and Moorreesburg, claimed £28 10s. on an account for goods sold and delivered. There was a tender of £3 odd, representing certain admitted items, and the dispute was narrowed down to a question of £24, which was the price of certain chaff that had been ordered by the defendant, who was a produce broker carrying on business in Cape Town. Defendant pleaded that on October 26, 1905, he instructed plaintiffs to forward immediately, as a very urgent order, certain chaff, as per item of the account to Messrs. Hirschovitz and Co., at Pretoria, in the Transvaal Colony. It was of the essence of the contract that the chaff should be forwarded forthwith, and plaintiffs so accepted the order. The chaff was not despatched from Rust Siding until November 2, 1905, and did not arrive at Pretoria till November 7, 1905. Hirschovitz and Co. thereupon refused to accept delivery of the chaff, by reason of the delay in despatching, and as a result, defendant likewise refused to accept delivery, and forthwith notified the same to plaintiffs. Plaintiffs, in their replication, said that the order was executed with all reasonable despatch. Counsel submitted that the despatch on the Tuesday was a reasonable despatch under the circumstances. The plaintiffs missed one possible train. Defendant did not cancel the order when it was brought to his notice that the chaff was being loaded on the Tuesday. It was only after Hirschovitz had declined to accept the chaff that the defendant cancelled the order. Plaintiffs had got nothing to do with Hirschovitz, the order was from defendant, and if he wanted to cancel the contract it was his clear duty to do so at once, and thus they might have stopped all this expense of the chaff going to Pretoria.

[Maasdorp, J.: When do you say there was acceptance of the chaff by the defendant?]

Mr. Burton: The acceptance was by defendant here in Cape Town, when he received word that they were loading the chaff. Defendant, in his evidence, said he would not have complained if Hirschovitz had not complained.

[De Villiers, C.J.: Does not the letter that defendant sent mean that he accepted conditionally?]

Mr. Burton submitted that it was a tacit acceptance. It would be straining language to say that the defendant's letter was an intimation to the plaintiff that he would only accept, knowing that they were loading up at Rust Siding, if Hirschovitz and Co. accepted. Although there was some delay, after the attitude defendant had adopted on the 1st November, he was not, in law, entitled to say that he did not accept the goods.

De Villiers, C.J., informed Dr. Greer that the only part of the case to which he need address himself was as to the construction of the defendant's letter of November 1, 1905, whether that was not a waiver on the part of the defendant of his right to insist upon immediate delivery?

Dr. Greer submitted that appellants knew that the order was to be despatched to Hirschovitz and Co., of Pretoria, and, therefore, the acceptance must be at Pretoria. He made it clear in his letter that the delay had been unduly great, it was not an acceptance on the part of the respondent of the late despatch made by the appellants in sending on the chaff, but it was an intimation to them that they knew this chaff was for Hirschovitz and Co., and the probability was that they would make trouble about it, and if they did make trouble it was their (appellants') risk.

Mr. Burton having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (February 27th).

De Villiers, C.J.: I quite agree with the learned Judge in the Court below, that the defendant was not bound to accept the 330 bales of chaff on the 31st October, 1905, which was the day on which the bales were loaded on to a truck of the Government Railways. It was only five days after the order for the chaff had been sent by the defendant to the plaintiffs, but the order made it perfectly clear that time was of the essence of the bargain. On the 26th October the defendant inquired from the plaintiffs by telegraph whether certain chaff ordered for Prieska had been despatched, adding the following: "Can you forward another bogie immediately; reply sharp; will instruct." The answer was: "Forwarding chaff now; can forward another bogie; instruct." Thereupon, on the 26th, the defendant telegraphed: "Forward bogie chaff Hirschowitz, Pretoria; very urgent," and on the same day confirmed this telegram by letter, adding that the order was very urgent, and pressing the hope "to have advices of despatch at the latest by Monday next." Although the de-



defendant's telegrams were sent to Somerset West, the head office of the plaintiffs, he knew that the chaff would be despatched from De Rust Siding, from where trains ran on three days a week, namely, Tuesdays, Thursdays, and Saturdays. The 26th of October was a Thursday, and if the plaintiffs had, immediately on receiving the order, telegraphed for a truck to Malmesbury, it would have been quite possible to load the bales of chaff on the truck in time for the train leaving on Saturday, the 28th. They had, on the 26th, undertaken to forward a bogie immediately, and if they could not despatch the chaff on the 28th, they ought at once to have informed the defendant to that effect. In fact, they loaded the chaff on Tuesday, the 31st, and on that day they wrote to the defendant as follows: "We have just received telegraphic advice that Hirschowitz and Co.'s chaff is being loaded." In my opinion, the defendant would have been justified, on receipt of this letter, in forthwith repudiating the sale, on the ground that there had been no immediate delivery of the chaff as agreed upon. Instead, however, of repudiating, the defendant, on the 1st of November, wrote to the plaintiffs as follows: "I am very much disappointed to learn that the truck of chaff for Hirschowitz has not yet been despatched, as when I gave you the order I wished it to be sent off at once, seeing that the conditions were from Hirschowitz and Co. that the chaff was only to be forwarded if it would have immediate despatch; it is now several days since I gave you the order, and I am afraid that it will cause some unpleasantness between Hirschowitz and Co. and myself." This letter does not amount to a repudiation, nor does it even amount to an intimation that, in case Hirschowitz and Co. should refuse acceptance, the defendant would also have to refuse. The delivery to the defendant took place as soon as the chaff had been loaded on the truck, and when he was informed that such delivery had taken place, it was his duty, if he wished to repudiate, to do so immediately in unequivocal terms. Instead of that, he grumbled about the delay, and expressed the fear that there would be some unpleasantness between himself and Hirschowitz and Co., but he left the plaintiffs under the impression that he accepted the chaff, notwithstanding the delay. The consequence was that the plaintiffs could take no steps to stop the chaff en route to the Transvaal. On the 7th of November the defendant telegraphed to the plaintiffs: "Hirschowitz wires refuses acceptance chaff, owing delay forwarding—wire instructions sharp." The plaintiffs replied by letter that Hirschowitz was bound to take delivery, and it was only on the 8th of Novem-

ber that the defendant repudiated the delivery on his own behalf, saying: "The chaff is now lying at Pretoria at your risk and expense." In my opinion there was a sale and delivery of the chaff to the defendant, and, although the defendant might have refused to accept delivery on the 31st, he waived any objection he might have had to the late delivery by his letter of the 1st of November. The defendant did not purchase the chaff as the agent of Hirschowitz, but on his own behalf, and when he failed to inform the plaintiffs by his letter of 1st November that he repudiated the sale on the ground of late delivery, the plaintiffs were justified in regarding his letter as a grumbling acceptance of the chaff. The learned judge seems to have considered that the intimation by the defendant to the plaintiffs that unpleasantness between him and Hirschowitz and Co. might result amounted to a refusal to accept the chaff, but I regret that I cannot so construe the letter. After the receipt of that letter the plaintiffs would not have been justified in treating the sale as cancelled or in stopping the chaff on its way to Pretoria. I am of opinion, therefore, that the appeal must be allowed and judgment entered for the plaintiffs, with costs in this Court and in the Court below.

On the applications of Mr. Burton (for appellants), the plaintiffs (the Noltes) were also declared necessary witnesses.

Laurence and Maasdorp, J.J., concurred.

[Appellants' Attorneys: Dempers and Van Ryneveld; Respondent's Attorneys: C. and A. Friedlander.]

ESTATE LANSBERG V. ESTATE SMIT AND ANOTHER. } 1907.  
Feb. 18th.  
" 27th.

Land Beacons Act—Appointment of Commission to settle dispute—Informality—Waiver.

*The appellant applied to have the proceedings of a Commission appointed by a Divisional Council to settle a boundary dispute between himself and the respondent set aside, on the ground that the Council had not, before making such appointment, appointed a surveyor required to do the preliminary work under the Land Beacons Act.*

*Held, that as the appellant had, with knowledge of the informality, taken part in the selection of the members of the*



*Commission and had there only raised the single objection that the case ought to be tried in the Supreme Court, he had waived his right to take advantage of the informality.*

This was an application to make absolute a certain rule nisi calling upon Pieter Gideon Smit, the estate of the late Alwyn Johannes Smit, the commission appointed by the Provisional Council of Clanwilliam, and the Divisional Council, through their secretary, to show cause why the proceedings of a certain commission appointed under the Land Beacons Act (No. 7, 1865) should not be set aside.

Applicants are Caelius Leonardus E. Lansberg, Joseph Marco B. Lansberg, and Sophia J. Lansberg, the two former being sons of the late Jean Louis Lansberg, and executors testamentary in his estate, and the last-named being the surviving spouse of the late Mr. Lansberg. Four-sevenths undivided shares in the farm Ratelrug were registered in the name of the late Mr. Lansberg. During 1905 the owners of the farm Bovenberg Vallei, situate to the east of the farm Ratelrug, caused the said farm to be surveyed, and in the course of such survey a dispute arose as to the correctness of one of the beacons common to the two farms. The registered owners of Bovenberg Vallei were the present respondents, P. G. Smit, and the estate of the late Alwyn Johannes Smit. Surveyor Murray made the survey on behalf of the owners of Bovenberg Vallei. Surveyor H. M. Shaw was called in on behalf of the applicants. The two surveyors differed in their results. The owners of Bovenberg Vallei then proceeded under section 108 of Act 7, 1865, and petitioned the Divisional Council of Clanwilliam to appoint a commission to go into the question of the disputed boundary. At the outset Caelius Lansberg took up the position that he would prefer to have the matter decided by the Supreme Court, but when the commission proceeded to work he took a certain part, though he had again protested against the commission. The applicants submitted that the requirements of section 94 of the Act were not complied with by the Divisional Council, inasmuch as no surveyor was sent to the farms to make the necessary re-survey and determine the true position of the beacon in dispute. They said that if the decision of the commission were to remain undisturbed the estate of the late J. L. Lansberg would suffer great and irreparable harm.

Sir H. Juta, K.C., for applicants; Mr. Schreiner, K.C. (with him Mr. Burton), for respondents.

Sir H. Juta said that applicants' case was that 26 years ago this farm was partitioned, that this piece was deducted, that there had been orange trees planted there for 26 years, that the line now decided upon cut off nearly all their water. All these things were not gone into before the commission because the unfortunate man (Caelius Lansberg) had no witnesses, but the commission, as he said, put some questions, and he gave some evidence. The applicants' case had never been put before the commission. The policy of the Act was that an independent surveyor should be appointed to report before the commission was appointed.

Mr. Schreiner said that this objection about the appointment of an independent surveyor was not raised in the petition, or the supporting affidavit, filed in June, 1906, within the requisite three months. It was not until November, when Mr. Caelius Lansberg made his affidavit that a word was said about the Commission not having appointed a surveyor, and any complaint was made that there had been an irregularity. Counsel contended that there had been an absolute waiver by the applicants in regard to the appointment of a third surveyor. The question between the two surveyors was as to the superposition of the diagram to indicate the one beacon or the other. The two surveyors were not in difference as to the data. One surveyor preferred one superposition, and the other preferred the other superposition, one saying that the beacon should be at "c," and the other that it should be at "d." The Commission and the surveyors did not consider it necessary to call in a third surveyor. Counsel called the Court's attention to the terms of the rule, which called upon respondents to show cause why the proceedings of the Commission, after the petition to the Council to appoint the Commission, should not be set aside. Respondents now appeared to meet an attempt to set aside the whole of the proceedings after a perfectly legitimate application, under section 108; and the only ground why applicants said those proceedings were to be set aside was the purely technical ground that there was nothing apparently on the face of the record to show why a third surveyor was not appointed. It was therefore, impossible, upon this application, to go into the merits. In further argument, counsel said that it was agreed between the surveyors that it was unnecessary to appoint a third surveyor. In regard to the partition, he pointed out that the respondents were not parties to that partition, and that the applicants might have been under a *bona fide* mistake as to their boundaries.

[De Villiers, C.J.: Is it not imperative that the Divisional Council should send a surveyor?]

Mr. Schreiner submitted that it was not.

Sir H. Juta said that the finding of the Commission was that the beacon marked "b" on the chart, put in with the records was a well-ascertained one, and had for an uninterrupted period of 30 years been recognised by the parties to the dispute as the true and proper beacon. Counsel submitted that that finding was absolutely contrary to the facts.

[De Villiers, C.J.: Are you going into the merits?]

Sir H. Juta said that he was.

[De Villiers, C.J.: Had we not better decide the question of the irregularity first?]

Sir H. Juta said that he took objection to the proceedings of the Commission, both on the ground of the irregularity and of the merits. Dealing with the question of the irregularity, counsel submitted that his clients had not acquiesced in the proceedings of the Commission. It was significant that three of the Commissioners thought it was unnecessary to have a third surveyor. The point must, therefore, have been before them. He contended that it was obligatory that the Divisional Council should have sent a surveyor before the Commission was appointed. The Commissioners could not have appointed a surveyor. It would have been quite futile for the applicants to have objected before the Commission, because the Commission could not have remedied the defect. The appointment of a surveyor did not even rest with the Divisional Council. They could recommend a surveyor, but the actual appointment must be made by the Surveyor-General. Sir H. Juta proceeded to read from an affidavit by Surveyor Shaw to show that the reason why he had said he did not think it was necessary to have a third surveyor was because he thought the parties would come to an amicable settlement in view of a conversation which he had had with Mr. Smit.

De Villiers, C.J., raised the question as to whether the applicants when they took part in the appointment of the Commission knew that a certain preliminary requirement of the law had not been complied with, viz., that a third surveyor had not been appointed.

Sir H. Juta submitted that there was nothing on the record to show that the applicants were aware of the defect.

Mr. Schreiner submitted that the applicants must have had knowledge that a third surveyor had not been appointed, and that there had been a waiver.

De Villiers, C.J.: There can be no doubt that the Legislature contemplated, preliminary to the appointment of a commission for the purpose of a land beacon dispute, that a surveyor should be appointed

ed by the Divisional Council. The duties of the surveyor seem to have been two-fold—first to endeavour to see whether he could bring the parties themselves to agree in regard to the boundaries, and, secondly, if he failed in this object, then to report to the Council the full nature of the dispute, very important functions which would greatly assist the commission subsequently in the performance of its duties. Then the Act provides that, after such a report by the surveyor to the Council, proceedings may be taken under the 36th, and subsequent sections of the Act. In the present case, it would appear that no such surveyor was appointed by the Divisional Council. In point of fact, surveyors appointed by the parties themselves had done the work which that surveyor would have had to do. When the Divisional Council was requested to take proceedings for the appointment of a commission, the appellant was present at the proceedings, and, not only was present, but took an active part in the selection of the commission, who were to be the judges of the case. If the appellant were aware at the time that the preliminary requirements of the Act had not been complied with, I am clearly of opinion that it is too late for him now, after having taken part in the selection of the commission, to turn round and say that he objects to be bound by their decision. Well, then, the next question is, was the appellant aware of the defect in the previous formalities? There was not much evidence on this point, but all the circumstances of the case lead me to conclude that the appellant had such knowledge. With that knowledge he ought to have objected to the appointment of the commission until the surveyor had been appointed by the Council; but the only objection raised by him was that the case ought to be tried in the Supreme Court. That is the sole objection raised. In my opinion, it is too late now to take this objection, especially when it is borne in mind that in the petition which has been filed in this very case this informality was not relied upon as one of the grounds for applying to set aside the proceedings. I am of opinion, therefore, that the preliminary objection cannot be sustained. The Court will now hear argument on the other question.

Maasdorp and Laurence, J.J., concurred.

Mr. Schreiner at once took objection that the Court could not now go into the merits of the case, and that there was not upon the rule any duty cast upon the respondent to show cause any further.

Sir H. Juta submitted that it was competent for the Court now to go into

the merits. The Commission had gone entirely wrong. The line shown by Surveyor Murray went right through the applicants' orange grove, and yet the ground of the Commission's decision was that there had been occupation by respondents for an uninterrupted period of 30 years. For 26 years at least the applicants had been occupying the land that they claimed up to the beacon. Surveyor Murray's line would cut off six morgen out of a farm of 154 morgen, but those six morgen would mean that the water and the arable land would go.

De Villiers, C.J., said that their lordships would like to read the evidence very carefully before deciding to hear Mr. Schreiner. An intimation would be made to the parties if the Court desired to hear further argument.

*Postea* (February 27th).

De Villiers, C.J.: In this case the Court has already decided that the preliminary objection raised by the appellant could not be upheld. The preliminary objection was that the provisions of the Land Beacons Act had not been properly complied with, and that consequently the proceedings of the commission were null and void. The Court held that the objection to the alleged illegality, which consisted in a surveyor not having been appointed by the Divisional Council prior to the appointment of the commission, could not be entertained, seeing that the appellant had himself taken part in the appointment of the commission and had entirely waived his right to take the exception. The Court however, took time to consider whether upon the merits of the case the appellant has made out any claim why the proceedings should be set aside. In strictness, the only question that arises upon this appeal under ordinary circumstances would be whether the proceedings should be set aside on the ground of some informality or illegality, but the parties on both sides seem to have taken it that the rule *nisi* should include the right on the part of the appellant to enter into the merits of the dispute and to have the right of showing that the decision of the Commissioners was entirely against law and justice. Well, the Judges have carefully considered this evidence, and for myself I have read the whole of the evidence, and I am wholly unable to come to the conclusion that any injustice has been done to the applicant. He has himself to blame if all the evidence he could have brought forward has not been brought forward. He raised a preliminary objection to the Commission on the ground that the matter should be decided in the Supreme Court, and, having raised that objec-

tion, he thought he was justified in not taking part in any further proceedings. It appears, however, that the present respondents did bring forward their evidence, and the evidence of Surveyor Murray was taken. Surveyor Shaw's evidence was not taken, but his report was before the Commission. The Commission had a full opportunity of reading his report and comparing that report with the report of Murray. Moreover, the Commission had before them several witnesses of standing, and these witnesses gave very strong evidence as to the beacon "b," which was in dispute. They allege that for many years that beacon had been recognised as the beacon between the two farms. It is true that the appellant now states—and the Commission admitted that—that the line does run through some cultivated lands of the appellant, but the appellant has not had these lands in cultivation for the full period of prescription. Without the full period of prescription, he could not claim title to that land, and, seeing that the Commission found upon good and substantial evidence that the beacon "b," which was the beacon claimed by the present respondents, had been for many years—certainly for the period of prescription—the recognised beacon between the two farms, I think that this Court would not be justified now in interfering with the decision. There is no doubt some hardship to the appellant, and it is because of that hardship that the Judges thought they should enter fully into the case, in order to see whether some relief could be given, but, after reading the evidence, I am satisfied that the Court would not now be doing any good to the applicant himself by ordering any fresh proceedings, because, if such further proceedings are taken, they would have only one result, and that would be to show that the respondents and not the applicant are in the right as to the boundaries of the farm. For these reasons, I am of opinion that the application should be refused, with costs.

Mr. Schreiner, K.C. (for respondents), said (in answer to the Court) that Surveyor Shaw was called, and gave evidence before the Commission.

[De Villiers, C.J.: That makes it still stronger, because if Shaw had been before the Commission, then the most important witness for the applicant was heard.]

Laurence, J., in concurring, said he had thought that it would be well if the Court were to appoint a surveyor to go to the farm and report to the Commission, but he quite recognised what had been said by the Chief Justice as to the Commission having gone on very strong evidence, and it seemed to him, after very careful consideration of the evidence, there was

no strong probability of the Commission arriving at any modified decision.

Maasdorp, J., concurred.

Rule nisi discharged, with costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondents' Attorney: G. Trollip.]

[Before the Hon. Mr. Justice HOPLEY.]

VAN ZYL AND ANOTHER v. { 1907.  
GRAAFF. { Feb. 18th.

Private prosecution—Gross irregularity—Review—190th Rule of Court—Ordinance 40 of 1828, Secs. 10 and 11—Act 15 of 1864, Sec. 5.

*Applicants having been arrested on a certain criminal charge, the Magistrate took a preliminary examination and sent the papers to the Solicitor-General, who refused to prosecute and certified to that effect. The complainant thereupon caused criminal summons to be issued out of the Magistrate's Court: the Magistrate proceeded to try the case summarily and convicted and sentenced the accused. The private prosecutor had not obtained leave to prosecute from a judge of either a Superior Court or a Circuit Court in terms of Sec. 5 of Act 15 of 1864 and Secs. 10 and 11 of Ordinance 40 of 1828.*

*Held, that the trial in the R.M. Court was irregular, the prosecutor not having obtained the necessary leave to prosecute, and that the proceedings must be set aside.*

This was an application for review on a summons from the Resident Magistrate for the division of Wodehouse, sitting at Dordrecht. The applicants, Jacobus Francois P. van Zyl and Matches Quanda, were charged with assault with intent on one Nathan Graaff, of Dordrecht. A preparatory examination was held on November 6, 1906. After the preparatory examination had been concluded the papers were sent in the ordinary way to the Solicitor-General, and on November 27 he stated that he declined to prosecute, and the accused were both discharged. On December 3 the applicants were again summoned on a

private prosecution instituted by Nathan Graaff before the Magistrate. To these proceedings the applicants took an exception, and upon that and upon the whole proceedings they contended that they were null and void, *ab initio*. Both were convicted and fined in £5 ls., or, in the alternative, 30 days' imprisonment. Now it came up under the 190th Rule of Court, under the provisions of the Ordinance for irregularity, the contention being that the Magistrate should never have issued the summons or held the proceedings at all.

Mr. Molteno for applicants; Mr. Alexander for respondent.

Counsel took the initial stage of review on account of the gross irregularity of the whole proceedings, and if that point was not upheld then the applicants appealed on the facts. The charge against the applicants was that they wrongfully and unlawfully assaulted the respondent, Nathan Graaff, a tailor, of Dordrecht, by striking him several blows on the head and body. Counsel said no leave had been obtained, as required by section 5 of Act 15 of 1864, to issue the process. He also cited sections 10 and 11 of the Ordinance 40 of 1828, and contended where there had once been a public prosecution and where it had been carried to the completion of a preliminary examination, if the respondent was dissatisfied with the decision, he had a course open to him to go to a Judge and get an order allowing the prosecution to go on, or he could take a civil action for damages in the ordinary way.

Mr. Alexander submitted if the applicants were to succeed at all it must be on review, as they had not given statutory notice in regard to appeal. If a Magistrate made a mistake in law it did not necessarily constitute a gross irregularity. Section 1 of Act 15 of 1864 would repeal "indictment" so far as making it refer in section 5 to Magistrate Court proceedings. The whole point would be what was the meaning of "indictment," as indicated by the context? What it meant in the previous Act would not affect the question very much. The "indictment" had a different meaning in Act 3 of 1861, because that is provided for in section 1 of 1864. He submitted under the Ordinance 8 of 1852 the Attorney-General may intervene in summary proceedings at any time in order that a preparatory examination might be taken. From section 11 of Ordinance 40 of 1828 it would be found that it did not deal with the further prosecution at all. It simply said when a private party intended to prosecute and keep another party in gaol, then application could be made in the Supreme Court or Circuit Court. There was no such application here to keep the men in gaol. Counsel submitted it was clear that the trial should proceed, and that



his lordship should hear the record to see if there were any grounds of appeal.

Hopley, J.: In this case the present applicants were arrested on the 6th November, and a preparatory examination began against them on a charge of assault with intent to do grievous bodily harm on Nathan Graaff. The Magistrate held the preparatory examination on the 6th November, and on the 7th November committed them for trial in the ordinary way. The papers were sent in due course to the Solicitor-General at Graham's Town, who on the 14th November granted his certificate that he declined to prosecute these people. Thereupon on the 29th November a summons was issued out of the Resident Magistrate's Court, who had held the preparatory examination, summoning these same people at the instance of the private prosecutor, the man who was alleged to have been assaulted, and the Magistrate thereupon proceeded to try the case summarily. Before the then accused pleaded, their attorney took the exception "that it was not a competent course for this man to sue on the ground that they had been committed for trial by this Court, for the very crime or offence alleged in the indictment now before the Court, and had upon such commitment been liberated or discharged by the Solicitor-General, and that no leave of the Supreme Court, Eastern Districts Court, or Circuit Court, or some judge thereof, as required by section 5 of Act 15 of 1864 had been obtained for suing out the process for summoning the defendants to answer the present indictment at the suit of the private prosecutor, Nathan Graaff." The Magistrate overruled that exception, proceeded with the trial, and found the two prisoners guilty, and fined them £5 ls. each, and it is from such finding—not so much from the finding as upon an allegation of irregularity—that the present application is brought, which, in so far as I have to deal with it, is under the 190th rule of Court, on the ground that the Magistrate was guilty of a gross irregularity in hearing this matter at all, in face of the terms of the section quoted. Now, the rights of private prosecutors are fully laid down in the various Ordinances and Acts of Parliament, and they have sometimes—not very frequently—been acted upon in this country. Apparently as far as summary proceedings are concerned, and having regard to the terms of the Magistrate's Court Act, a private prosecutor may prosecute summarily in certain cases, and that Act was in existence in 1861, when the Criminal Law Amendment Act was passed. Act 3 of 1861 does not deal specifically with private prosecutions, but it does contain a section which defines the word "indictment": "In the construction of this Act the word 'indictment'

shall be understood to include any charge or complaint in any court of the Resident Magistrate, or in any other court, and also any plea, replication, or other pleading." That shows, at all events, that the word "indictment" is taken in an Act of Parliament dealing specially with criminal proceedings in the widest sense, and is not confined to any one Court, or the higher Courts in this country. In fact, I have always taken these complaint summonses in the Magistrate's court to be indictments in the courts in which they are presented. Now, after the Act of 1861 there came the Act of 1864, dealing specifically with this Act of 1861, and generally with the criminal law, and the 5th section is material in the present case. After saying that no defendant shall be tried in the Supreme Court or any Circuit Court for any crime or offence unless such defendant shall have been previously committed for trial by some competent Court or Magistrate, for or in respect of the crime or offence charged in such indictment; it goes on to say: "And in case any defendant after having been so committed for trial shall, if he be again liberated by order of the Attorney-General, no process for summoning such defendant to answer any indictment at the suit of any private prosecutor shall be sued out without the leave of the Supreme Court, or some Circuit Court, or some Judge thereof for that purpose first had and obtained." This seems to me not to apply only to the superior Courts, but to be so widely and generally laid down as to apply to any procedure against the same party, on the same charge, in any court whatsoever, and the reason it seems to me is perfectly clear. It is intended to protect the subject from harassing prosecution at the hands of people who might institute spiteful prosecutions. A man has an individual arrested, the Magistrate inquires into the case, commits him for trial, and sends the papers to the Attorney-General. The Attorney-General, or his deputy, looks carefully into the matter, and having come to the conclusion that he will not prosecute the individual for the particular crime it seems to me that this all means that the individual is free from prosecution under that particular charge unless the prosecutor comes before some higher Court, or some judge thereof, and shows good cause why the proceedings should be re-opened, and the private prosecutor has the right to prosecute, I think the words are strong enough to include prosecution in an inferior court if the Attorney-General has refused to prosecute, and in this case the Solicitor-General, having refused to prosecute the present applicants, it was an irregularity in the face of the terms of this section for the Magistrate to allow summons to issue



out of his court, and an irregularity for him to try the case even after the terms of this Act had been brought to his notice. It is said it was only a mistake of law, and, therefore, not a gross irregularity, but where the Legislature lays down that a Magistrate shall not do a certain thing, and he proceeds to do it, it seems to me this is an irregularity as contemplated by the section. The proceedings are, therefore, set aside from the commencement of the private prosecution, with costs in this court, and costs in the court below.

[Applicants' Attorneys: Herold and Gie; Respondent's Attorneys: Faure, Van Eyk and Moore.]

GROENEWALD V. NEWMARK.

Civil imprisonment—"Means"—  
Act 8 of 1879, Sec. 6.

Mr. Louwrens for the appellant, said he understood the respondent was not opposing. A rule nisi had been granted on February 6th calling on the respondent to show cause why the applicant should not be allowed to appeal in *forma pauperis* against a decree of civil imprisonment on an unsatisfied judgment for £106 3s. 10d., granted by the Resident Magistrate of Bredasdorp. The evidence of the defendant showed that he earned nothing, and was supported by his sister. The Magistrate granted the decree, and stayed execution pending payment of monthly instalments of 7s. 6d. In his reasons he said the only parties before him were the defendant, himself, and his brother-in-law, and he was by no means satisfied that the defendant was speaking the truth, or that he could not obtain work. The defendant had appeared before him on several occasions, and he was known to be a person who relied upon others for support. He was physically able to obtain a livelihood. Counsel pointed out that the evidence on the record was to the effect that the defendant had no means or property whatever. The terms of the Act of 1879 had been complied with, and the Magistrate was bound, on that evidence, not to have granted a decree. It was not within his right to have granted the decree.

Hopley, J.: The Act 8, of 1879, section 6, enacts that "no writ of civil imprisonment for non-payment, or non-satisfaction, of any judgment, or decree, shall be granted or issued by the Supreme or any other Court of this colony, in cases in which the defendant, or any other party against whom such writ of civil imprisonment is sought to be issued, shall prove to the satisfaction of the Court—to which such application is made—that such defendant, or other party as aforesaid, has not property or means

sufficient to satisfy in whole, or in part, the said judgment or decree." In the present instance, Newmark sued the appellant Groenewald to show why he should not be civilly imprisoned for debt owing to Newmark. Upon a return of *nulla bona* by the officer of the Court, the defendant, however, appeared to show cause, and did produce evidence that he came within the terms of this section of the Act, that he had no property of any sort, nor means, to satisfy in whole, or in part, the said judgment. In this case there is no conflict of evidence in which the Magistrate could have come to a decision one way or the other for all the evidence tendered in the matter, namely, the evidence of the defendant himself, and of his brother-in-law, is in one direction only, namely, that the defendant had absolutely no means. He was an insolvent, and some debts were incurred even after his insolvency. He had never been rehabilitated, and he had no farm stock or property of any sort. He seems to have been sponging upon his sister for a livelihood. The Magistrate does not seem to think there was any property of this man's hidden away—or that he was concealing anything—but he seems to have held that the defendant, even if he had no property, might find the means wherewith to satisfy the judgment. In other words, he holds that the man, being still an able-bodied person, ought to be able to get work, and be able to pay something. The Magistrate has travelled outside the evidence given before him in this matter to other facts, that he seems to know from other proceedings, things which I cannot take into consideration, and which it was not proper for the Magistrate to take into consideration. He seems to think if this man set about it vigorously he could get something of a living. A good deal of what he says in his reasons for his judgment would be very useful to convict this man of being a vagrant, with not having any means of livelihood, and of being an idle person, going about without any visible means of subsistence. Because the man is an idle man, and relies on whom he can sponge, it does not follow he has any means to satisfy this judgment, and by "means," I take it, present available means, and not potential means, which might possibly be earned if the defendant was lucky enough to obtain employment. If such construction could be put upon the Act, it seems to me that with any person out of employment, it might very well mean that the order at present might take away from him the only chance of his getting employment, because if he was not fortunate to get the 7s. 6d. at the end of the first month, if he does not get immediate employment, then he would be at once imprisoned, and

all potential means would vanish, because his body would be incarcerated, and he would not be able to apply for work. It seems to me that the Magistrate has placed a wrong construction on the word "means." If the man had been earning money in employment, the Magistrate might have made an order giving some of his wages to his creditor. It seems to me that the order appealed from must be set aside, with costs, and costs in the Court below.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ESTATE OF ABRAMS V. INDUSTRIAL LIFE ASSURANCE COMPANY OF SOUTH AFRICA, LTD. 1907.  
Feb. 19th.

#### Insurance—Forfeiture of policy.

This was an action in which the plaintiff claimed the amount of a certain insurance policy on the life of the late John Abrams. Plaintiff sued as the executrix in the estate.

The declaration set forth that the plaintiff was a widow residing at Cape Town, and sued in her capacity as executrix dative in the estate of her deceased son, John Abrams. In 1894, John Abrams effected a policy of insurance on his life for £45, for a premium of 9d. a week, it being an undertaking that the defendant's agents should call for the premiums. In April, 1906, Abrams was engaged to act as a transport driver in German West Africa for six months, and it was then agreed that the premiums falling due during Abrams's absence should be suspended until his return. Abrams died in German West Africa on July 5, 1906, but the defendant company had refused to pay the amount of the policy, though the arrears of premiums had been tendered.

The defendant company, in their plea, stated that one of the conditions of the policy was that the assured should not become employed as a soldier without the sanction of the directors endorsed on the policy. They denied that there was any undertaking that the premiums should be collected at the insured's place of residence. Abrams, in April, 1906, became a soldier, or otherwise entered

into the service of the German military authorities while active military operations were in progress. They denied that any arrangement was made to defer payment, and said that if their agent gave such undertaking he was acting, to the knowledge of the plaintiff, wholly outside the scope of his authority. The defendant company further stated that there was an arrangement to suspend the policy for one year on condition that if Abrahams returned to the Colony before the expiration of that period he should revive the policy, but that if he died during his absence the policy should become null and void. Defendants denied knowledge of Abrams's death, and put plaintiff to proof thereof.

Mr. Lewis was for the plaintiff; Mr. Struben was for the defendant.

John M. Commaille, clerk in the Master's office, produced letters of administration and the death notice, given in the estate of John Abrams.

Baron Von Humboldt, Consul-General for Germany, deposed to having given a certificate of the death of John Abrams, who died of inflammation of the lungs at Windhoek on July 5 last. Witness received official advice of Abrams's death. Abrams was a transport driver. His wages began on April 9. The wages due had been paid to the Master.

Cross-examined: It very rarely happened that a transport driver was shot. It had happened.

Wilcox Wilkens, recruiting agent for the German authorities at Cape Town, deposed to having engaged a man named Abrams as a transport driver for three or six months.

Georgina Meyer, the plaintiff, said that Abrams was her son by her first marriage. She was the executrix in the estate. The witness deposed as to insuring her son's life in 1894 for £45. The payment to be made was 9d. a week. The collector was to call, and did call, for the payments. She paid the premiums from 1894 up to May 9, 1906. Last April her son signed to go to German West Africa. He left on Easter Monday. She saw him go away in a boat. Witness told the collector, Mr. Wasserfall, that her son was going to Swakopmund, and the latter said he would report it to the office. He took the money for four weeks after John had gone. On May 7 the inspector (Mr. Moore) came, and said that the office had said it was all right, that in six months she was to come to the office and report whether John had returned, and that the six months' premiums on the policy would be paid for by the 12 years' interest on the policy. Mr. Moore said that if John went as a soldier £10 would have to be deducted from the amount of the policy. Witness said he had gone as a transport driver. Subsequently

witness paid premiums in respect of other members of the family—the agents came to collect these.

Corroborative evidence was given by a daughter of the plaintiff, and her husband, who said they interviewed the manager of the company, who said they would only get a few pounds, as Abrams might have been shot.

Maasdorp, J., said there was no proof of death.

Mr. Struben said that, if necessary, he would admit the death, in order to get a declaration from the Court as to what this contract was. There were other cases depending on this, and the defendant company wished to have the Court's decision.

Mr. Lewis closed his case.

Chas. Wm. Corlett, manager of the defendant company, said it was decided to suspend the policy during Abrams's absence from Cape Town for a period limited to twelve months, renewable on his return. A minute was made in the books of the company accordingly. There was a record that Abrams's mother had been advised.

Cross-examined: Witness's contention was that anyone in the employ of the German Government at the front was a soldier. He was satisfied this was so from the regulations.

Charles Moore, inspector in the employ of the company, said he told Mrs. Meyer that the policy would be suspended for twelve months, and that if the assured returned before that time, he could renew it. That was perfectly understood.

Herman Wasserfall, a former agent of the company (called by the Court) said that Mrs. Meyer informed him early in April of the fact that her son had gone to German South-west Africa. He had instructions from Mr. Corlett to convey to Mrs. Meyer that her son would be allowed to proceed to German West Africa, on condition that there would be a 25 per cent. increase of the premiums, or that there would be a reduction of £9 in the policy amount. He did not tell Mrs. Meyer that the premiums while Abrams was away would be covered by the interest and bonus on past premiums. He conveyed Mr. Corlett's statement to Mrs. Meyer.

Maasdorp, J., said that this evidence introduced an entirely new point.

Mrs. Meyer (recalled) denied that Mr. Wasserfall told her she would have to pay extra in premiums.

Mr. Corlett (recalled) said he had no recollection of what Mr. Wasserfall said had happened. They had been in the habit of increasing the premiums or reducing the amount of the policy, and Mr. Wasserfall had either confused this case with previous ones, or he had acted entirely on his own authority.

Maasdorp, J.: The plaintiff in this case is the executrix dative in the estate of her son John Abrams, and she claims from the defendant insurance company the amount of a policy effected on the life of the deceased. The deceased man insured his life with the defendant company for the sum of £45, and the premiums payable weekly amounted to 9d. One of the conditions of the policy is that it shall become absolutely void, and all premiums paid thereon be forfeited to the defendant company, and absolutely retained by them, if default shall be made in the payment of the premiums. It appears that this policy was effected on the 29th of October, 1894, and the premiums were regularly paid every week until the 7th of May, 1906. The assured died on the 15th July. If the default in payment is not excused or justified on good grounds, then the policy has become void, and nothing can be recovered by the executrix from the company. The question therefore arises: was there any agreement arrived at between the interested parties which altered the condition as to the weekly payment of the premiums? Referring to the evidence, his lordship said there were very important documents which corroborated the evidence of the defendants, and there was no corroboration of a similar kind of the evidence of the plaintiff. The documents put in, written by different persons, supported the contention of the defendants that an agreement was entered into whereby the defendant company refused to be responsible at all for the amount of the policy during the absence of John Abrams. If neither of the agreements set up was absolutely established, then the plaintiff must fail, because the burden was upon the plaintiff to prove that an agreement was arrived at by which she was excused by the company from the payment of the premiums during the interval of John Abrams's absence. The impression on his (the learned judge's) mind was that no payments were made because the agreement as proposed by the Board of the defendant company was accepted by the plaintiff. The plaintiff's case was, to his mind, improbable. On the whole, he came to the conclusion that the agreement set up by the plaintiff had not been proved, that the assured failed to pay the premiums as they became due, and that, under the conditions of the policy, the policy was rendered void, unless it was kept alive by the condition now set up by the defendant company. Judgment would therefore be for the defendants, with costs.

[Plaintiff's attorney: C. Brady. Defendants' attorneys: Fairbridge, Arderne and Lawton.]

Dr. Rainsford: Our affidavit says that the costs have reached that amount.

Mr. Buchanan: It includes survey fees and everything.

[De Villiers, C.J.: How could a transfer cost that sum? I want to get to the bottom of this. Surely the most complicated estate could not have cost that money? How could it have run up to such a figure?]

Mr. Buchanan—It seems that the journey from Lady Grey to this farm occupies three days.

[De Villiers, C.J.: I see he has charged for that in the appraisalment—£10 3s. 6d. Does he charge in addition for travelling as an attorney?]

Mr. Buchanan: On the same day, my lord? He may have gone out to the farm on another occasion. The appraisalment was made for the purpose of the transfer. The surveyor would go out for the purpose of surveying, and plaintiff would probably go out with the surveyor to assist him.

[De Villiers, C.J.: I think attorney's accounts should be taxed and made perfectly clear. The charges are enormous.]

Mr. Buchanan said that defendant was given a very full explanation of the various items in the plaintiff's bill, and it was not until he had given a further promissory note that he sought legal advice.

[De Villiers, C.J.: Have the other parties paid the full amount?]

Mr. Buchanan: One has paid; the other has not. Counsel submitted that provisional sentence should be given upon the promissory note, and that the defendant should, if so advised, afterwards go into the principal case.

Dr. Rainsford (in answer to the Court) said that he did not know how much the defendant said he owed. He did not think that the question of precise indebtedness had been gone into.

De Villiers, C.J., suggested that the matter should stand over for two days, and that in the meantime the defendant should go into the account and consider what amount he admitted his liability for. In the meantime any of the charges in the plaintiff's account subject to taxation must be taxed. The case could be mentioned again on Thursday.

Dr. Rainsford then raised the question as to whether the case was *res judicata*.

[De Villiers, C.J.: Was not the Magistrate's judgment equivalent to absolution from the instance?]

Dr. Rainsford said that the terms of the judgment were "case dismissed with costs."

De Villiers, C.J.: I do not see how it could have meant anything else than absolution from the instance, and, if that is so, then of course it is open to the plaintiff to re-open the case, though if he had reopened it in the Court where the case was originally tried other con-

siderations might have arisen. That is one of the reasons why I am not prepared at once to give provisional sentence. The case will be postponed, and in the meantime the defendant should consider what amounts he admits to be owing, and the plaintiff must see to it that any of these charges appearing in the account which are subject to taxation shall be properly taxed. The case will stand over until Friday.

*Postea* (February 22nd).

Further affidavits having been read, and a communication from the plaintiff refusing a tender of £60 from the defendant, counsel moved for provisional sentence for the full amount.

Dr. Rainsford having been heard in reply on the different items, some of which he contended were unauthorised expenditure, and others excessive,

De Villiers, C.J., said an attorney of the Supreme Court stood in a peculiarly confidential position to his client. If a client trusted an attorney he would naturally sign any document which was placed before him for signature by such an attorney. He was not, however, prepared to accept the position that merely because the defendant in the present case gave a promissory note for £90 to the plaintiff, who was his confidential attorney, that the Court would be bound to accept that as conclusive proof that that amount was due and owing by him. If there had been any clearly taxable items on this amount of £90, he should certainly have directed that these items should be fully taxed in a proper manner, but it did not appear that any proceedings took the form of judicial proceedings. He understood it had not been the practice in such cases to have a taxation, although he considered it would be well worth considering whether a taxation of costs should not also be applied to such cases. On the face of it, he did not see how the item in connection with the survey could be interfered with. Of course, if provisional sentence were granted, it would still be competent for the defendant to go into the principal case, and have this matter fully discussed. The initial mistake made by the plaintiff in the present case was made by him in the course of the proceedings in the Magistrate's Court. It was an extraordinary position for the plaintiff's agent to take up to take exception to the jurisdiction of the Court after the defendant had given his evidence in support of his plea. The plaintiff might have sued the defendant in a superior court, and in that case his charges would have been inquired into by the superior court. But he chose to sue the defendant in a Magistrate's Court, and the Magistrate very properly refused provisional judgment, with costs, and dis-



missed the case, with costs. Now the question had been raised as to what was meant by the case being dismissed with costs, and he considered it ought to be treated as absolution from the instance. Thereupon the plaintiff brought an action in this court, and it would have been far better in the first instance if the plaintiff had brought his action in a superior court. At all events, no such exception would have been listened to for one single moment. Then the mistake made by the defendant in this court was that he did not himself prepare any account, so as to show the amount due by him. It was true, as long as the plaintiff and defendant were dealing with each other in a confidential position, the defendant was not in a position to discover what amount was due to him. When he gave the matter into the hands of his own attorney, his lordship thought they had ample time to prepare some counter account, to show what they admit to be due and owing to the plaintiff. There had been a tender of £60, but there had been no explanation of how that amount was arrived at. Among the objections raised, he could not find any tangible objection, except the objection to the appraisement, which, upon the face of the account, was £9 13s., which was charged against the defendant alone, and there was no explanation as to why that was done. He could hardly imagine that the plaintiff made two other appraisements, and went to the farm for the purpose of two other lots. In his opinion, only one-third of that should be charged as against the defendant. If this view was wrong, it was still open to the plaintiff to go into the principal case, and claim the whole amount. In regard to the Divisional Council rates, here was the cheque for the amount of rates, £6 0s. 2d. It was incredible that three cheques would have been given for each rate, and only one-third of this would be charged to the defendant. There would be provisional sentence for £90, minus £8 6s. 8d., with costs.

[Plaintiff's Attorney: P. A. M. Cloeta. Defendant's Attorneys: Herold and Gie.]

#### FOSTER V. BEELDERS.

Mr. Van der Byl moved for provisional sentence on a mortgage bond for £575, with interest from July 1, 1905, less £2 15s. paid on account; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ESTATE EATON V. VISSER.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £1,000, with interest from July 1, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ILLIQUID ROLL.

S.A. PRODUCE, WINE AND { 1907.  
BRANDY CO. V. MOORE. } Feb. 19th.

Mr. Sutton moved for judgment, under Rule 329d, for £115 13s., goods sold and delivered, and Excise duty paid by plaintiffs on behalf of defendant, with interest and costs.

Order granted.

#### MUZOYI V. MUZOYI.

This was an action brought by a native residing at the Ndabeni Location against his wife Lydia, for restitution of conjugal rights, failing which, a decree of divorce.

Mr. Howes was for plaintiff (Harper John Muzoyi); defendant did not appear.

The parties were married at the Wesleyan Church, Healdtown, in the division of Fort Beaufort, in 1882. Plaintiff alleged that his wife had refused to join him, although he had requested her to do so. She remained in the Transkei.

Decree of restitution granted; defendant to return to or receive the plaintiff on or before the 1st April, failing which, to show cause on the 16th April.

#### GENERAL MOTIONS.

HAASBROEK V. HAASBROEK. { 1907.  
Feb. 19th.

This was an application to have a certain award of arbitrators made a Rule of Court, costs to be divided between applicant and respondent in equal proportions.

Mr. Benjamin was for applicant; Mr. W. Porter Buchanan was for respondent, Johannes Jacobus Russouw.

The arbitration related to the subdivision of the farm Op de Tradouw, in the division of Swellendam. Respondent, who is interested to the extent of one-ninth, objected to the award, on the ground that the division of the arable land was inequitable, and that the division of the water was also unjust, inasmuch as no provision was made for him to get the water allotted



to him unless he trespassed on the property of Hermanus Haasbroek, and there was no right of servitude reserved. Respondent also attached to his affidavit a power of attorney made by P. G. Haasbroek and R. G. Haasbroek, which was the foundation of the arbitration proceedings, and he took up the position that, the old people having died, the award was no longer binding. It was intended to be a division during their lifetime, and the award had now practically lapsed.

Mr. Buchanan said that his client had got transfer of his undivided share of the property under the will, and not as per the award.

Mr. Benjamin said that all the parties had treated this award as if it were an agreement to partition the property, not merely during the lifetime of the old people, but also afterwards. The point that the power only applied to the lifetime of the old people was raised for the first time by his learned friend. The parties had hitherto acquiesced in the partition laid down in the award of the arbitrators.

Mr. Buchanan argued that the partition had been looked upon by the applicants themselves as one that was available only during the lifetime of the old people. When the testators died the children were given transfer according to the will. Counsel also discussed the question of the water rights of respondent as set out in the award. Furthermore, he argued that the pasture land was divided in such a vague way that it was not a division at all.

Mr. Benjamin submitted that it was quite clear from the affidavits that had been filed that the sub-division was a fair one.

De Villiers, C.J.: It seems to me that this was a family arrangement made during the lifetime of old Haasbroek and his wife. I am satisfied that all parties understood that this arrangement was made not only to remain in effect during the lifetime of the old people, but also to have effect after their death. It is true that the power of attorney might be read as if it is to be confined to their lifetime, but if the power of attorney is read by the light of the will, then I take it that the two together show what was intended by the old people. Then we have the fact that no objection is raised after the death of the old people to the sub-division made by the arbitrators, except the petition that it was unfair, but no objection was raised that such an award could only remain during the lifetime of old Haasbroek. Clearly, therefore, the respondent himself understood that it was a family arrangement, which was to be binding upon all parties. The next question is as to this sub-division, whether it is fair or not. Well, if a case had been made out of such gross

injustice, as would in itself have proved partiality on the part of the arbitrators, possibly a case for interference might have been made out, but the Court has repeatedly said that, short of such proof as would amount to a want of *bona fides* on the part of the arbitrators, the Court would not interfere in altering or correcting the award. In the present case a point is made as to water—the difficulty of access to the river, and such matters—but it does not appear to me that the objection is of so serious a nature as to justify the Court now in setting aside this arrangement. In the absence of clear proof of partiality, I am not prepared to interfere with the decision of the arbitrators. The Court will, therefore, order that the award be made a Rule of Court as prayed, each party to pay half the costs incurred.

#### KRUGER V. MARX.

Mr. Close moved for the removal of this case, by consent, to the ensuing Circuit Court, to be held at Burghersdorp.

Case removed accordingly.

#### UNITED TOBACCO COMPANIES (SOUTH), LTD. V. DAIKOFISKY.

This was an application calling upon respondent to show cause why he should not be interdicted from selling certain cigarettes described as the "Springbok cigarette," in contravention of the applicants' trade mark.

Mr. Gardiner was for applicants; respondent appeared in person.

Mr. Gardiner read an affidavit by Mr. Palethorpe, one of the directors of the applicant company, stating that they had registered the word "Springbok" as the trade mark of tobaccos which they manufactured, and it had come to their notice that respondent was manufacturing and selling cigarettes described as the "Springbok cigarette," and thus infringing their registered trade mark.

Respondent said that in October last he began to manufacture the "Springbok cigarette," i.e., earlier than the applicants claimed to have registered the mark. He was a poor man, and had been unable to take out patent rights. He had not seen a notice by the applicants of their intention to register the mark. Respondent produced a sample packet of his cigarettes bearing the word "Springbok," and said that he would be able to produce a printer to show that he had labels printed in October last bearing this mark.

De Villiers, C.J., ordered the case to stand over until to-morrow (Wednesday),

to enable the applicants to produce replying affidavits and the respondent to lead evidence.

*Postea* (February 20th).

Respondent (in answer to the Court) said that he instructed the printer to print the labels bearing the words, "Springbok cigarettes," in December last. The label was first printed about the middle of January, and it was about the middle of January when the cigarettes were sent out in packets labelled "Springbok cigarettes." He had a conversation in October last with a printer about printing the labels.

Mr. Gardiner said that the applicants gave notice in the "Government Gazette" in November of their intention to apply to have the trade-mark registered. The mark was registered on the 21st January.

Max Syrkin, printer, said that respondent gave him an order to print the labels in the middle of December.

Cross-examined: The printer's block was delivered on or about the 16th January, and a number of labels were printed on the same day.

Mr. Gardiner said it was clear that there was no user of the mark before the time within which opposition must be made to the application for registration. He read an affidavit by a representative of the applicant company, who said that on the 18th February respondent called at their offices and offered to cease selling the cigarettes manufactured by him if they would compensate him. He had more than once offered to destroy the cigarettes if they would compensate him. Definite instructions were given by the company on the 2nd November to take steps to have the mark registered, and public notice was given on the 16th November.

Respondent proposed to use the rest of the labels and to consent to an order.

Mr. Gardiner said that his clients could not acquiesce in such a course.

Respondent then proposed that applicants should buy the remaining labels for £15.

Mr. Gardiner, however, said that the applicants could not entertain the offer, as the labels were absolutely worthless to them.

De Villiers, C.J., said that applicants' trade-mark must be protected, and an order be granted as prayed, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WESTERN WINE, BRANDY AND SPIRIT CO. AND OTHERS } 1907.  
V. FEDERAL SUPPLY AND } Feb. 20th.  
COLD STORAGE CO.

[At the time of going to press this case was standing over for further hearing. The report will be given under the date of the judgment.]

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

RAUSBY AND COVELL V. } 1907.  
WOUDBERG. } Feb. 20th.  
" 27th.  
" 28th.

Patent—Infringement—Helm of still.

This was an action for an injunction restraining respondent from making, using, vending, or exercising helms for eliminating fusel oil and other impurities in the distillation of brandy, in infringement of patent rights granted to the plaintiffs on the 17th April, 1905.

The declaration set forth that the plaintiffs carried on business in partnership at Montagu as mechanical engineers and copper-smiths, and were patentees, on letters patent, of a certain helm for a pot still and apparatus in connection therewith. Letters patent were granted on the 17th April, 1905. Plaintiffs alleged that the defendant, who is a copper-smith, carrying on business at Wellington, had, since the grant of letters patent, infringed their rights by making and selling helms which were constructed in the same manner, or which were a colourable imitation. They claimed an injunction against defendant, an account of the profits made by defendant from the sale of the helms by him, and £2,000 damages by reason of injury to their business.

The defendant, in his plea, denied that the plaintiffs were the true inventors of the helm and apparatus, said that prior to the granting of the letters patent he (defendant) had made helms of a similar kind. He and his father had, for the last 25 years, made and sold helms similar in all material respects to the helm in respect of which plaintiffs had obtained letters patent.

Mr. Upington, with him Mr. Toms, was for the plaintiffs; Mr. Benjamin, with him Mr. Close, was for the defendant.

Mr. Upington explained, with the aid of a specimen in court, the construction of the helm made by the plaintiffs, and the features in regard to which plaintiffs complained there had been imitation by the defendants.

Mr. Benjamin also detailed, by means of a model, the nature of the alleged infringing helm.

Henry Pain, professor of civil engineering at the S.A. College, deposed to having examined the letters patent of the plaintiffs. The patent, for the first time within witness's knowledge of pot stills, contained a means of fractional distillation within the helm for the pot still. Prior to this, witness was not aware of any case where fractional distillation was employed inside the helm of a pot still. The witness described the process.

[Hopley, J.: The principle of fractional distillation is a very old one?]

Witness: Yes.

[Hopley, J.: But you say the plaintiffs are the first people in the world to whom it has occurred to put it into such a small space as the helm of a pot still?]

Witness: Yes, so far as I know, my lord.

Dr. Hahn, professor of chemistry at the S.A. College, said that the plaintiffs' apparatus displayed ingenuity in that there was put into the helm a simple contrivance by which the heavy fusel oil vapours were condensed, and at the same time a contrivance by which the fusel oil, condensed, was removed, so that it did not run back into the pot. The plaintiffs had also added to the tubes an arrangement by which the condensed fusel oil was drawn away, and it was done in such a simple way that it was not at all to be compared to the large rectifying columns of the ordinary still, but could be done in the ordinary farmer's still, and a palatable liquid at once distilled. The ingenuity consisted in the simplicity of the apparatus by which the deleterious fusel oil was condensed and also removed in the ordinary pot still.

[Hopley, J.: If this thing had been eight times as large and could not be put into a farmer's still—?]

Witness: There would be nothing new in it, then. As it is now, every farmer can use it.

[Hopley, J.: It is really because it is small and handy, though it introduces a well-known principle, that it is novel and good?]

Yes, certainly.

[Hopley, J.: its smallness and compactness constitute what you consider its novelty?]

Yes.

James Henry Covell, one of the plaintiffs, gave evidence, detailing the circumstances leading to the making of the helm. He took out letters patent not only here but in England. In May, 1906, he received a letter from defendant saying that he had heard plaintiffs had made a new kind of helm, and he would like to be given the work of making such helms for them. Witness did not agree to defendant's terms. A man named Jenkins was subsequently sent by defendant, and there was further correspondence, after which defendant came to see witness. Witness showed defendant one of the helms (this was about August 20), and told him that the firm needed capital for their business; that they were handicapped for want of capital. Defendant said he had copper to the value of about £1,000, and about £500 cash, which he was willing to put into the business if they came to terms. He said, also, his connection was worth £500, which made up the amount of capital (£2,000) which the firm required. The invention was explained to defendant, who said it would be a good thing to amalgamate the businesses. He did not, however, then decide on the matter, saying he would have to consult his father. He said he would like to see the whole thing to explain it to his father, and thereupon witness showed the drawings and the whole thing perfectly openly and frankly. Three days later, defendant wrote saying he did not feel inclined to enter into any arrangement. Subsequently, witness saw an advertisement, in which defendant drew the attention of the farmers to a helm made by him for separating the fusel oil from the brandy. When defendant first saw the apparatus he expressed admiration of its utility and ingenuity. The helm made by defendant was an infringement of the patent of witness's firm. Witness had sold a number of these stills to farmers. The firm had been injured in their business through the advertisement of the defendant.

Ernest George Rausby, partner in the plaintiff firm, also gave evidence. He said that one Jenkins called upon him before defendant's visit, and said defendant had asked him to see the firm as to making the helms. The witness corroborated Covell's evidence as to what occurred during the interview with Woudberg.

A. P. Burger, a brandy farmer, said that the helm made by the plaintiffs had resulted in the making of better brandy. Witness had obtained better prices for his brandy. He had never seen an apparatus like this applied to a helm before.

George J. Barry, partner in the firm of Messrs. Barry Brothers, said he had bought stills from the defendant, but the latter had never supplied a still

with a helm containing an apparatus such as the one in question. An apparatus of this sort was highly desirable. Superior brandy was made in this manner.

Mr. Upington closed his case.

The defendant, Daniel Benjamin Woudberg, coppersmith, who has been twenty-five years in business at the Paarl, stated there was an advertisement in "Ons Land," and in consequence of what he read, witness approached the plaintiffs. It was stated they intended having the apparatus made by Colonial workmen. The first he knew of the interior of the apparatus was at the interview in August. When the plaintiffs opened the apparatus, he saw it was quite a simple thing, and he said to them he wished they could see the one he had made and set up for Messrs. Sedgwicks at Wellington. The Robertson show was held before he saw the apparatus in August last. Twenty years ago his father had an apparatus for taking fusil oil from the brandy. The objections the farmers had were the pumping of the water, and that they did not get anything more for the purer article. The farmers looked to the quantity, and not quality.

Cross-examined by Mr. Upington: It did not strike him to say in his affidavit in the application to restrain him that he had made before the phylloxera a tin helm for his father, which was identical with the one he exhibited in court. His father also did not say that witness had made for him exactly the same as the model produced. The brandy which he made by the still was for home consumption, but witness was not a judge of brandy, and could not say whether the brandy was good or not. Witness neither exhibited the brandy nor did he offer to give the farmers a free trial. Witness had shown the interior of his helm which he had in his shop at the Paarl to many prominent wine-farmers, but could not give the name of a particular one who had seen it before the case. Mr. Malan had seen it after the case began.

William T. Steven, coppersmith for about 35 years, and manager of Sedgwick and Co.'s distillery at Wellington for many years, stated that he remembered about 27 years ago being called on to examine a helm for Atherton. The still, excepting having fewer pipes, was the same as the one produced. Witness reported that the apparatus was not worth repairing. Witness was positive that the construction was exactly the same as the defendants. Witness constructed a similar one for the then head of the Excise, who was trying to improve stills for farmers. One was worked suitable for farmers by witness at the exhibition about 25 years ago. Apparatus similar to the

one produced was put up at the distillery at Wellington.

Cross-examined by Mr. Upington: Witness had made four helms similar to the model produced. He had eight baffle plates on the one he put on exhibition, and it was about 6 feet high. It was not a small distillery column. In his particular column the baffle plates were not perforated.

Dr. Marloth stated he had seen the distilling apparatus on the Rhine and Switzerland and a good many in this country. The witness described the stills in use on the Rhine.

Cross-examined by Mr. Upington: The shape of the drip plate in plaintiff's helm was different to any other, but the effect was the same. There was nothing novel about plaintiff's helm.

Have you seen anything like it before?—It is a primitive arrangement.

But you see, by this primitive arrangement, you get £2 a leaguer more for your brandy. Have you seen anything like it before?—No; I have not seen the same thing before.

By the Court: Defendant's helm was better than plaintiff's, but there were better ones still in use.

David M. C. Roux, farmer, Paarl, said that in February, 1905, he was supplied with a still by Mr. Lambrechts. He had not seen the inside of the top of this still, but the parts he had seen were like those in the model of the alleged infringing still produced in court.

Mr. Benjamin closed his case.

Mr. Upington, in argument, referred to section 32 of Act 17 of 1860, and urged that a considerable amount of the evidence led by his learned friend was wholly inadmissible and irrelevant in face of the provisions of that section. Counsel further quoted "Wallace and Williamson on the Law of Letters Patent," p. 489 and 491-2, contending that as to actual user of similar machines, the particulars in the plea were defective, and that evidence was not admissible to impeach the validity of the plaintiffs' letters patent in respect of particular instances and particular times and particular places, such as had been endeavoured to be led in this case.

[Hopley, J.: But if these people give vague particulars, isn't it your duty to come to the Court and object to the particulars?]

Mr. Upington submitted that if the defendant gave general particulars he must be bound by them, and he could not attempt, in the course of the case, to prove specific instances. As regarded specific instances of prior publication and prior user, he contended that the evidence led by the defendant was not admissible. Counsel went on to argue on the merits of the case, quoted "Frost on Patent Law" (1898 Edition),



page 65. He contended that, assuming it could be taken that this new arrangement produced something different from what the distillery column and the ordinary helm produced, it was patentable. Counsel urged that, on the evidence, wherever the idea came from, or wherever part of the idea came from, the helm of the defendant was an infringement of the plaintiff's invention. The use of a baffle plate, which was a colourable imitation of the baffle plate used in the plaintiffs' helm, constituted an infringement of the plaintiffs' patent rights. It was in little things that the difference in process was seen, but it was in these little things that the real novelty and inventiveness of a thing consisted. It was surprising, to say the least, that in all the alleged anticipations of this helm in the Cape Colony, there had been none in which there had been only one baffle plate. There had been evidence of the use of miniature distillery columns, but these had not been proof of the previous use of anything substantially resembling the plaintiffs' invention. In all prior arrangements, the process of distillation was radically different to the one embodied by the plaintiffs in this helm.

Mr. Benjamin, referring to the objection taken in reference to the alleged lack of particulars in the pleadings, submitted that if the particulars were not sufficient, the plaintiffs should have followed the general rule, and have applied to Court to compel the furnishing of further particulars. Counsel quoted Edmonds on Patents, p. 412, and the authorities there cited case on this point, and said that if the plaintiffs objected to the particulars as not being sufficient, clearly their course would have been to apply for further particulars. In the course of further argument, counsel referred to 15-16 Vict., c. 83, and to cases reported in 20, Solicitors' Journal. In regard to the evidence in the present case, Mr. Benjamin contended that it was amply clear that the apparatus manufactured by the defendant had been manufactured in substantially the same manner, if not in every detail, by other people for years past. It was very difficult to crystallise out what was the special merit of the plaintiffs' apparatus, and on what the claim for a patent rested. If it consisted in the use of water inside a helm, it was clear that a similar apparatus was in use in Sedgwick's distillery. Moreover, there was evidence that this apparatus had been in use elsewhere, and it seemed idle to argue that apparatus identical in principle was not generally in use before. The reduction of the baffle plates, as in the case of plaintiff's apparatus, could not be held to be such a novelty as would justify the plaintiffs in coming to Court and asking for a

patent. Counsel cited Edmonds on Patent Law, pp. 54 and 59. On the point whether plaintiffs' apparatus was patentable, counsel said that every detail of this alleged invention was described in books on the subject of distillation. He urged that the plaintiffs could not combine together two or three of the principles contained in these works, and then come to the Court and ask for patent rights. Counsel quoted from the judgment of Lord Esher (Edmonds on Patent Law, p. 83). Where, counsel asked, was the novelty in plaintiffs' apparatus? There was a combination which, in the language of Lord Esher, "any fool would have thought of." Mr. Benjamin referred to Edmonds, p. 341, and to the case of *Seed v. Higgins* (8 H.L. 550).

Mr. Upington having been heard in reply, the Court gave judgment for defendant, with costs.

Hopley, J., said this was a matter of great importance to the parties, and if he had any doubt at all as to how his judgment should go he would have taken time to put it into shape, and to have looked up the various authorities which had been cited; but having analysed carefully the arguments advanced on both sides, he did not think it was necessary or advisable to do so, because his own mind was fixed upon what he thought was the view which should be taken of the evidence in this case. The first point he had to consider was the case advanced by the plaintiff that he was the first person who had reduced this process of distillation to such a small scale as to enable it to be used in ordinary farmers' stills, and on this point the evidence convinced him that others had done this many years before the plaintiffs. He did not say for a moment that plaintiffs knew this, but it was perfectly clear to his mind that others had done this on such a small scale as to make it applicable to the ordinary farmers' skill. It seemed to him that the other alleged original features claimed for the plaintiffs' apparatus were purely mechanical contrivances, which were of no inventive merit whatever. It was argued that the combination of these features might be so ingenious as to be patentable, but it seemed to him that there was no such amount of ingenuity exhibited in this combination as to merit such protection. It was said further that the baffle plate in plaintiffs' machine was of such design as to be patentable, but, though it might have been shown to be a very good machine, he did not think a combination of known processes had been shown to display such genius as to entitle plaintiff to patent rights in respect of the apparatus. His Lordship reviewed the evidence, and said that in principle he could see no difference between the machines spoken



of by witnesses for the defence, and the machine made by the plaintiffs. He thought that on all the essential points, although in its actual shape the utility of the plaintiffs' machine was great, it had been anticipated. He had no reason to doubt the evidence of the defendant as to his having built machines to attain the same results, previous to the patent rights being obtained by plaintiffs. At any rate, there did not seem to him to be an infringement of the rights of the plaintiffs. Plaintiffs had got their patent for what it was worth, but whichever apparatus attained the better results, it seemed to him that the helm of the defendant did not constitute an infringement of the patent, and judgment would, therefore, be given for the defendant, with costs.

[Plaintiff's Attorneys: Herald and Gie. Defendant's Attorneys: Faure, Van Eyk and Moore.]

*Ex parte* FRIEDLANDER.

Mr. P. S. T. Jones asked leave to mention a matter of urgency.

Leave having been granted,

Mr. Jones said that the petition was that of Charles Friedlander, acting on behalf of Carl Frank, of Gordonia.

The circumstances were that the Immigration Department refused to allow a man named Wursing to land in the Colony from the S.S. Buergermeister, which arrived here from Germany on the 17th inst. According to the petition, Wursing was engaged by a storekeeper named Frank as a shop assistant. Frank handed Wursing £20 on board the ship at Cape Town, but the Immigration Officer refused to allow Wursing to land on the ground that the declaration required by the Act had not been made, there being no proper contract of service, while the man had not £20, as required by the regulations. The vessel had sailed from Cape Town to Europe, and was now between Port Elizabeth and East London. An order was asked compelling the Government to allow Wursing to land, subject to his undertaking not to leave the port at which he landed until the question was decided by the Court, after notice given to the Colonial Secretary.

Hopley, J., said he would grant a rule nisi allowing Wursing to land, upon security for £50 being given (to cover the cost of the proceedings and the cost of removing the man in the event of an adverse decision), that Wursing would leave this country if the Court should find against him, the rule being returnable on Tuesday next.

THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL ROLL.

MARSH MEMORIAL HOMES { 1907.  
V. KRAMER. { Feb. 20th.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £3,200, with interest from the 1st July, 1906; counsel also applied for the property specially hypothecated to be declared executable and rents attached.

Order granted.

ILLIQUID ROLL.

JANSEN V. WHILLIER.

Mr. Inchbold moved for judgment, under Rule 329d, for £11, balance of wages due, with interest and costs.

Order granted.

COLONIAL GOVERNMENT V. KOPELOWITZ.

Mr. Howel Jones moved for judgment, under Rule 329d, on a summons claiming that certain diamonds and rubies, value £75 or thereabouts, which were found concealed in the baggage or person of the defendant on his arrival by steamship from England on the 25th December, 1906, after he had informed the Customs officials that he had no dutiable articles, be declared forfeited, and that he be compelled to pay a sum of £225, being treble value of the said diamonds and rubies. Counsel said that service of the summons had been effected upon the wife of defendant. Defendant, however, did not appear.

Order granted as prayed.

GENERAL MOTIONS.

*Ex parte* ESTATE GARLAND. { 1907.  
{ Feb. 20th.

Mr. Swift moved in the petition of the executors of the estate of the late E. B. Garland for leave to mortgage certain estate property in Cape Town in a sum of £9,000, to liquidate the claims of creditors and interest.

Order granted as prayed.

## CORDER V. UPTON.

This was an application upon notice calling upon respondent to show cause why he should not be ordered to furnish security for costs of an action which he had instituted against applicant, and why he should not be barred from proceeding with the said action until such security was given.

Respondent had instituted an action against applicant to recover £1,000 damages for alleged libel and slander. Defendant says that the action is vexatious, and that he has a good answer thereto.

The ground of the present application was that plaintiff was not domiciled in this colony, that he had no fixed address here, and that his wife and children remained in England. He was frequently moving about between Cape Town, Johannesburg, and Natal.

Respondent, in his affidavit, said that he was a commercial traveller, that Cape Town was his headquarters, and that he intended to reside here. He had a post-box in Cape Town.

Mr. M. Bisset was for applicant, W. J. Corder; Mr. Burton was for respondent, W. H. Upton.

Having heard Mr. Burton in argument,

De Villiers, C.J.: The respondent's own letters and cards show that Cape Town is not his headquarters. I do not think he has acquired a domicile here. He does not allege that he has a residence here. He travels over the whole of South Africa, and, as far as I can judge, Johannesburg is as much his domicile as Cape Town. If he chooses to sue the applicant for slander, he must give security. Order granted as prayed, security in the sum of £150 to be given to the satisfaction of the Registrar of the Supreme Court.

## ESTATE HAZELL V. SCHMIDT.

Mr. W. Porter Buchanan moved for an order authorising the substitution of the name of Mr. J. M. P. Muirhead, trustee in the insolvent estate of Thomas Herbert Hazell, as plaintiff in an action brought against respondent for provisional sentence on a mortgage bond. The case had previously been before the Court when Hazell sued for provisional sentence on the bond, and plaintiff was then directed to give Schmidt a statement of account, and the parties were ordered to go into the principal case.

Respondent, who is a farmer on the Cape Downs, appeared, and handed in a statement in which he said that the claim was not equitable and legal, and that no statement of account had been furnished to him. He added that he had been reduced from a position of prosperity to a struggle for bare subsistence by the fraudulent actions of the said Hazell.

Mr. Buchanan read a replying affidavit by petitioner, in which he said that he had submitted a detailed statement of account to respondent, and had offered to debate same, but respondent had refused to go into the account, or to pay the balance due. Counsel said that the respondent was sued for £126 19s. 2d. on an account, which was secured by a mortgage bond for £160.

Respondent said that his books showed that he only owed £3 or £4. That was the only amount he was prepared to pay.

De Villiers, C.J., said he thought that petitioner should carefully consider whether he should proceed with his action against the respondent. If Hazell had defrauded the respondent, the trustee could not have greater rights than the insolvent had.

Respondent said he objected to the substitution of Mr. Muirhead's name as plaintiff in the action.

De Villiers, C.J.: I would strongly recommend Mr. Muirhead to reconsider the matter. In the meantime, respondent had better tender what he thinks is due. Respondent had better see if he cannot increase the tender, and then no more may be heard of the case. Application granted.

*Ex parte* ESTATE SYPHUS.

Mr. De Waal moved, on the petition of the *curator bonis* of estate Syphus, for an order authorising registration of transfer of certain properties.

Order granted.

*Ex parte* ESTERHUIZEN.

Mr. Pohl moved for an extension of the return day of citation and for directions as to substituted service upon respondent, efforts to effect personal service having failed.

Return day extended until the 16th April, personal service, failing which one publication in the "Volkstem."

*Ex parte* HERSCHMAN.

Mr. Pohl moved for an order authorising the Registrar of Deeds to issue a copy of a certain deed of Kinderbewys, or for cancellation of the said deed.

Order granted authorising cancellation of the deed of kinderbewys.

## SCOTT V. CALDER.

Mr. De Waal moved for judgment in terms of a tender contained in a letter addressed by respondent's attorney to applicant's attorney on the 29th January, which tender was accepted on the

following day and further for an order upon respondent to pay costs.

Order granted as prayed.

*Ex parte* ESTATE KOTZE.

Mr. P. S. T. Jones again mentioned this matter, which was an application for leave to mortgage estate property for the purpose of paying costs of a certain action. Counsel now presented a report by the Master, as required by the Court.

De Villiers, C.J., remarked that the costs seemed to be monstrous. He postponed the matter until Friday, and directed that the bill of costs should be produced and that the costs between attorney and client should be taxed in the meantime.

*Ex parte* DOUALLIER.

Mr. M. Bisset again mentioned this matter, which was an application by the usufructuary of a certain estate for leave to mortgage certain property for the purpose of obtaining funds with which to put the property in repair. Counsel produced additional affidavits.

De Villiers, C.J., said that the information was insufficient to justify the Court in practically setting aside the terms of the will, and he ordered the matter to stand over pending additional information on several points.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

TURNBULL V. OHLSSON. { 1907.  
Feb. 21st.  
" 22nd.  
" 25th.

Landlord and tenant — Assignment of lease — Acceptance of tenant — Unauthorized acts of agent.

This was an action for damages by reason of alleged wrongful ejectment.

The plaintiff's declaration was in the following terms: (1) The plaintiff (James

Turnbull) resides at Wynberg, and sues in his individual capacity and as a surviving partner in the firm of Robert Dickson and James Turnbull, lately trading at Wynberg as Dickson and Turnbull. The defendant (Anders Ohlsson) resides in Cape Town. (2) On the 14th April, 1898, the defendant granted to George da Costa Ricci a lease of certain premises known as the Royal Hotel, at Wynberg, for a period of ten years from the 1st October, 1898. (3) Thereafter, on the 20th March, 1900, Ricci ceded and transferred his right in the lease to Robert Dickson and Walter Bass Pentilow. (4) In or about October, 1902, Pentilow retired from the business carried on in the said premises, and on the 28th November, 1902, Dickson entered into partnership with the plaintiff for the purpose of carrying on business as hotel-keepers in the said premises, the partnership to date from the 1st December, 1902. A deed of partnership was duly executed to that effect. (5) Prior to the execution of the deed Dickson obtained the consent of the defendant through the latter's duly authorised agent and representative, one Bultitude, to the introduction of the plaintiff as a partner in the business and as a lessee of the premises under the lease, together with Dickson, but the consent in writing of the defendant to the transfer of the lease into the joint names of the plaintiff and Dickson, as required by the terms of the lease, was not obtained, owing to the express representation of Bultitude, acting for the defendant, that such written consent to the cession was not necessary, and that the plaintiff would be recognised by the defendant as a lessee fully and equally with Dickson. (6) Thereafter the plaintiff and Dickson proceeded to carry on the business under the style of Dickson and Turnbull, and the plaintiff acted as managing partner thereof, all transactions of the firm being conducted through him, as a rule, to the knowledge and with the approval of the defendant, who accepted payment of rent under the lease from the firm as the lessees, and in this and other respects fully recognised and accepted the plaintiff's position as lessee of the premises. (7) In or about April, 1904, the defendant, at an interview with the plaintiff, confirmed an undertaking and promise previously made by the defendant to Dickson to grant a renewal of the lease after the expiration of the ten years' period thereof. (8) On the 25th June, 1906, while the partnership was still subsisting, the private estate of Dickson was sequestrated as insolvent, and thereafter, on the 30th August, 1906, the defendant gave the plaintiff notice that he regarded the lease as determined by operation of the law by reason of Dickson's insolvency; that he, the defendant, had made arrangements for the transfer of the liquor licence in respect of

the premises—which had theretofore stood in the name of Dickson—to another person, one H. S. Boffey, to whom the defendant had let the premises, and that he required plaintiff to vacate the same as soon as transfer of the licence was completed. (9) The plaintiff objected to the proceedings indicated by the above notification, and refused to vacate the premises, claiming that the partnership of Dickson and Turnbull were lessees thereof; and thereafter the defendant applied to the Supreme Court on the 13th September, 1906, for an order directing the plaintiff to deliver up possession of the premises (16 C.T.R., 847). The plaintiff craves leave to refer to the record of the proceedings, and the order of Court thereupon, whereby he was compelled to give up possession forthwith of the premises, but the right was reserved to him of bringing an action for damages if he so desired. (10) The plaintiff contends that the lease was not determined upon the insolvency of Dickson, and that the action of the defendant in treating the lease as so determined and in purporting to re-let the premises and ejecting the plaintiff was wrongful and unlawful and in violation of the plaintiff's rights under the agreements between the parties herein referred to, especially in paragraphs 5, 6 and 7 hereof. (11) By reason of the defendant's wrongful and unlawful action and of the plaintiff's ejectment, the plaintiff has lost the benefit of the moneys invested by him in the said business, and has also suffered loss of trade as well as loss on furniture and stock, which he has been compelled to dispose of at a forced sale, has been put to considerable expense in the way of disbursements for wages and other charges, and has in the above and other respects sustained damage to the extent of £5,550. (12) The trustee of Dickson's Insolvent Estate has given the plaintiff notice that he declines to join the plaintiff in instituting the present proceedings. The plaintiff claims: (a) The sum of £5,550 as damages aforesaid; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows: (1) The defendant admits that plaintiff resides at Wynberg and defendant resides at Cape Town, but he does not admit that, for the purposes of this action, the plaintiff sues as surviving partner in the firm of Robert Dickson and James Turnbull, lately trading at Wynberg as Dickson and Turnbull, or that he is entitled so to do. (2) Paragraphs 2 and 3 are admitted. By the said lease it was agreed that the tenant shall not assign or sublet or in any way alienate or part with any of his interest in the said premises, nor transfer his licence for the sale of intoxicating liquors to any other person or persons without the consent of the landlord (the defendant),

thereto first had and obtained in writing and the cession by the said Ricci on the 20th March, 1905, is endorsed upon the lease and is signed by the defendant—who thereby gave his consent in writing thereto. (3) As to paragraph 4 the defendant admits that Pentilow retired from the said business, and he admits that a partnership was entered into between the plaintiff and Dickson and a deed executed, but he had no knowledge of the date thereof, and was not aware of the terms thereof until September, 1906. (4) As to paragraph 5, the defendant denies that he gave his consent to the introduction of the plaintiff as a partner in the business or as a lessee of the premises. He denies that the said Bultitude was his agent and representative, and that he had any authority from defendant to give any such consent. He had no knowledge of representations alleged to have been made by Bultitude, and he denies that the representations were made. He says that he has never given his consent to the transfer of the lease to plaintiff and Dickson, that he never authorised anyone, and no one had any authority to do so, and that if Bultitude, as alleged, purported to give his consent and to make the representations, it was without his knowledge and consent and without any authority; but he admits that no written consent, as required by the lease, has been given by him. (5) Defendant admits that plaintiff and Dickson carried on business as Dickson and Turnbull; he denies that all transactions of the firm were conducted through plaintiff with his knowledge and approval, or that the latter was managing partner. He denies that he accepted payment of the rent under the lease from the firm as lessees, and he denies that he ever accepted the plaintiff as lessee of the premises, but says that Dickson was, after the retirement of Pentilow, regarded as the sole lessee. (6) Paragraph 7 is denied. (7) Paragraphs 8 and 9 are admitted, and defendant says further that the trustees in the estate of Dickson, in whose name the liquor licence stood, gave their consent in writing to the transfer of the licence to Boffey to the knowledge of the plaintiff. (8) As to paragraph 10, defendant denies the contention, and he denies paragraph 11. (9) Paragraph 12 is admitted, save "trustee" should be "trustees." (10) One of the stipulations in the lease is that the rent shall be paid monthly, and section 13 of the lease provides that, if the tenant commits any breach of any of the stipulations in the lease, or should become insolvent, that the defendant could at his option cancel and annul the lease, which should be thereupon absolutely determined, and in that event the landlord could, without any previous demand whatsoever, enter upon and take

possession of the premises, and expel the tenant and all persons claiming under him or being on the premises let, and that the tenant should be allowed 30 days from the date of any monthly rent within which to pay the same, without his being considered to have committed a breach of the terms of the lease. The last rent paid to defendant was the rent due on the 31st May; on the 25th June, Dickson became insolvent; no rent due for the premises for June was paid, and on the 30th of August the defendant, as he was entitled to do, gave notice to the plaintiff that the said lease was determined, the defendant being legally entitled, quite apart from the operation of the Insolvent Ordinance, to cancel and annul the lease, and having so cancelled and annulled it. Save as aforesaid, defendant denies the allegations in paragraphs 4, 5, and 6. Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

Dr. Greer for plaintiff. Sir H. Juta, K.C. (with him Mr. Upington), for defendant.

James Turnbull, the plaintiff, was called, and gave evidence bearing out the statements in the declaration. He said he was an accountant, and had served as a captain in the war. He was looking out for a licence in the neighbourhood of Cape Town in 1902, and he went to Ohlssons and saw Mr. Bultitude, who advised him not to have anything to do with a certain hotel then for sale. Subsequently he was introduced to Dickson, and there were negotiations regarding a partnership in the Royal Hotel. Witness again went to Ohlssons, and Bultitude advised him to take the partnership. A deed of partnership was drawn up, the terms being that witness should pay £4,000 for a half-share of the hotel business. There was an addendum to the deed of partnership whereby Dickson agreed to cede to witness his half-share as security for moneys drawn by him. Before witness paid anything, witness and Dickson went to Ohlssons, and saw Mr. Bultitude, who said that the lease did not require endorsing, but that Mr. Ohlsson agreed to accept witness as partner. Witness did not see the lease until the proceedings on motion to eject him from the Royal Hotel. Witness became the managing partner in the business, and the names of the partners—Dickson and Turnbull—appeared on the firm's letter-paper. Witness communicated with Ohlsson's Cape Breweries and with Mr. Ohlsson from time to time, signing as "J. Turnbull, of Dickson and Turnbull." The witness deposed as to correspondence which, it was contended, proved that the company and Mr. Ohlsson recognised the partnership, and dealt with

Turnbull and Dickson as partners. In 1903 witness saw Bultitude about re-papering the place, and the work was done by Ohlsson's Breweries' staff. Witness regarded Bultitude as fully authorised to act. He advised witness to buy Dickson's share. A billiard-table licence was taken out in the names of the partners. After Dickson's insolvency, and when trouble arose, witness offered Bultitude to purchase the goodwill for £1,500, and to pay £10 a month extra rent. His idea was to buy the goodwill outright, and afterwards to sell, so that he might clear himself. Witness had been given to understand that Ohlssons received an offer of £5,000 for the place. He set off the improvements made in the premises against the rent due.

Robert Dickson said he was a partner in the late firm of Dickson and Turnbull, and was at the same time the proprietor of the Standard Bar, Cape Town. He also had an advertising business on the Cape Government Railways, and was the proprietor of a wholesale business as well. Witness and Pentilow took over the Royal Hotel from De Ricci. He knew that the hotel was the private property of Mr. Anders Ohlsson. The retirement of Pentilow from the business was not endorsed on the licence, which, he believed, still stood in the names of Pentilow and Dickson. When Pentilow retired, witness was on the lookout for another partner, and he got into communication with Turnbull. Witness went to Ohlsson's, and saw Mr. Bultitude, whom he asked whether there would be any objection to taking in Turnbull as a partner. Bultitude said: "Oh, you can take in a thousand if you like." He could not be certain that anything was said about the lease.

Dr. Greer said he would ask the Court's leave to treat Mr. Dickson as a hostile witness.

Maasdorp, J., remarked that he did not see that the witness had so far shown hostility.

Dr. Greer then asked the witness whether he had ever made a different statement about the lease to what he had made in the box.

Sir H. Juta objected to the question. His learned friend could not cross-examine his own witness.

Maasdorp, J., said he saw nothing improper in the question.

Witness, answering the question, said he did state on one occasion that he believed Bultitude said the lease would be all right. At the time he made this statement, he was worried with financial troubles, and he was not prepared to swear what actually took place. When Pentilow retired from the partnership there was an indebtedness of about £7,000, which was afterwards reduced to about £500 or £600. He did not remember that when the deed of partner-



ship was signed, the thousand pounds was not paid until Turnbull had satisfied himself that he would be accepted. Turnbull said something to him about having to realise some scrip.

In cross-examination by Sir H. Juta, the witness said he took Turnbull in as a partner, but he supposed that was a different thing from taking in a co-lessee. He supposed that his financial position would not admit of him telling his creditors that he was taking in a co-lessee. The matter of the lease was never mentioned between witness, and Turnbull during the partnership. Turnbull never told him that Ohlsson had promised him a lease or an extension of the existing lease. In June last, witness was under the impression that Turnbull was a lessee, and he (witness) therefore went to Mr. Ohlsson and asked him, as a personal favour, to give Turnbull the unexpired portion of the lease.

A Juryman: When the partnership was entered into, were you under the impression that you were conveying to Mr. Turnbull not only the half-share in the proceeds of the business, but also in any interest you might have in the lease itself?

Witness: I understood I was giving Mr. Turnbull a half-share.

It included the interest you had in the lease?—At the time I understood so. That was the intention: that I was to give a half-interest in everything.

In re-examination, the witness said he ceded this remaining interest in the business to Turnbull as collateral security for moneys already drawn in excess of what witness was entitled to, and for any moneys so drawn in future.

Dr. Greer: You have seen Mr. Bultitude a couple of times?

Witness: Yes.

Lately?—Yes.

And have you been in the office of Mr. Ohlsson lately?

Sir H. Juta objected that this did not arise out of cross-examination.

Dr. Greer did not press the question.

Harry D. Bradley, racehorse owner and speculator, said he was present on an occasion when Turnbull was introduced to Mr. Ohlsson as "Dickson's partner." This was in the early part of 1904.

[Maasdorp, J.: Is it your case, Sir Henry, that Mr. Ohlsson did not know there was a partnership?]

Sir H. Juta: He says he did not know; at least, until 1904.

Henry Magor, proprietor of the Kimberley Hotel, Cape Town, said he had been for ten years connected with the trade. He had had negotiations with Dickson with a view to purchasing the latter's half-share in the Royal Witness saw Bultitude, who advised him it was a good thing to go in for. Witness had previously dealt with Bul-

titude as representing Ohlsson's. Bultitude and Dickson gave witness to understand that there was a disagreement between the partners. Witness had bought the Bay View Hotel at Muizenberg and the Fountain Hotel, Cape Town. Both these houses belonged to Mr. Anders Ohlsson personally, and witness had negotiated with Bultitude in regard to these. From the previous transactions, witness regarded Bultitude as qualified to act as Mr. Ohlsson's agent.

Cross-examined: He did not say Bultitude could sign a lease, but he acted as intermediary. The leases were drawn up by Ohlsson's solicitors.

Walter Bass Pentilow, former partner of Dickson in the Royal Hotel business, said that Bultitude had authorised him to do some painting.

After further evidence of a similar nature, Dr. Greer closed his case.

Anders Ohlsson, the defendant, said he owned the Royal Hotel, Wynberg. He was director of Ohlsson's Cape Breweries, but this house had nothing to do with the company. Great care had to be taken in regard to the character of the tenants, and it was very important that there should be satisfactory proof of the tenants' honesty and good character. The leasing of houses being so important, witness always did that himself. When the question of a new tenancy arose, inquiries were made into the character of the applicant. Bultitude was a kind of outside manager of the company, who saw that the houses were properly conducted and the rent paid, and attended to other details. Bultitude had no authority to accept a tenant or to sign a lease, whether it was the company's or witness's property. No houses were leased except by witness or his son, who held his (witness's) general power of attorney. In this instance Pentilow retired with witness's approval. Witness knew nothing of Turnbull in 1902. In 1904 he heard something about Turnbull's standing and position. He would not have allowed Turnbull to take a half-share in the house, if asked. In 1904 Turnbull asked for an interview with witness. The house was then in arrears with the accounts of the company. On that occasion Turnbull said he had an interest in the business, and Dickson's position being doubtful, he wished to know if witness would allow him to have a half-share in the lease, so as to secure himself. Witness told Turnbull he had acted foolishly, and refused to give him credit. Nothing was said then about an extension of the lease. Witness never said that he would extend the lease. Shortly before Dickson's insolvency, the latter and Turnbull came and asked if witness would grant the lease to Turnbull. He replied that

he could not do it. He said he would not take Turnbull as a tenant at any price. Turnbull said that he wanted a five years' extension of the lease if he were allowed to take over the lease. Witness never authorised anybody to allow Turnbull to come in as a lessee, nor did he consent to this.

Cross-examined by Dr. Greer: Pentilow's share in the lease had not been cancelled in writing on the lease, but there was a verbal cancellation.

If there were a verbal cancellation, could not there have been a verbal substitution?

No; because it distinctly says on the lease that there can be no substitution without my written consent.

In further cross-examination, the witness said it was provided by the lease that the lessee should not part with any of his interest. Witness was not aware that Dickson had parted with any of his interest. When he received a letter from Turnbull, signed "J. Turnbull, of Dickson and Turnbull," he took no notice of it.

Dr. Greer: You know there is such a thing as waiver by action?

Witness: You can't get me to waver. I am perfectly straight in my evidence. I never waver.

Dr. Greer: My waiver is not the same as yours, Mr. Ohlsson.

Dr. Greer was proceeding to question the witness with regard to letters establishing the partnership, when

The foreman of the jury said the jury were satisfied that a partnership existed. He merely mentioned this in order that it might save time in questions on this point.

Maasdorp, J., said the position was that counsel, to protect himself, wanted to have as much evidence on this point as possible, because the case might take some other course.

The witness was cross-examined as to statements made in his affidavit on the occasion of the motion, proceedings for Turnbull's ejectment. He said Turnbull did not ask him for an interview to discuss the financial position of the firm. Witness knew Turnbull was managing the business.

Dr. Greer: What did Boffey pay you?

Witness: £80 a month.

What was he to pay you for the goodwill?—He was supposed to pay me £2,000 if he could pay it, but there was no stipulation fixed on account of bad times.

Do you mean he isn't bound to pay you anything?—I am not going to force him.

That is not my question. Do you mean to say he isn't bound to?—If he sells the property and gets cash, then he pays me, but not otherwise.

The witness, in further cross-examination, said that the business did not now

pay. He thought this was due to the depression. He did not know it was due to the talk about Wynberg as to the transactions in regard to this hotel.

In re-examination the witness said the business of a licensed victualler was not half so good now as it had been.

F. A. Ohlsson, son of the last witness, also gave evidence repudiating that Bultitude had any power to act for Ohlsson, or the Brewery Company.

Archibald Bultitude, one of the managers of Ohlsson's Breweries, said his duties were to see that the houses of the company were properly conducted, that the people paid their rent and generally to supervise the conduct of the houses. Before a lease was granted a thorough inquiry was made into the character of the applicants. That was an important matter. Witness had never signed any leases. He had accepted tenants under Mr. Ohlsson's instructions. Witness had never been an agent to sign leases, and had never done so. He had signed monthly tenancy agreements. Witness knew Turnbull in 1902. Witness would not have accepted Turnbull as a tenant, nor would he have recommended him. Witness knew that Dickson and Turnbull entered into a deed of partnership. Dickson never asked witness to accept Turnbull as a lessee. Dickson came to witness after the partnership was entered into, and said he had taken Turnbull in as a partner. Witness said he could take in as many as he thought fit, and he added: "We look to you only." Nothing was said about admitting plaintiff as a co-lessee. No deed of partnership was shown to witness. In 1904 witness remembered Turnbull coming and asking if he could come in as a co-lessee, as he was afraid of Dickson's position. Mr. Ohlsson refused to agree to this. He was not a man whom witness would have taken in as co-lessee. The liquor business had for the last year been dwindling. That was the case all over the Cape Peninsula.

Cross-examined by Dr. Greer: Witness negotiated with Mr. Magor regarding the Fountain and Bay View Hotels up to a certain point. He acted, however, on Mr. Ohlsson's instructions. The first time witness saw Turnbull on business was at the interview regarding a hotel at Paarl. Witness told him not to touch it, as he did not think it good enough to buy. Turnbull did not come to see him subsequently about a partnership in the Royal Hotel, and witness did not advise him it was a good thing. Witness would swear that. Dickson did not come to see witness about it until after the partnership was entered into. Witness recollected now that Turnbull and Dickson came to him together in 1903 to ask if Mr. Ohlsson would agree to the substitution of Turnbull's name instead of Pentilow's on the lease,

though in an affidavit made in September last, he saw he could not recollect this.

By the Jury: Witness never said he would accept Turnbull on equal terms with Dickson.

Further evidence was given on behalf of the defendant by Mr. Harries, one of the managers of Ohlsson's Cape Breweries, relating to the alleged default in the payment of rent. He denied, in cross-examination, that the plaintiff had tendered money to pay rent, nor had he said such money would not be accepted as rent, but would be placed to his credit on the liquor account.

H. S. Boffey said he took over the Royal Hotel last September, paying £2,250 goodwill. The agreement was to pay £80 a month rent, but after a month that was reduced to £60, in consequence of the falling off in trade. At the present rental things came out about square. He had given a promissory note for £2,000 on account of the goodwill, and had paid £250 in cash.

Cross-examined by Dr. Greer: The trade of a hotel depended much on the popularity of the proprietor. He intended to pay the amount of the promissory note if he could.

Re-examined: Witness was the proprietor also of the Railway Hotel, Wynberg, and had no reason to suppose that he was an unpopular man at Wynberg.

By the Jury: Witness had no lease of the Royal Hotel. He paid the good will to become a monthly tenant.

F. W. Poulton, accountant to Ohlsson's Cape Breweries, Ltd., also gave evidence.

Dr. Greer, addressing the jury on behalf of the plaintiff, said the issue was really a simple one, but it was one the determination of which meant a great deal to the plaintiff. The points to be decided were: Was the plaintiff entitled to share in the benefits of the lease of the Royal Hotel, and was he accepted and recognised by the defendant as being a participator in that lease? Counsel reviewed the evidence at length, emphasising the point that letters written by Turnbull and signed "J. Turnbull, of Dickson and Turnbull," were received and answered by Mr. Anders Ohlsson. The grounds on which the jury were asked to give judgment for the plaintiff were two-fold. There was, first of all, the ground that Bultitude was the agent for Mr. Ohlsson, that he was entitled to act on Ohlsson's behalf, and that he did say and was entitled to say, at the interview with Dickson and Turnbull: "There is no necessity to have the partnership endorsed on the lease." If the jury found that, then, of course, the case terminated at once, because that immediately fixed the defendant's liability. But if the jury were against the plaintiff on that ground, there was the further ground that, even

if Bultitude did not say these words, Mr. Anders Ohlsson, immediately after the partnership was entered into, knew of that partnership, accepted it, and by his acceptance of it, tacitly consented to Turnbull having a half-share of the lease. It was a noteworthy feature of this case that in all matters not material directly to the issue, the plaintiff was corroborated by the defendant's witnesses, that he was only contradicted where it was at all material to the direct issue, and that where he was contradicted by witnesses for the defence, the latter disagreed among themselves as to detail. If the jury found for the plaintiff they must remember, in assessing the damages for the plaintiff, that he had put his worldly all into this venture, that everything he had in this world, all his earnings, had gone into this hotel, and that the benefit of his savings and earnings, at any rate, to a certain extent, had gone into Mr. Ohlsson's pocket. Plaintiff had paid a certain amount in cash, and he had allowed his share of the profits to remain in the business, and he was entitled to those just as much as though he had drawn them from time to time. He (counsel) was sorry to have detained the jury so long, but it was a matter of vital importance to the plaintiff, who was fighting for his all against a wealthy corporation.

Sir H. Juta said that the keynote of the case lay in the last remark made by his learned friend. It was an appeal to the emotions of the jury. They were not asked to consider the case as men of business; there was an appeal made to them on the ground that the plaintiff was a poor man, and the defendant a wealthy one, or a member of a wealthy corporation. It showed at once the weakness of the case. To find for the plaintiff in face of the lease providing that the written consent of the owner must be obtained before the original lease was in any way altered, the jury would have to say that the parties made another contract, in which they distinctly said: "Never mind all that about writing; we annul it; we make an entirely new contract." The jury were asked to treat the lease as though the words "consent in writing" were never there. The words "consent in writing" were put into the lease especially to obviate the kind of proceeding which had kept the jury there for three days. Counsel cited the cases of *Paterson's Executors v. Webster, Steel and Co.* (1 Juta, p. 350) and *Green v. Griffiths* (4 Juta, p. 346). Referring to the evidence, counsel urged that there was no evidence at all to establish that Bultitude had authority from Mr. Ohlsson to admit leases, or to allow any lessee to come in without the written consent of Mr. Ohlsson. That being so, if Bultitude made certain re-

marks attributed to him, they did not bind Mr. Ohlsson. But without going to that extent, he contended that there was no proof that Bultitude ever said that the plaintiff could come in as co-lessee. What was the use of drawing up documents if they were to be annulled by such evidence as they had heard in this case? When was this contract made? When could it be said that Mr. Ohlsson accepted Turnbull as lessee? If there were not an express contract, what happened to lead to the mutual understanding that the written contract was at an end? A good deal of evidence had been directed to showing there was a partnership, but it was of no use mixing up the case by harping on a partnership. To do that was to try to draw the minds of the jury off the real point of the case, which concerned the lease. Counsel submitted that the only way in which the whole of the case could be explained was that Turnbull did not know that Mr. Ohlsson's written consent was required. He further contended that the insolvency of one partner terminated the partnership, that thereafter the lease could not be transferred to any other parties without the landlord's consent, and that if the landlord's consent were withheld, the lease would be at an end. In that event, where were the damages? His learned friend had waved all this aside, and had argued that the plaintiff was entitled to damages because he had put £5,500 into the business, as though that were any reason why he should get anything out of it. Counsel further referred to the non-payment of rent after Dickson's insolvency, as showing that Turnbull was never considered a lessee.

Dr. Greer having replied,

Maasdorp, J., in summing up, said that the main ground of the plaintiff's claim, as set forth in the declaration, was that Mr. Bultitude, being the agent of Mr. Ohlsson, made plaintiff a co-lessee. That was the first position the plaintiff had to establish, and it was the main point of the case. Now, was Bultitude's agency proved? There was no evidence of appointment in writing or by direct word of mouth from Ohlsson to Bultitude. Agency could be proved in a third way: by conduct, but was there anything here to show that Ohlsson allowed Bultitude to act as agent for the purpose of entering into written leases or to consent to the assignment of a lease? It was for the jury to say whether they could lay their finger on such conduct or circumstances as would establish an agency of this kind. Here they had a document providing that the lease could not be altered without written consent. If it were sought to establish something which was not in writing, it must be very clearly proved indeed, because the object of the writing was to have the

thing clear. What had to be made clear to the satisfaction of the jury was that Mr. Ohlsson said: "I consent to Turnbull becoming co-lessee with Dickson." Was there proof that that was said or conveyed, and was it established as an agreement? His Lordship went on to refer to the evidence as to what occurred at the various interviews, and said that to find for the plaintiff the jury must be clearly satisfied that Ohlsson agreed to the assignment of the lease to the partnership, and waived his right to have nothing done otherwise than in writing. On the question of the damages, His Lordship said it was a very nice point whether plaintiff could set up a claim for damages in this form when the business had been stopped by reason of the insolvency of his partner. That was a point on which exception might have been taken, but he did not raise it now, except to mention it as a point to consider in relation to the measure of damages. It was for the jury to consider whether the plaintiff had established any rights, and if so they would determine the extent of the damages under the directions given them.

The jury retired to consider their verdict, and returned after an absence of 35 minutes.

The Foreman intimated that the jury found for the defendant, the plaintiff having failed to establish his claim as co-lessee. The jury also wished to state that they considered the aspersions thrown on the character of the plaintiff had not been established in Court.

Maasdorp, J.: I think you are quite right in the decision. There should not be any aspersions thrown on a man except on clear proof in court, and any insinuations made you are quite right in repudiating. I also think that upon the law and facts of the case your verdict is quite right.

Judgment was entered for the defendant, with costs, including costs of the proceedings on motion.

[Plaintiff's Attorneys: Dempers and Van Ryneveld; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ESTATE ROOS V. TROLLIP. { 1907.  
Feb. 21st.

[At the time of going to press this case was standing over for judgment. A full report will be found under the date when judgment is given.]



## THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.),

ADMISSION. } 1907.  
Feb. 21st.

Mr. Sutton moved for the admission of Cyril Espineli Espin as a notary, the oaths to be taken before the Registrar of the Eastern Districts Court.  
Application granted.

## PROVISIONAL ROLL.

LILIENFELD BROS. V. RIEL.

Mr. Watermeyer moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

ESTATE FLETCHER V. BRUYNS.

Mr. Swift moved for provisional sentence on a mortgage bond for £4,000, with interest, and £3 12s. 9d. insurance premiums, and that the property be declared executable. The bond became due through non-payment of interest.  
Order granted.

SCHROEDER V. GARDENER.

Mr. Rowson moved for provisional sentence on an acknowledgment of debt for £126 15s., less £69 6s. 3d. paid on account, with interest and costs.  
Order granted.

## ILLIQUID ROLL.

HO BEN V. KALK BAY FISH AND LAND CO., LTD.

Mr. M. Bisset moved for judgment under Rule 329d for £11 17s. 6d., goods sold and delivered, with interest and costs.  
Order granted.

## REHABILITATION.

Mr. Pohl moved for the rehabilitation of Arthur Isaac Meyer.  
Application granted.

## GENERAL MOTIONS.

*Ex parte* GOOD HOPE FUNERAL ASSOCIATION, LTD.

Shareholder—Fully paid-up share  
—Contributory—Petition for winding up.

*The holder of fully paid-up shares in a limited liability company is entitled, under the Companies Act, to present a petition for the winding up of such company.*

This was an application for the winding-up of a certain limited company and the appointment of an official liquidator.

The petition of Joseph Fock, George de Lacy, and Thomas Dawson Henry Long, in their capacity as trustees for the time being of the Good Hope Funeral Association, set out that the company was formed about 1886, with the object of carrying on the business indicated by its name. The nominal capital of the company was in the deed of association of the company stated to be £1,000, divided into 1,000 shares of £1 each, with power to the directors to increase the sum up to £2,000 by issuing additional shares. Petitioners are the present trustees of the company, and the two first-named are shareholders or contributories, while the last named petitioner, as a director of the company, represented the Independent United Order of Scottish Mechanics, who were the holders of 60 shares in the company. Of the shares in the company only 1,250 were issued, and the actual subscribed capital of the company amounted to £1,250 of fully paid-up £1 shares. The company had not paid its way for the last three years, and had gone back during that time about £900. On the 25th January, at the annual general meeting of shareholders, it appeared from the accounts submitted that the company was still losing money, and it was then decided that a special general meeting of shareholders should be convened for Friday, 8th inst., for the purpose of taking into consideration and finally deciding upon an offer to take over the assets and the liabilities of the company, exclusive of the shareholders' capital account, and to pay to each shareholder 2s. 6d. per share. The offer was made by Gert Joel Hoffman, who for many years had been secretary of the company, and to whom the company was indebted in all in about £1,100. The offer was rejected at the special meeting, the general feeling being that the assets of the company were of such value that shareholders might fairly expect upon realis-



ation thereof to obtain considerably more than 2s. 6d. a share. Indeed, if the assets were judiciously realised, the company would probably return to the shareholders 10s. or 15s. in the £. The meeting then resolved to call for tenders for the company's assets as a going concern, and tenders had already been advertised for. After the meeting had rejected the offer made by Gert J. Hoffman, the latter informed the meeting that he would have nothing more to do with the company, by which those present understood he resigned his position. Mr. Hoffman then asked that the election of officers should be proceeded with, but the chairman ruled that as the meeting was called for an especial purpose, officers could not be elected thereat. On the 12th inst., petitioners received notice from Mr. J. C. de Korte, attorney for Hoffman, giving them three months' notice to pay up the sum of £200, owing on a notarial bond, with interest. Summons was served on petitioners requiring payment of liabilities, amounting, without interest, to £827 3s. 3d., secured by mortgage on landed properties. The summons was made returnable on the 15th inst., less than three days from the date of service. No special general meeting of the company could be held under seven days' notice, so that petitioners were unable to consult the shareholders in the matter. The assets of the company consisted of landed property, stock-in-trade, horses, etc. The landed property was valued for municipal purposes at £1,750, while the movable assets were worth £500 or thereabouts; in all £2,250. The total indebtedness of the company at the 31st December last, exclusive of liabilities of shareholders, in respect of their shares, was £1,217 3s. 3d. Petitioners were satisfied the assets, if judiciously realised, would not only pay the debts of the company, but also leave considerable surplus for division among the shareholders. The result of the judgment being obtained by Hoffman, and the attachment of the assets of the company would be entirely to destroy the goodwill of the company as a going concern, and cause irreparable damage to it, and if a judicial sale were carried through in the present state of depression, great loss would be sustained by the shareholders. It was quite clear that the company was unable to pay its debts without realisation of its assets, and petitioners considered that it was just and equitable that the company should be wound up. In order that the value of the assets might not be unnecessarily depreciated, it was advisable that its business should be continued, so that, if possible, sale thereof might be made as a going concern, and that a liquidator be appointed, and that Mr. George William Steytler, in his capacity as the secretary of the Colonial Orphan Chamber

and Trust Co., should be appointed as official liquidator.

A further affidavit by Joseph Fock set out that at the present time contracts were in force with the Colonial Government in respect of burials from Valkenberg Asylum and Woodstock Morgue. Four horses belonging to the company required to be fed. There was only sufficient forage to last to Saturday next. Two drivers and a clerk, in addition to the manager, required to be paid. The manager was paralysed, and unable to carry out his duties.

Mr. P. S. T. Jones for applicants; Mr. Burton for certain creditors and shareholders.

Mr. Burton took a preliminary objection that the petitioners had no *locus standi* to petition for the winding up of the company. By section 137 of the Companies' Act of 1892 a company could only be wound up on the petition of the company itself, or one or more creditors or contributories. The petitioners did not fall under any of these heads.

Mr. Jones contended that two of the petitioners were contributories. They were holders of fully paid-up shares, and a holder of fully paid-up shares was a contributor. This had been decided in England under section 74 of the Act of 1882, in the case *In re National Savings Bank Co.* (1866 L.R., 1 Ch., 547). Counsel also quoted Lindley on Company Law (sixth edition, vol. II., pp. 845 and 850). The Court could wind up a company when it was just and equitable to do so.

De Villiers, C.J.: I am not prepared to dissent from the decision in the English case just cited. It was held by the Master of the Rolls under a section of the English Act, which for the purposes of this case, is identical with the section now in question, that the holder of fully paid up shares in a limited liability company is entitled to present a petition for the winding up of such company. That decision was affirmed by a very strong Court of Appeal, and although there is much to be said in favour of the contrary view, I am inclined, on the whole, to adopt the reasoning of the Court of Appeal.

His Lordship ordered that Messrs. J. H. Roos and George William Steytler, in their respective capacities as secretary of the Board of Executors and secretary of the Colonial Orphan Chamber and Trust Company, be appointed official liquidators, with powers under section 149 of the Act. In giving judgment, His Lordship said he thought it was in the best interests of all parties that the company should be wound up, and that the winding up should take place at once. The company seemed to have failed wholly to carry out its objects, and there appeared to be no chance of it retrieving its position.

*Ex parte* ESTATE LUCK.

Mr. Lewis, for the petitioner, Annie Marie Luck, executrix testamentary in the estate of her late husband, Carl August Luck, moved for leave to raise a mortgage of £200 on certain property to enable petitioner to complete certain work which enhanced the value of the estate.

Application granted.

*Ex parte* COSSLY.

Mr. Lewis moved for leave to sue *in forma pauperis* for damages for breach of contract, but counsel said he was not prepared to certify at present.

An order was granted authorising counsel to take the record.

*Ex parte* WRIGHT.

Mr. J. E. K. de Villiers moved, on behalf of the executrix, for leave to transfer certain property, which she had purchased at a public auction, for £1,450, in the sale of her late husband's estate.

Granted.

*Ex parte* SILBERMAN.

Mr. Lewis moved for leave to extend the return day. The publication was omitted from the "Gazette."

Return day extended to the second day of next term; one publication in the "Gazette."

## VAN ROOYEN AND OTHERS V. MCKAY.

Mr. Molteno said this was the return day of a rule *nisi*, calling on the respondent to pass transfer of certain property upon the applicants' paying the balance of the purchase price, and restraining respondent from passing transfer to other persons.

Rule made absolute.

CAPE ELECTRIC TRAMWAYS CO., LTD.  
V. COLONIAL GOVERNMENT.

Mr. Burton, for the plaintiffs, moved to have an award of arbitrators made a Rule of Court, and an order on the respondents to pay the costs.

Mr. Searle, K.C., appeared to consent on behalf of the respondents.

Award made a Rule of Court, with costs.

## PEPPER V. PANTRY.

Mr. Burton, for the defendant (applicant), moved for removal of bar and removal of the trial to the Circuit Court

at Beaufort West. There was a consent paper from the plaintiff.

Application granted.

## OTTESTROM V. STEPHAN BROS.

Mr. Burton, for the defendants, moved as a matter of urgency for a postponement of the commission fixed to take evidence at Port Nolloth, until March 15, 1907. The applicants were put to great difficulty and inconvenience to enable them to get anyone to go to Port Nolloth to represent them, as there were no legal practitioners in Port Nolloth.

[De Villiers, C.J.: When does the next boat leave for Port Nolloth?]

Mr. Van der Byl (for respondent): To-morrow night.

[De Villiers, C.J.: Why cannot you send your man?]

Mr. Burton said there would be considerable difficulty in getting a man to go at such short notice without a good fee.

De Villiers, C.J., said he did not think it fair that the plaintiff, who was suing as a pauper, should have this matter further postponed, and run the risk of losing witnesses. There was ample time before to-morrow to instruct counsel, attorneys, or their clerks to go to Port Nolloth for the purpose. The application must be refused.

SOTEWU V. NOSENTI. { 1907.  
Feb. 21st.  
" 27th.

Review—Illegality of proceedings  
—Transkeian Appeal Court.

*The appellant, against whom judgment was given in a Transkeian Magistrate's Court at the suit of the respondent, appealed to the Native Appeal Court, which, finding that the appellant had been unable to produce all his evidence before the Magistrate, remitted the case to the Magistrate, with the object of having such further evidence taken. The defendant, on frivolous grounds, refused to produce such further evidence, whereupon the Appeal Court dismissed the appeal.*

*Held on summons for review, that there was no ground for setting aside the proceedings of the Magistrate's Court.*

Mr. Benjamin, for the applicant, said this was a case for review, under Rule

190, and it ought to have been set down for a Monday or a Wednesday. Summons was issued before the new rules came into force.

Mr. Alexander, for the respondent, took a preliminary objection that there was no right of review as against the Court of Appeal in native cases.

His Lordship said he would look into the papers, and before deciding upon the preliminary point, he should like to consider the facts.

The facts of the case sufficiently appear from the judgment.

*Postea* (February 27th).

De Villiers, C.J.: This case was heard before me sitting alone, and was heard before me sitting alone, and it came before the Court by way of summons against the Magistrate of Willowvale and also against the Native Appeal Court for the Transkei to show cause why certain proceedings should not be set aside by reason of the gross irregularity in the said proceedings. (a) In that the said first-mentioned Magistrate unlawfully and unjustly declined to allow a postponement of the proceedings to enable the said Sotewu (the defendant) to be represented by his legal adviser, who was then absent from the district in which the said Magistrate was sitting, and unable to be present, the said defendant being a native unskilled in the practice, and procedure of courts of law, and thereby being debarred from presenting the facts of his case before the said Magistrate; (b) in that the Magistrate thereupon gave judgment for the said Nosenti (the plaintiff) upon certain evidence which the said Magistrate did not consider established the said plaintiff's claim, and upon certain additional evidence "which he considered meagre and unsatisfactory." It appears that judgment was given for the plaintiff by the Magistrate's Court of Willowvale, whereupon the defendant appealed to the Transkeian Appeal Court. The Appeal Court remitted the case to the Magistrate to enable him to take evidence on behalf of the defendant. Then the case being again called in the Magistrate's Court, the defendant refused to proceed with the defence on the ground that his attorney was not there, although the attorney had left a representative for the purpose. What took place when the matter again came before the Transkeian Appeal Court would appear from the following note on the record: "When the case of *Sotewu v. Nosenti* was heard at the sitting of the Native Appeal Court, at Butterworth, on the 6th November, 1906, the grounds upon which it is now sought to have the proceedings reviewed and set aside, were not argued, although the Court, under the 9th section of Proclamation, No. 391, of 1894, had power to deal with such questions. It

will be seen by the record that the attorney for the appellant only applied to have the case returned to the Magistrate to enable the evidence for the defence to be taken, and, as this had already been done once and the appellant had refused to give evidence, the application was refused." From this it is clear, therefore, that when the Magistrate first came before the Court of Appeal, they sent the case back to the Magistrate to take further evidence, and that the appellant then refused to give evidence. Well, then, naturally the Appeal Court went on with the case, and this is what appears on the record: "At the last hearing of this case the Court, as an act of grace, returned the case to the Resident Magistrate, to enable the present appellant to lead his evidence. This he has deliberately refused to do. The evidence taken in the several actions between the parties shows clearly that the respondent had certain cattle, being the increase of an animal given to her by her late husband, and it is also clear that there are cattle in the estate of the right-hand house of Mpiyana accruing from the dowries paid for the daughters of that house, of which the minor Tubeni is the heir; this boy, although he is unable to give the exact details of the cattle, states that they now number 26 head, and there is no reason, in the absence of any rebutting evidence, to discredit his statement. The appeal is dismissed, with costs." Thereupon the applicant sought, by procedure in review, to set aside the original proceedings in the Magistrate's Court by reason of their irregularity. In my opinion, even if he had ground of complaint as to what took place at the first hearing, he had no ground of complaint after he had on most frivolous grounds, refused to take advantage of the opportunity given to him by the Transkeian Appeal Court to produce all the evidence that could be given on his behalf. I am of opinion that the application must be refused with costs.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MAZZUR V. MEINTJES. { 1907.  
Feb. 22nd.

This was an action brought by Morris Mazzur, horse and cattle dealer, of Cape

Town, against Stephen Meintjes, farmer, Dwaalfontein, district of Hanover to recover two sums of £65, purchase price of two mares and foals and £7 2s carriage.

Plaintiff, in his declaration, said that he sold to defendant on the 2nd November, 1906, certain two mares and foals for £65, delivery to be taken at the railway station, Cape Town. The animals were duly trucked for the plaintiff at the railway station, on or about the 16th November, in sound condition, and consigned to defendant at Dwaal Siding, where they arrived on or about the 19th November. Plaintiff, on behalf and at the request of the defendant, expended £7 2s. in and about the carriage of the animals. Plaintiff duly delivered the said animals, but defendant refused to pay the two sums of £65 and £7 2s. respectively.

Defendant, in his plea, said that the animals arrived at Dwaal Siding, on the 18th November. A reservation was made that the foals would presently be worth £60, and would be worth £200 in about a year. The mares were to be sound and in fair condition. Defendant did not admit that plaintiff expended £7 2s., and put the plaintiff to proof thereof, and did not admit liability for such expenditure. He said specially that the two foals delivered were worthless. The mares, as well as the foals, were not sound or in fair condition. Both mares were in low condition. One was gone in the left hind leg. One foal was deformed in both his legs, and had clubbed feet and an open wound on one side, and the other had a deformed leg and one clubbed foot, and was lame. Defendant claimed in reconvention £50 as and for damages by reason of the plaintiff's failure to deliver the mares or foals in sound or fair condition.

Mr. Searle, K.C. (with him Mr. Gardiner), was for plaintiff; Mr. Benjamin (with him Mr. De Waal) was for defendant.

Mr. Benjamin said he would admit that £7 2s. was expended by plaintiff for carriage of the animals.

Morris Mazzur (the plaintiff) said he carried on business in Sir George Grey-street, Cape Town. In October last, while he was returning from Johannesburg, he met defendant at Naauwpoort, and travelled with him as far as Dwaal Siding, where defendant alighted. In consequence of a talk they had about brood mares, correspondence passed between them, and eventually a sale was concluded on the 2nd November. Witness had got a number of mares from young Mr. Mellish, son of the late Mr. E. F. H. Mellish.

Mr. Searle read the correspondence which passed between the parties concerning the sale.

Witness said that he wrote a letter to defendant on the 16th November, in which he stated that the animals he

was sending would be all right in a few days after they had been on the veld. He had been unable to trace this letter, but he was quite sure that he posted it to the defendant. Defendant telegraphed that the horses, which had arrived, were the most miserable creatures he had ever seen, and he did not want them at any price. Further correspondence ensued.

Mr. Searle said that the animals remained in the hands of the Railway Department; one died, and the rest were eventually sold.

Witness (in further evidence) said that the mares were called Fanny and Prosperity, and were both bought from Mr. Mellish—the former on the 28th September and the latter on the 17th October. The animals remained on the farm Mossel Bank, Mellish's Siding, until the 13th November. He sent out a man for the animals, and had them brought in by road. The mares had foaled in September. For brood mares he considered that they were in good condition. He made arrangements for the mares to be looked after by a boy while on the railway. Mr. Blaine was present when the horses were trucked. The horses walked all right. They had not deformed feet. There was no indication that one of the mares was gone in her left hind leg. There was nothing wrong with any of the animals when they were put into the trucks. He had not seen a wound on the colt's side. He had had no intimation that it had been cut by barbed wire. While the colt was in his possession he did not see any cut upon her.

By the Court: Witness sold the horses as in sound condition.

Cross-examined by Mr. Benjamin: Witness had not been very anxious to sell the animals to the defendant. He had heard that the horses had since been sold by the Railway Department. He was not aware of the results of the sale. He did not know that the three animals sold, one of the mares having died, had realised £16 10s. by auction at Naauwpoort. He did not know that the cost of keep to the Railway Department exceeded the price made by the animals. He was sure that neither of the mares had a club foot.

Joseph Watkins, formerly in plaintiff's employ, said that he had had 25 years' experience of horses, and was now in the service of Fillis's Circus. He brought the mares and foals by road from Mossel Bank in November last. Mossel Bank was near Klipheuvcl. The mares were in the best of condition for brood mares. The foals walked all right; neither of them was deformed or club-footed. The colt ran headlong into barbed wire, and got a "bit of a scratch," which was "absolutely nothing." Anyone looking at the foal would not notice the scratch. The animals, after reaching Cape Town, re-



mained in Mr. Mazzur's stables until they were trucked. There was nothing wrong with the animals, except that the foals were rather sore-footed through having travelled on a hard road. There was no deformity about the animals. The foals ran about quite freely when on the way to the station to be despatched. The mares were Cleveland bays. One of them was rather aged, but otherwise she was a grand mare. She was 15 years old. The other mare was nine years old.

Cross-examined by Mr. Benjamin: When the horses were trucked the foals were not suffering from sore feet. The wound on the filly had dried up. He thought that Mr. Meintjes made a good bargain in getting the animals for £65.

Peter Dixon, an employee of the C.G.R., said that he was in charge of the trucking operations at the goods station. He saw the animals brought in by Mr. Mazzur, and found nothing wrong with any of them. It was his custom to look at stock and to make a note if he saw anything wrong.

Other evidence was also given, one of the witnesses stating that he saw the mares and foals at Mellish's farm, and offered £60 for them.

Mr. Searle closed his case.

Stephen Meintjes (the defendant) said that on the 18th November he received an intimation from the stationmaster at Dwaal that the animals had arrived. He went to the station, and the animals were liberated from the truck into the small kraal. He did not find any fault with the animals so far as flesh was concerned, but they were seriously wanting as regarded their limbs. The little filly had one club foot and limped. The colt had both feet clubbed and travelled on its toes. It also had an ulcerated wound on its side. He did not think the wound could have been caused by collision with the truck.

[Hopley, J.: It seemed to be well bred, according to its pedigree?]

Witness: It was the pedigree that tempted me to buy the foal. In further evidence, witness said that during the past ten years he had dealt in better class horses instead of the ordinary farm horse. The dark brown mare had a defect in its left hind leg. He really made the purchase for the sake of the foals. He had been anxious to get the young stock bred by Mr. Mellish. He had been anxiously looking forward to the arrival of the animals, seeing that they were young stock from Mr. Mellish's farm. Witness had the animals examined by certain farmers in the district. A few days later the horses and foals were removed to Naauwpoort and were subsequently sold by auction on the 22nd December in the presence of a good number of farmers. The price realised was £16 odd.

By the Court: No pedigrees were produced at the sale. He had returned the originals to Mr. Mazzur, and he had sent the copies to his attorney.

Witness, in further evidence, said that the foals were radically wrong in their hoofs. The defects were such as could not have been caused within the period occupied by the railway journey. He did not receive a letter dated 16th November from plaintiff, saying that the horses should be rested for a few days.

By the Court: Witness did not take possession of the animals, because he wanted to make it quite clear to plaintiff that he would not accept delivery and that the horses were there at his risk.

Cross-examined by Mr. Searle: The defects in the foals were of some considerable standing. He was not complaining about the animals being cramped; he was complaining about their being club-footed. He did not know whether the defects existed at birth, but, if they did not, they were developed soon afterwards. The animals were three days at Dwaal siding. Excepting that they were sent to water twice a day they were kept in the truck or the kraal.

Corroborative evidence as to the state of the animals was given by Hendrik S. van der Merwe, farmer, Hanover district, and Johannes F. Celliers, farmer, also of Hanover district, both of whom saw the animals after they had been received at Dwaal siding.

Alex. R. Johnson, stationmaster at Dwaal siding, said one of the foals when it arrived stood on its four toes, and the other foal had what was called a club foot. One also had an ulcerated wound on its side of some standing. The animals were at Dwaal siding three days, and during the whole of the time the foals stood in the same fashion.

Mr. Benjamin closed his case.

Plaintiff (recalled by the Court) said that he gave Mr. Mellish £55 for the mares and foals.

Percy Andrew Mellish (called at the request of the Court) said that the foals were both sired by King Fred. He delivered the animals to Mr. Mazzur's man at the farm. He was not aware that any of the stock by King Fred had had club feet. He did not even know what a club foot in a horse was. The hoofs of the foals were all right when he delivered the animals to Watkins. Their forelegs appeared to be rather stiff. He put that down to the stables being wet. The animals were sold cheap because they had to sell off the stock in connection with the estate of his late father.

Mr. Searle having been heard in argument on the facts,

Hopley, J.: The sole question to be determined in this case is whether the animals were delivered in the trucks at Cape Town station in



such a condition that the Court must hold that they were sound. If they were, and if they got damaged in any way in the truck between Cape Town and Dwaal, that risk would be the defendant's. On the other hand, if the Court found that they were not sound when they were put in the trucks, the plaintiff must be held responsible. These were young foals that were with their dams, and it seems to me that to bring them for 26 miles over a hard road did not show any great knowledge of horseflesh. It is upon the soundness or otherwise of these two foals that the decision of this case must depend. As to the witnesses called by the plaintiff, they seem to have been more concerned about the purchase of the mares than the foals, and I do not think they gave such close observation to the condition of the foals as the defendant and those who saw the foals at Dwaal did. We have also the evidence of Mr. Mellich that the foals showed a stiffness in the forelegs while they were in the stables. I do not think that that would be due to damp stables, but that it might have been the beginning of the mischief which was accentuated by the long journey over a hard road, and the railway journey, the result being that when the foals arrived at Dwaal the trouble clearly showed itself. A suppurating wound on one of the foals or a blister on one of the mares would not be sufficient to say that these animals were unsound, but it is undoubtedly unsoundness in an animal to be club-footed, and if, as I find, the colt and the filly were club footed, then the only conclusion I can come to is that the plaintiff has not made out his case. There is, however, something short still in the evidence. The people have not been called who bought the foals at Naauwpoort, and if it should appear that the foals are not now club-footed, then the plaintiff would have good cause for a further action against Mr. Meintjes. The judgment of the Court, therefore, will be absolution from the instance, with costs, defendant to be allowed his personal expenses.

*Ex parte* BOYES.

Mr. Benjamin moved for the attachment of certain funds in the hands of the Civil Commissioner of the Cape, balance of proceeds of a sale under a writ of execution in the case of J. M. Wilson and J. B. Eayrs.

Ordered that the sum of £12 8s. 2d. in the hands of the Civil Commissioner of the Cape and held on behalf of the debtor be declared executable, as prayed.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

ADMISSION. } 1907.  
} Feb. 22nd.

Mr. Howes moved for the admission of Allan Emen Victor Fraser as an attorney, notary, and conveyancer.

Application granted and oath administered.

### STEFFEN V. DE MARILLAC.

Mr. Pohl moved for provisional sentence on a mortgage bond for £1.054. The bond became due by non-payment of interest.

The defendant appeared in person and read affidavits which set out that he had an option on the purchase of a farm from the plaintiff, and upon his paying £700 in cash the plaintiff agreed to waive any right he had over the land, which had been divided into building lots and sold at the time of the public auction. Defendant suggested that if execution was issued that the execution should only apply to the portion of the land not sold by him. The purchase price had been paid to the plaintiff.

De Villiers, C.J., said he was not prepared to make the property executable. Provisional sentence would be granted with costs.

### HOMES V. SCHACH.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £2,000, with interest, and that the property be declared executable and the rents attached.

Order granted.

### CAPE DISTRICT MUTUAL BUILDING SOCIETY V. JEFFERY.

Mr. P. S. T. Jones moved for provisional sentence on two mortgage bonds for £700, less £86 15s., and £8, with interest, and that the property be declared executable and the rents be attached. The bond became due through non-payment of interest.

Order granted.

### FOUCHE V. FOUCHE.

Mr. Marais moved for provisional sentence on a mortgage bond for £90, with interest, and that the property be declared executable. The bond became due through non-payment of interest.

Order granted.

GENERAL MOTIONS.

OTTOSTROM V. ESTATE { 1907.  
STEPHAN. { Feb. 22nd.

Mr. Close moved as a matter of urgency to have a certain commission fixed to take the evidence of the plaintiff and his witnesses at Port Nolloth on the 26th inst. postponed, and for leave to an assumed executor in the estate to intervene in the case.

De Villiers, C.J., after hearing counsel in argument, did not see why the plaintiff should suffer. The commission would be heard on the 26th, and the application to intervene could be heard on Tuesday, costs to be costs in the cause.

*Ex parte* KOTZE.

Mr. P. S. T. Jones moved for leave to the executor in the estate to mortgage certain property to pay the costs in a certain action. The plaintiff got nothing out of the judgment, as defendant surrendered his estate after the action. Counsel put in the two bills of costs.

De Villiers, C.J., said before the Court gave the order it must be clearly satisfied that the costs were properly incurred before giving authority to mortgage an estate. Before giving an order he wished to have all the costs taxed.

*Ex parte* ESTATE DE BEER.

Mr. Marais moved for an order authorising the payment of certain money from the Guardian's Fund to curators in the estate. The debts were contracted on behalf of two minors.

Order granted.

*Ex parte* BYDELL.

Mr. Roux moved for leave to the petitioner to sell or mortgage certain property. The property was registered in the name of petitioner's husband, to whom she was married in community of property, but she had not heard of him since 1894. Petitioner bought the property with her own money.

[De Villiers, C.J.: We can authorise a sale, but the difficulty comes when you come to transfer. How is the transfer to be effected if the man is not here?]

Mr. Roux: We might assume his death.

A rule *nisi* was granted calling on Solomon Bydell and all concerned to show cause on April 10th why petitioner should not be allowed to sell the erf in question, and failing transfer by Solomon Bydell, why she should not be allowed to pass transfer, one publication in "Kokstad Advertiser."

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LAZARUS V. ESTATE LAZARUS.

Mr. P. S. T. Jones appeared for the parties who were plaintiffs in the action. Mr. Close was for Messrs. Morris and Drabbe; Mr. Swift was for the executors; and Dr. Rainsford appeared as *curator ad litem* to the minors, who were defendants in the action. Mr. Jones moved to have a certain agreement between the parties made a rule of Court.

Mr. Close said the testator died on the 5th May, 1899, leaving a will and a number of children. The will became a matter for decision by a special case, and the petitioners were plaintiffs in the action, and asked for the appointment of a *curator ad litem* to certain three children of one Sarah, the daughter of Lazarus, who died some two years after the testator. Counsel represented Morris, who married Sarah, and he was father to the children represented by Mr. Rainsford. Before her death Sarah made a will, and appointed his client executor to the will. Counsel opposed the application.

De Villiers, C.J., said it would be a great pity if everything that had been done should be undone. The respondent, represented by Mr. Close, would consider his position with a view of coming to an amicable settlement. The further hearing of the application would be postponed, in order to enable all persons interested in the settlement to come to an amicable arrangement, and if they failed to do this, the matter could be mentioned again, the question of costs to stand over.

ST. JOHN'S LODGE BENEFIT SOCIETY V. COATES AND COTTERELL.

Mr. J. E. R. de Villiers was for the applicant, and Mr. W. P. Buchanan was for the respondent. The application was for the setting aside of an order which his lordship granted some time ago in this case between the same parties. The order, which was as follows, was granted, pending an action to be brought by the respondent: "(a) cancelling a resolution to the effect that the said St. John's Benefit Society in future work under the charter of England, and that the sum of £10 be paid out of the funds of the society for the purpose of defraying the expenses of the initiation of twelve of the members into the British Order of Free Gardeners, passed at a meeting of the members, to be convened for the purpose at Wynberg; (b) declaring the resolution to be expunged from the minutes; (c) an interdict restraining the secretary or any other member from paying out any money for the purpose contemplated by the resolution pending an action to be forthwith instituted by applicants to have the matter properly decided." Counsel read an affi-

davit, which set out that the working of the society had been to some extent restricted through the order.

Mr. W. P. Buchanan read a replying affidavit, which set out that the respondent could not proceed with the action until he had inspection of the letter books, roll of membership, and other documents belonging to the society. It was the intention of the society to proceed under the new English order. Counsel's client was prepared to proceed forthwith.

It was ordered that the respondent should bring his action for a declaration of rights during next term, failing which the order of 2nd February, 1906, be dissolved, with costs, the costs of the application to be costs in the cause.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice LAURENCE and the Hon. Mr. Justice HOPLEY.]

TABLE BAY HARBOUR BOARD  
V. CAPE TOWN TOWN COUNCIL. { 1907.  
Feb. 25th.

Cape Town Municipal Act (26 of 1893)—Valuation of property.

*The respondent Town Council, under its Act (26 of 1893), caused a valuation of immovable property to be made, including some property in the occupation of the applicant Board. The Board applied for an order declaring that such property was not liable under the Act to be rated.*

*Held, that the Council was justified under the 87th section in having the valuation made, and that until a rate was imposed on the property, the Board had no ground of complaint.*

This was an application upon notice calling upon respondents to show cause

why (a) the properties mentioned in the special interim valuation 1906, which was examined by the Valuation Court of the Town Council on the 3rd December, 1906, should not be declared non-rateable, and, failing which (b) the decision of the said Valuation Court, with reference to the value of certain of the said properties, should not be reviewed, and the valuation made by the said Court set aside, or reduced, with costs.

Mr. Schreiner, K.C. (with him Mr. M. Bisset), was for applicants; Mr. Searle, K.C. (with him Mr. W. Porter Buchanan), was for respondents.

De Villiers, C.J., asked counsel whether this matter was likely to occupy any considerable time.

Mr. Schreiner said he thought it would, as it would be necessary to analyse about 45 different properties.

Mr. Searle said that the proceedings might be shortened a good deal if he stated that he proposed to take a preliminary objection with regard to half the matter being heard on motion at all. One portion of the matter was an appeal from the Valuation Court, which course was provided for in the Act. Applicants said that the valuations were too high. In addition to that, there was another part, quite separate, under which the Harbour Board wished to obtain a declaration that they were not liable to be rated at all with regard to certain property. His (Mr. Searle's) position was that he took no exception to the valuations being argued, but he did take exception to a declaration on motion as to property being rateable.

De Villiers, C.J., said he thought it would be very inconvenient to hear both a declaration and an appeal at the same time.

Mr. Schreiner said that the real point was that the Act, of course, provided for a review from decisions of the Cape Town Council with regard to the rating of property. The Harbour Board took exception, both on the ground that the properties were exempt, and also to the valuations of the property. His learned friend was willing to go into the question of the valuations, but he did not want to discuss the question of the exemptions. Counsel submitted that upon the basis of the affidavits which had been filed, it would be possible for the Court to give a decision, and thus do away with another expensive and costly action for a declaration of rights. The matter involved a large range of property, that had never been valued before in the dock area. If it were not dealt with now, it would be difficult to get it tried before the next session of Parliament. It was a matter of so intricate and important a nature that it ought, after a judicial decision, to be put upon a clear basis in some Act of Parliament.

There was nothing more than pure law to be determined in the present motion. If they were to have a lawsuit, let them have a lawsuit on the whole line. The real dispute was the ratability of the property.

Mr. Searle (in reply to the Chief Justice) said, in regard to the use of the properties, they had got a general statement that they were used for harbour purposes. There were certain of the properties as to which there was a dispute upon which he was not prepared to accept their somewhat general evidence. Under the Act 26 of 1893, the Town Council was bound to value all property, for whatever purpose it may be used. Counsel was instructed that the Town Council intended to demand rates on these properties, although it had not yet done so. Counsel was prepared to go on with the case, and put before the Court any information in his power.

[De Villiers, C.J.: You cannot have a claim for a declaration until there has been an infringement of your right. What infringement of rights of your client has there been?]

Mr. Schreiner: There is the statutory assertion that our property is rateable property.

[De Villiers, C.J., said it appeared to him that the matter had not reached a stage at which the Court was in a position to make any declaration. The 87th section of the Act of 1893 enjoined upon the Council a duty of from time to time causing a valuation of immovable property within the municipality to be made by one or more competent persons, who shall be sworn appraisers. The 96th section made it lawful and competent for the Council to levy the rate, and until that rate had been levied, there was no ground of objection. It might well be that there was a private intimation to the applicants that there would be a rate, but there was no grievance and no infringement of a right until there was actual levying of the rate. It appeared to him the applicant should await the levying of the rate before he objected to the valuation of the properties. He was of opinion that the first part of the application could not be allowed. The next was why the decision should not be reviewed and the valuation made by the Court set aside or reduced, with costs.

Mr. Searle said the proper procedure was to bring the actual valuation of the Court under review.

Mr. Schreiner said he did not think the matter of such importance to take up the time of the Court to secure only reductions.

De Villiers, C.J., said the whole of the Court was of opinion, although there was no order on this application,

that the question of costs should be reserved.

Laurence and Hopley, J. J., concurred.

[Before the Hon. Mr. Justice LAURENCE and the Hon. Mr. Justice HOPLEY.]

KEHRMANN AND CO. V. { 1907.  
POTTS. { Feb. 25th.

### Sale and purchase—Delivery.

This was an appeal from a judgment of the Acting Resident Magistrate of Mount Currie, sitting at Kokstad, in an action brought by the appellants against respondent to recover £55 10s. 6d. for certain goods sold, or, in the alternative, for damages for failing to take delivery, and also for carriage. The Magistrate had given absolution from the instance.

Mr. W. Porter Buchanan was for appellants; Mr. Benjamin was for respondent.

Mr. Buchanan said that the Magistrate, in his judgment, went through practically all the facts, and came to the conclusion that he could not decide the case without the evidence of Patterson, who was the traveller of the plaintiff firm, and who received the order in question from the defendant. Patterson, it seemed, had left the country, and was believed to be in Scotland, but his address was not known. The question was raised as to whether it was not a condition of the order that delivery should not be made until the defendant told the plaintiffs to despatch the goods. Potts had had a fire on his premises, and he said he would not want delivery until he had settled with the insurance company. Counsel submitted that the Magistrate was wrong in saying that there was no evidence that this condition was made, and argued that the evidence of the documents and the conduct of the defendant showed that this condition had not been attached to the order. He submitted on all the facts the case should be sent back to the Magistrate for re-hearing as to the question of damages.

Mr. Benjamin said he relied upon the final part of the Magistrate's reasons, where he said he did not feel justified in giving judgment against the defendant without hearing Patterson's evidence. That was the only judgment which the Magistrate could give on the matter. Here was a question as to whether there was a firm contract entered into between the parties, or a provisional contract. The evidence given before the Court was that of the defendant himself. Counsel submitted it was more

in the nature of what Pollock called an illusory promise.

Laurence, J.: This is one of those cases in which the Court has to deal with ambiguous phrases used by men of business, who naturally have not always a lawyer at their elbow. The action is for the value of goods, £55 10s. 6d., which, according to the summons, were sold by the plaintiff, a firm of merchants carrying on business at Durban, to the defendant, who seemed to be a country storekeeper in Griqualand East. They claimed for the value of the goods sold, and in the alternative £20 for damages, which they had sustained on this order through the defendants' conduct in the matter. There was a small matter of 12s., but the real question was about this order of goods alleged to have been given by the defendant to their traveller, a certain Mr. Patterson, when he visited him at his store in September, 1905. Now, the order was apparently for goods of a miscellaneous description, such as an up-country trader might want. The order was given to this traveller, and before this there was some little unpleasantness between the plaintiff firm and the defendant, which might possibly account to some extent for his failure to reply to the proper and business-like communications, which they sent in connection with this order. After the order was given, the defendant wrote to the plaintiff that he did not want the goods despatched until he would let them know further, at any rate, not until he had settled with the insurance company. From that he presumed the defendant had some claim against some insurance company, that the matter was still pending, and that the insurance company might dispute the claim or offer some compromise or other things might happen to render the date of settlement of an uncertain character. On receipt of the order from Patterson, the plaintiff collected together the goods, and packed them in cases, and held them at the defendants' disposal. From time to time they wrote one or two letters asking when these goods were to be despatched, and one in particular on the 21st November, in which it appeared for the first time they stated specifically that the goods were packed, and as they understood that the insurance company effected a settlement, they would like to have early instructions. The defendant gave no answer at all to the plaintiff, and the plaintiff then put the matter in the hands of their attorney. The Magistrate gave absolution from the instance, with costs, except in regard to the small amount which was immaterial to this case. The first question was, could the plaintiff recover the value of these goods which he alleged were sold and not delivered. As these had been no

delivery, he did not think the plaintiff could succeed on the claim. The next point was, could he claim damages by reason of the defendant's breach of contract, damages alleged to have taken place in the packing of the goods when the order was received, and subsequently unpacking them, and the depreciation owing to the fact of their being packed in cases. The plaintiff claimed £20, and he said that was what he estimated to be a fair amount of his damages. Well, he did not know that he would not say that the plaintiff might have taken a bolder course, and possibly with more success than the course he adopted. That was when he found that the defendant had got a settlement with the insurance company he was not certain if there had been a tender of the goods that an action would not have lain for goods sold and delivered. He certainly thought it would have been more prudent for the plaintiffs to have suspended the packing of the goods until there were more definite instructions that the goods were likely to be wanted. It was still open for the plaintiff to take steps to take Patterson's evidence, and prove what actual damage they sustained by the second count of the summons. There was the further fact in the case that the Magistrate had before the uncontradicted evidence of the defendant as to what took place between him and Patterson. Having given instructions to Patterson, the defendant might believe there was no obligation upon him to develop the matter in detail in the letter he wrote to Patterson's principal. If, therefore, the order to the plaintiff was subject to the condition that the goods were not to be packed or despatched until a future event, the happening of which was uncertain, the plaintiff was not now in a position to obtain damages for the costs of the packing or such other process. He did not think the Court was justified in remitting to the Magistrate for further evidence on behalf of the plaintiff. If the plaintiff thought it desirable, he could have further evidence, as the opportunity was given by the form in which the Magistrate gave his judgment. The appeal would be dismissed with costs.

Hopley, J., concurred.



# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DESCO V. SANTICH. { 1907.  
( Feb. 26th.

This was an action brought by an Austrian named Giovanni Desco, of Cape Town, against Orsolina Santich, of Cape Town, for damages for breach of engagement to marry.

A tender had been made by defendant, and in the replication plaintiff said that was a sufficient tender, but, subsequent to the replication, correspondence ensued between the parties, and plaintiff's attorney at one stage of the proceedings offered to accept defendant's tender, except that he made certain additions in regard to small items which were repudiated by the defendant, but subsequently to that, the plaintiff was prepared to take judgment in terms of the tender.

Mr. Alexander was for plaintiff; Mr. Upington was for defendant.

Counsel stated that plaintiff was in court, and he seemed to be dissatisfied with that course. Under the circumstances, he (counsel) thought he could not usefully occupy the time of the Court. He therefore retired from the case.

Plaintiff thereupon conducted his own case, and went into the box and gave evidence through an interpreter. He said that he was suing defendant for £600 damages for breach of promise of marriage. Witness was a widower, and had a son and daughter, and defendant was a widow and had six children. He had had work as a stone cutter in the Calvinia district. Before he went up to the work defendant promised that she would marry him in six months. A few days before he went away she said, "Look, Desco, what a nice opportunity; a young man came and asked me in marriage." Witness, in order to test her sincerity, told her to marry this young man, but she said she would marry witness. Defendant carried on business as a barkeeper at the Star Hotel, and had means. Witness returned from the country in order to prepare for the marriage. On the 25th July an ante-nuptial contract was executed. They intended to be married on the 6th August. The ceremony was postponed from day to day until the 8th August, when this young lover of hers came and presented her with a button-hole. On the following day when witness went to work as usual in the bar

she told him she was not going to get married, and ordered him to go away. She asked if he was going to kill her, but he said he would take her to the Court. Witness had incurred some expense in giving presents to the defendant.

[De Villiers, C.J.: How do you say you have sustained £600 damages?]

Witness: Because of the time I have lost in staying down here, £250, and the injury to my honour, £300.

Witness, in further evidence, said that defendant had said, "It is very nice here, because you can play with the men just as you like and you are not condemned by the Court."

By the Court: He did not know whether in his native country a man could get damages from a woman for breach of promise.

[De Villiers, C.J.: I am afraid he could not.]

Mora Otavio, an Italian mason, said that if plaintiff had continued working, he could have taken on work by contract at 25s. to 30s. a day. Up to April plaintiff was earning 16s. a day. On the 6th August two other masons came up and gave out that the plaintiff was serving in the bar and was married.

Another Italian also gave evidence as to defendant having said that plaintiff came to her house, and that he would one day come for her.

Defendant, who gave evidence through an interpreter, said that she managed the Star Hotel. The hotel had belonged to her husband. They made a joint will, which gave the children an interest in the hotel. She admitted having promised to marry the plaintiff, and having signed an ante-nuptial contract. Before she could marry, she had to file an inventory of the property in the joint estate. This gave her a good deal of worry. Plaintiff came down, and kept on urging her to marry him. She told him to wait, and he then seemed to get annoyed. He then told her that he would bring her into court, and she told him to go away. He sent a demand next day for £600, and she tendered to pay £10 odd, to return a ring and certain dress material. She would not then have been willing to marry him. She had been prepared to return to him all the things he had given her. Plaintiff had never complained to her that he had lost work on her account.

Cross-examined: Her daughter had always been opposed to witness marrying the defendant. Defendant threatened to kill her if she did not become his wife.

Plaintiff: No.

By the Court: It was not true that after the contract had been drawn up another young man came along and pro-

posed marriage to her. She was not engaged to another man.

Plaintiff having addressed the Court, De Villiers, C.J.: Plaintiff would have acted wisely in accepting the tender which was made by the defendant. There is no doubt that his feelings were hurt by the refusal of this lady to marry him, but it is not usual in this Court to give damages to a man for the refusal of a woman to marry him, unless the man can clearly prove the actual damages which he has sustained. The damages which he mentions now are wholly indirect damages; there is nothing to show direct damages. When this lady refused to marry him, he could have gone to his work, and her refusal to marry him did not in any way interfere with his facilities for obtaining work, but, instead of that, he seems to have remained here for the purpose of this lawsuit; and in that way could not earn money, but that does not entitle him to damages for the loss of that money. Defendant has made a very reasonable tender of actual expenditure by him on her behalf, with the exception of the petticoat, medicine, etc., which are not worth talking about, and for the amount tendered there will be judgment against the defendant. The Court will order that the defendant return the gold ring which plaintiff has given her, and that she also pay to him the sum of £17 19s., which is the value of the materials, etc., sent by him. Judgment accordingly, that defendant be ordered to return the ring and to pay the plaintiff £17 19s., and to pay the costs up to the 15th August, subsequent costs to be paid by the plaintiff.

JOSEPH V. ESTATE JOSEPH ( 1907.  
AND OTHERS. ) Feb. 26th.

Will — Reservatory clause — Unattested codicil.

*At the foot of a will containing the reservatory clause, the testator added the following unattested disposition at a date subsequent to that of the will: "I cancel and make void the fourth clause of this my will, and bequeath the whole of my estate" in a certain manner.*

*Held, that in the absence of any statement by the testator that he was acting under the reservatory clause, or of anything to shew that he purported so to act, the unattested dis-*

*position could not be legally regarded as a valid testamentary disposition.*

This was a special case brought by Jenny Joseph, as plaintiff, and the executor testamentary, under the will of the late Leopold Frank Joseph and others, as defendants, to determine the construction of certain codicils to the will.

The special case was set out in the following terms:

1. The plaintiff is Jenny Joseph (born Barnett), widow of the late Leopold Frank Joseph. The defendants are George Rothschild Joseph, of Port Elizabeth, in his capacity as executor dative of the estate of the said late Leopold Frank Joseph and Louis Edmund Benjamin, in his capacity as curator ad litem to Cyril Frank Joseph, Vera Constance Joseph, and Emmeline Rose Joseph, the minor children of the said late Leopold Frank Joseph and the plaintiff.

2. On or about the 6th day of February, 1888, the said Leopold Frank Joseph, then resident at Port Elizabeth, and unmarried, duly executed his last will.

3. By his said will the said Leopold Frank Joseph appointed Maurice Joseph and Frederick Maurice Joseph or the survivor of them to be the executors or executor of his said will.

4. By the second clause of the said will the said Leopold Frank Joseph directed his executors to devote the sum of £25 towards the purchase of a mourning ring, which he bequeathed to Constance Marion Webb, of Port Elizabeth.

5. By the third clause of the said will the said Leopold Frank Joseph bequeathed as a memento to each of his brothers living at his death a mourning ring, each of such rings to cost a sum of ten pounds (£10) sterling.

6. By the fourth clause of the said will the said Leopold Frank Joseph bequeathed the rest and residue of the whole of his estate, goods, chattels, and effects nothing whatsoever excepted to his mother Emma Joseph, whom he thereby instituted and appointed the sole heiress of the said residue of his estate and effects.

7. The said Leopold Frank Joseph in his said will reserved to himself the power to make all such alterations in or additions to the said will as he should think fit either by a separate act or at the foot thereof desiring that all such alterations or additions so made under his own signature should be held as valid and effectual as if they had been inserted in the said will.

8. On or about the 6th day of January, 1890, the said Leopold Frank Joseph did, in his own hand and upon the paper of the said will, write and sign

the following codicil: "January, 6th, 1890: I bequeath my life policies to Jenny Barnett, of 2, Pearson-street, Port Elizabeth. Dated this 6th day of January, 1890. (Signed) Leopold Frank Joseph."

9. On the said 6th day of January, 1890, the said Leopold Frank Joseph was engaged to marry the plaintiff, then Miss Jenny Barnett. On the 24th day of March, 1890, the said parties executed an ante-nuptial contract, which was thereafter duly registered, whereby the said Leopold Frank Joseph, settled upon the plaintiff, then Miss Jenny Barnett, two insurance policies of £500 each on his life in the Colonial Mutual Life Assurance Society and furniture to the value of £1,000.

10. On or about the 26th day of March, 1890, the said Leopold Frank Joseph was married to the plaintiff at Port Elizabeth. There is issue of the marriage: the three children aforesaid, by name Cyril Frank Joseph, Vera Constance Joseph, and Emmeline Rose Joseph, who are minors.

11. On the 4th day of May, 1890, the said Leopold Frank Joseph, who was then married to the said plaintiff, did with his own hand, strike out the second clause and the fourth clause of the said will and write opposite to each such clause in the margin of the will the words "made void, May 4, 1890," with his initials.

12. On the said 4th day of May, 1890, the said Leopold Frank Joseph did in his own hand and upon the paper of the said will, write and sign the following codicil: "May 4th, 1890.—I cancel and make void the fourth clause of this my will, and bequeath the whole of my estate, goods, and chattels to my beloved wife, Jenny Joseph, whom I hereby institute and appoint the sole heiress of the said residue of my estate and effects. Dated this fourth day of May, 1890. (Signed) Leopold Frank Joseph."

13. After the said marriage of the said Leopold Frank Joseph and the plaintiff the said two insurance policies of £500 were allowed to lapse and a fresh insurance policy of £1,000 on the life of the said Leopold Frank Joseph was taken out in place thereof in the name of the plaintiff in the New York Mutual Life Insurance Society. On the death of the said Leopold Frank Joseph in 1906 the amount of the said policy was paid to the said plaintiff.

14. In the year 1903 the said Leopold Frank Joseph and the plaintiff removed from Port Elizabeth and removed to England, where they took up their residence. On March 11th, 1906, the said Leopold Frank Joseph died in England, leaving the plaintiff and the said children him surviving, and without having executed any further testamentary disposition in regard to his estate.

15. Neither of the executors named in the will took up appointment pursuant thereto, and the first defendant has been duly appointed and holds letters of administration as executor dative aforesaid.

16. On the 13th December, 1906, on the application of George Marquard Findlay, the duly appointed agent of the said Jenny Joseph, in her capacity of mother and natural guardian of the said minor children, the honourable the Supreme Court appointed Louis Edmund Benjamin to be *curator ad litem* in this suit to the said children.

17. The parties annex hereto copies of the wills and codicils, and beg leave to refer this honourable Court to the originals of the said will and codicils when the same are produced from the custody of the Master at the hearing of this suit.

18. The plaintiff contends: That the second and fourth clauses of the said will have been duly revoked and are of no force or effect.

19. The plaintiff further contends: That the codicils of the 6th January, 1890, and 4th May, 1890, were duly and legally executed in pursuance of the power reserved in the said will, and that the plaintiff is entitled under the codicil, dated the 4th May, 1890, to succeed to the whole estate of the late Leopold Frank Joseph.

20. The first defendant contends that the third clause of the will is of full force and effect. Save as aforesaid, he submits to the judgment of the Court.

21. The second defendant contends that the second and fourth clauses of the said will have been duly revoked and are of no force and effect.

22. The second defendant further contends that the codicils of 6th January, 1890, and 4th May, 1890, were not validly executed and are of no force or effect, and that the minor children of the late Leopold Frank Joseph are entitled to succeed as heirs *ab intestato* to the undisturbed portion of the estate of their father, that is to say, the whole estate save and except the sum of £30 bequeathed by the third clause of the will, dated 6th February, 1890, and save and except the insurance policy for the sum of £1,000 referred to in paragraph 13 hereof, and save and except the furniture referred to in paragraph 9.

23. Wherefore the parties pray for judgment on their respective contentions, and that this honourable Court may be pleased to direct as to their costs in this suit.

Mr. Schreiner, K.C. (with him Mr. Russell), for plaintiff. Mr. Sutton for the executor dative. Mr. Benjamin, *curator ad litem* to the minor children of the marriage.

Mr. Schreiner, in argument, said two points arose: (1) That clauses 2 and 4 of the will were of no force and effect, having been erased by the testator with

the intention of revoking them. He quoted Voet 28, 4, 3, and 4. (2) That the codicil of May 4, 1890, was of full force and effect. It was in the handwriting of the testator, signed by him, and at the foot of the will. It was a usual and common thing to refer specifically to the reservatory clause, but it was not necessary to use any specific form of words. In *Sir John Wylde's will* (B. 1873, 113), the codicil made no reference to the reservatory clause, and yet it was upheld. He also quoted *Serfonteyn v. O'Hare* (B. 1873, 49), and referred to the Digest (28, 5, 77), and 35, 1, 38), Bynkershoek (Bk. 3, 4, 389), *Quaestiones Juris Privati*, and *Barjelijhe Rechtzaken* (2, 16, 4), *Lybrecht* (Vol. I., 322 and 323), *Van Leeuwen Censura Forensis* (1, 3, 11, 10), *Van der Keessell's Dictata* (2, 2, 289), and *Hollandsche Consultation*.

Mr. Benjamin said that the only question was what was necessary to give the reservatory clause effect. He relied on the case of *Nelson v. Currey* (U.S.C., 386), supported by *Van der Wall v. Van der Wall's Executors*, and followed in the Transvaal case of *Erasmus v. Erasmus' Executor* (T.S.C.R. 843). The whole tendency of the decisions was jealously to regard the exceptional cases of privileged wills. In *Sir John Wylde's will* the sole point was the appointment of an executor, and it did not appear that the codicil was ever before the Court. Further, the codicil purported to appoint an heir, and the authorities agreed this could not be done.

Mr. Schreiner having been heard in reply,

De Villiers, C.J.: There is considerable force in the argument of the learned counsel for the plaintiff, and if this were a case of first impression, I should certainly have taken time to consider my judgment. But it appears to me that the question raised in this case has been definitely decided by two judges in the Supreme Court. The first of these judgments was concurred in by a full bench, and I myself was a party to that judgment, and I am not prepared now to say that that judgment was wrong; on the contrary, I am confirmed by the arguments that the judgment was perfectly right. The only case in a court of this colony which has been cited now as throwing doubt upon the decision in the case of *Nelson v. Currey and Others* (4 Juta, 355) is the case relating to the will of the late Sir John Wylde (3 Buchanan, 113). The point raised there was whether a reservatory clause has force in an underhand will in the same manner as a notarial will. There was no one there to oppose letters being granted under the codicil, and the only per-

son who raised any question was the Master, and he raised that technical point whether the reservatory clause would have force in an underhand will. It was assumed in that case, judging from the summary and from the report itself, that the testator had executed the codicil under the reservatory clause, and I can quite understand, therefore, that the learned judges, under these circumstances, would not closely scrutinize the will. It was assumed by everyone in that case that the codicil was under the reservatory clause. The fact that it is now found that the codicil was not specifically under the reservatory clause does not, in my opinion, justify the view that the case is in conflict with that of *Nelson v. Currey and Others* and the case of *Van de Wall* (13 Sup. Ct., 316). What was said in the case of *Nelson v. Currey* was that "all the writers on the subject are agreed that the reservatory clause in a will cannot confer validity on a subsequent testamentary instrument, unless that instrument is incontestably proved to have been executed by the testator, and unless it purported to be and was executed under and by virtue of the reservatory clause in the will." Now, a codicil cannot purport to be executed under a reservatory clause, unless in some manner or another it is shown that the testator had that reservatory clause in his mind when he executed the codicil. It is contended in the present case that the testator must have had the reservatory clause in his mind, because the codicil is at the foot of the will itself, and because the codicil refers to the will. But the codicil does not refer to the reservatory clause of the will. "May 4th, 1890.—I cancel and make void the fourth clause of this my will, and bequeath the whole of my estate, goods, and chattels to my beloved wife Jenny Joseph, whom I hereby institute and appoint the sole heiress of the said residue of my estate and effects." It is quite consistent with this so-called codicil that the testator never thought of the reservatory clause. It is quite possible that he had not the reservatory clause in his mind, and that he thought he was executing a fresh testamentary disposition independently of such clause. The best proof that he acted under that clause would be a statement to that effect in the codicil, and in the absence of any such statement or of anything else to show that he purported so to act, the unattested codicil cannot be upheld as a valid testamentary disposition. I fully agree with the remarks of Innes, C.J., in the case of *Erasmus* (T.R. 1903, p. 643), which appear to me to summarise the authorities with great clearness and precision. For these reasons, I am of opinion that the judgment of the Court



should be given in terms of defendants' contention, but I think that costs might fairly come out of the estate. Judgment in terms of the contentions contained in clauses 20, 21, and 22 of the special case, costs out of the estate.

[Plaintiff's Attorneys: Syfret, Godlonton and Low. For the executor dative: Findlay and Tait.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HAYWOOD V. PAULING. { 1907.  
Feb. 26th.  
" 27th.  
Mar. 13th.  
" 15th.

Architect — Builder — Agency —  
Authority of architect to  
bind owner in respect of  
"extras."

This was an action brought by George Haywood, trading as E. Haywood and Co., builders and contractors, of Observatory-road, to recover £188 1s. 9d. from Augusta Mary Frances Pauling, of Rondebosch, for certain extra work, labour, and material supplied in the alterations and repairs to her residence Stanmore, Rondebosch.

The plaintiff's declaration was as follows: Plaintiff is George Haywood, who carries on business as a builder and contractor under the style or firm of E. Haywood and Co., of Observatory-road. The defendant is a widow, and resides at Stanmore, in Rondebosch. About the 4th July, 1905, defendant, through William Adamson, an architect, of this city (who acted in the matters in suit on behalf of the plaintiff, and who was duly authorised thereto by her), entered into contract in writing with plaintiff for certain specified alterations and additions to her residence Stanmore. Plaintiff craves leave to refer to the said contract when produced at the trial hereof, and says that he has duly performed his part of the said contract, and has been duly paid the contract price thereunder. From time to time as the work in connection with the said alterations and additions proceeded, Adamson, who duly acted as architect, supervising and directing matters in and about the said work, found that certain extra work was essential which had not been specified in the contract aforesaid. The said architect from time to time accordingly, acting both under his general authority as architect and under special authority given by defendant to look after her interests in the matter during her absence from the Colony, directed

the plaintiff to do certain extra work, and to provide the materials and labour required in connection therewith. It is usual and customary for building contractors to carry out all such instructions of the architect, even in respect of extra work outside the contract, and the plaintiff as instructed as aforesaid, did the extra work and supplied the labour and material, all as set out in the account. The prices set out in the annexure are fair and reasonable, and amount to £188 1s. 9d. All things have happened, all conditions have been fulfilled, and all times have elapsed necessary to entitle plaintiff to claim the said sum of £188 1s. 9d., but the defendant wrongfully and unlawfully fails, neglects, and refuses to pay the said sum or any part thereof, though repeatedly requested so to do. Wherefore plaintiff claims: (a) Payment of £188 1s. 9d. as and for extra work, labour, and material supplied at the instructions of defendant's architect and agent in and about the alterations and repairs to Stanmore as aforesaid (b) interest *a tempore morae*; (c) alternative relief; (d) costs.

The defendant's plea denied the existence of any agreement between herself and the plaintiffs, and set out that the only agreement entered into by her was with one William Adamson, who had no authority or power to enter into any contract binding her to the plaintiffs. It was denied that Adamson had any authority to act as alleged. The only authority from her which Adamson had was one given to him, authorising him to expend a sum not exceeding £1,700 upon alterations, additions, and repairs to her property in accordance with specifications which were furnished by him in writing on or about June 23. The document embodied the whole agreement between her and Adamson, save and except certain authority given to him by cable from England to renew certain electric wires at a cost of about £70. She had paid the whole amount (£1,700), which she authorised Adamson to expend as aforesaid in and upon the alterations, additions, or repairs to the building save and except the sum of £9, which she had tendered to pay to Adamson, but he refused to accept the same.

Mr. Close (with him Mr. M. Bisset) for plaintiff; Mr. Searle, K.C. (with him Mr. Joubert), for defendant.

Wm. Adamson, architect, of Cape Town, stated that in May, 1905, the defendant consulted him with a view to certain work to be done by witness, who prepared sketches at the request of the defendant for alterations and additions to her house at Rondebosch. Quantities and specifications were prepared on the suggestion of the defendant, who was satisfied to leave the matter in witness's hands as regards the



contractor. When defendant consulted witness, she selected her own decorator, Mr. Keene. Witness got an estimate for £1,250 from the plaintiff. The defendant said she would like to keep the total cost within £1,700. The actual contract with the plaintiff was made after the defendant left for England. As far as witness could make out from the letters, the matter was left in his hands for arrangement, and he entered into a contract with the plaintiff in pursuance of the directions he had from the defendant. Witness did not inform the plaintiff in any way that his authority was limited. Under the contract he had to put in girders when the walls were stripped, but the walls were in such a weak condition that steel columns had to be substituted. In the course of the work he discovered several extra things had to be done. Witness considered the extra work necessary for the safety of the premises. Witness authorised all the extra items mentioned in the declaration. The prices for the extra work were fair and reasonable. An arrangement had been made with Keene by witness for £400. Other work cropped up which he suggested should be done, and Cunningham and Gearing were given a contract to recover the wires. In February, 1906, the defendant returned from England, and wrote a letter to witness, saying the house was in such an ugly state that she could not accept it according to contract, and asking witness to meet her to go over the work. Shortly after the completion of the work the plaintiff sent in an account for the extra work. When plaintiff forwarded plaintiff's account to defendant the latter wrote that the contract exceeded the estimate given her by £41. In the arrangements between defendant and witness, the latter merely said he did not think the work would exceed £1,700, there was no guarantee given by witness.

Mr. Close was proceeding to question the witness on the custom among architects, where extra work had to be done, when,

Mr. Searle submitted that in such a case the principal must be communicated with, where the agent found that the work could not be done for a certain fixed sum.

Mr. Close said the mere fact of his appointment as architect gave him the authority in relation to the builder, according to the custom of this colony. The appointment of architect authorised him to order work even outside the contract. Counsel cited Storey on Agency (page 108, section 96), and contended that Mr. Adamson, being appointed as architect without any special instructions, being communicated to the plaintiff, the presumption was that plaintiff would be entitled to take the witness as exercising the ordinary functions of an architect. Counsel would

endeavour to show what the scope and functions of an architect were by usage. No exception had been taken to the declaration on that point as being irrelevant. He submitted they were entitled to get the functions of professional men by custom, particularly in a case like this, where there was no conflict between custom and law. Whatever the English law might be on the subject, architects had, at all events, the power to order extras.

Mr. Searle contended it would be an unreasonable custom to go outside the contract. According to the English law an architect would have to refer to his principal in such a case. Counsel did not wish to preclude himself from the right of raising the objection if the question was put in this form: Supposing there was a contract which says nothing about the additional work has the architect power to order the extra work?

Maasdorp, J., said he would admit the evidence for what it might be worth. At the same time he would note Mr. Searle's objection.

Mr. Close: What is the custom in this country as to the authority of architects to order extra work beyond what is in a scheduled contract?

Witness: If they order anything outside the schedule the contractor must be paid over and above his schedule by the principal.

Cross-examined by Mr. Searle: It was not unusual for orders for extra work to be given by architects verbally. The defendant was not informed at the time when witness wrote to her in England that he had exceeded the amount fixed by her. He would only order additional work when it was more or less necessary.

George Haywood, plaintiff in the case, stated he was not aware of any limit of price fixed with the last witness. In witness's experience he had more verbal orders as to extra work from architects than written ones. Witness explained the difference between a lump sum contract and a schedule contract. In a schedule contract, if there was more work done than in the schedule the builder would get paid for it. The architect gave directions as to extras. Witness would never go to the client for instructions.

Cross-examined by Mr. Searle: Witness never saw the defendant in the matter. This was the only contract which he had signed with the architect without the client signing. The architect's orders had to be followed. Witness had to carry out the work under the supervision of Mr. Adamson, and if the latter gave instructions for extra work witness was bound to carry them out. Even though the contract said nothing about extras, he would do double the work if told to do so by the architect.

John Rayner, vice-president of the Masters' Builders' Association, Cape Town; John Cran, of A. B. Reid and Co., builders; James Morgan, builder, Cape Town; Mr. Cowin, architect and quantity surveyor; and John G. Scott, of the late firm of Howard and Scott, spoke to the practice in the building trade when orders were given by architects under a schedule contract. The builder looked exclusively to the architect and carried out his directions.

F. J. Laing, builder's foreman, employed by plaintiff, also gave evidence.

Mr. Close closed his case.

Mrs. Pauling (the defendant) said that Mr. Adamson was a friend of her late husband, and she thought that she might trust him as a friend to deal properly with her. She took to him a plan which she had prepared of certain alterations that she wanted carried out at her residence, Stanmore, and spoke to him about having the work executed. Mr. Adamson said he thought the cost would be about £1,500, but later on he told her that that figure would be too small, and he promised faithfully that he would not exceed £1,700. That, he said, would be the outside figure, and there was a probability that the cost would be less. The amount consisted of £1,250 for building and £450 for decorations. When she returned from England she was dissatisfied with the work which had been done, and had to call in Mr. Adamson to have the work finished.

C. W. Herold, attorney, said that Mrs. Pauling told him that the decorator was to be paid £450 and the contractor £1,250.

John Frederick Davis (father of the defendant) said that he was present when Mr. Adamson told Mrs. Pauling that the figures of £1,700 would not be exceeded.

Caleb Keene, decorator, H. D. Pitts, architect, and F. Kendall, of Messrs. Baker and Masey, architects, also gave evidence.

Mr. Close, in his argument for the plaintiff, said the first thing to be ascertained was the way in which these extras came to be put in the building, and how they came to be ordered. The contract established the ground on which Mr. Haywood was justified in looking to Mr. Adamson as having certain authority. Mr. Adamson, of course, acted in a dual capacity. He was acting as a private individual for Mrs. Pauling in effecting the contract at her wishes, and he was also acting as the architect. Counsel submitted that Adamson was acting purely as the defendant's agent in the case, and, that being so, the case of the plaintiff was a very strong one. There was abundant authority to show that the agent had power to do whatever was necessary or required, and counsel referred to Story on Agency (sections 58, 60, and

61). As a fact, apart from any direct communication between the contractor and the principal, the contractor was justified in looking to the agent as having some authority, and the question was what authority he had. Then, if there was authority, unless there was a limit to that authority, the contractor was justified in looking to the agent in the light of the section quoted. Counsel contended that it was not necessary for the parties to get into direct communication. The whole nature of the proceedings absolutely justified Haywood in the view that Adamson was the agent. Dealing with presumptive agency, counsel referred to Leake (part 2, chapter 2, section 1), and the distinction between general agency and special agency. Bowstead (page 4 of the second edition, and articles 37 and 38). As to the powers of an architect, although there were one or two cases in English law, and the authorities were *prima facie* against the contention that the architect had the right to bind the owner, he thought it would be found that broad statements were made which were not borne out by the authorities. Although English law had been referred to, the Court had to deal with the law in the Colony, which, counsel submitted, was different. Where did the builder come in if he could be turned off for refusing to do extra work which the architect wished him to do. The builder could not go to the owner, and, if he did not obey the architect, he must leave the work. All sorts of emergencies might arise in the course of a contract. It was a good and sound principle where one person of two innocent ones had to suffer, he rather should suffer who had induced the other to act by means of relationship, as in this case of trust and responsibility.

Mr. Searle said if the evidence be looked into, it would be found there was practically nothing passed between Haywood and Mrs. Pauling so as to induce the plaintiff to consider that Mrs. Pauling had engaged Adamson as her agent. In the specifications and the contract Adamson was described as the architect. The contract gave no power to Adamson to bind Mrs. Pauling for any extra work. Adamson had no other power, and Haywood could only bring forward this contract, and unless he could show there was a special authority outside, and not as an architect, he could not recover. Counsel could find no circumstance that went to show that Mrs. Pauling held out or enabled Adamson to hold out to the plaintiff that he was the general agent of the defendant. Counsel referred to sections 126 and 133 of Story on Agency, and contended that it was clear that Adamson was not a general agent. He had to deal with this particular business, and, therefore, the principle ap-

plied that anyone dealing in that particular business must ascertain the nature of the authority. In the case of *Bains v. Ewing* (the Court of Exchequer, p. 320), Baron Bramwell said he thought the passage referred to in Story (section 131), by his learned friend, went too far. There were certain cases where it had been endeavoured to make an employer liable for work done in pursuance of a contract, because it was found afterwards it was more expensive than contemplated at the time of the contract, and counsel referred to *Thorne v. Mayor of London* (1, Appeal Cases, p. 120). It was held here that the contractor ought to have satisfied himself before he went into the matter that the contract could be worked according to the specifications. In the case of *Randall v. Trunc* (18, Common Bench, p. 786) the builder came upon the architect because the architect had told him to get certain stone which was not in the original contract, and the architect told him to order the stone. He ordered the stone, and then sued the owner for the value of the stone, and judgment was given against him, with costs in the case. Then he sued the architect, not only for the expense of the stone, but also for the costs in the previous case, and he recovered against the architect not only the amount of the stone, but the costs he had been put to in suing the owner. Counsel also cited *Cooper and Langdon* (9, Meeson and Welby, page 60), and said that the sooner it was laid down that architects and builders could not do what they liked in these contracts, the better it would be for building in this country.

Mr. Close having been heard in reply,  
*Cur. Adv. Vult.*

*Postea* (March 15th).

Maasdorp, J.: I had intended at first to go rather more fully into a consideration of the authorities cited at the Bar, but as that would necessitate my deferring judgment until my return from Circuit, and thus, perhaps, cause serious inconvenience to the parties, I have come to the conclusion that after the exhaustive argument of counsel in the case, I am now in a position, upon the general result of the principles contained in the authorities, to deal with the case at once. It appears that in June, 1905, the defendant, having determined to have certain repairs and alterations effected in her house at Rondebosch, consulted Mr. Adamson, an architect, as to the probable cost, and he was at first of opinion that £1,500 would cover it. Defendant told him that that was more than she had intended to spend, but was willing to go to that amount. Subsequently Mr. Adamson informed her that the work could be done for £1,700, and after he had assured her that the cost would not

exceed that amount she agreed to let the work proceed at that. On June 21 she wrote to Adamson, amongst other things, "You are hereby authorised to expend a sum not exceeding £1,700." On the same day, after seeing certain specifications, she wrote again suggesting that if some of the items were omitted there might be a margin left for a new front door, adding, "I certainly want a new door, and it must come under £1,700." Shortly after the defendant, when on the point of leaving for England, again spoke to Adamson, and emphasised that she could not spend more than £1,700. The effect of all this was that, between the defendant and Adamson, the latter was appointed the agent of the former for the purpose of having repairs and alterations made for £1,700, and no more. Adamson made out the plans and specifications, and got a tender from the plaintiff for £1,477 11s. 4d., but in order to keep within the £1,700, while also making allowance for decorations to be executed by another builder, Adamson arranged for a number of reductions totalling £186 11s. 11d., and accepted the plaintiff's tender for £1,290 19s. 5d. Mrs. Pauling having already left for England, Adamson, acting for her, entered into a contract with the plaintiff for the execution of the work in terms of the specifications. If the defendant were not herself a party to the terms of the specifications, and they exceeded the powers granted by her to Adamson, it might be contended that she was not bound by such contract. I am of opinion, upon the authorities that if Adamson exceeded his powers, he could not bind the defendant, and it was the plaintiff's duty to ascertain in this case what were the powers of the agent he was dealing with. But although the right of Adamson to enter into this particular contract was questioned in the pleadings, Mr. Searle could not but admit ultimately that the defendant is bound by the contract, and I do not see how he could deny it in the face of the fact that she saw the specifications and well knew that the work was to be tendered for in terms of the specifications. Now, the importance of the specifications consists in this: that it is contended they give power to the architect to order extras, and consequently the builder was entitled to be paid for extras executed by him under the instructions of the architect. The clause in the specifications relied on for this contention is the second, where it is provided that the contractor is to send a moneyed account and totalled copy of the approved bill of quantities on the basis of which all extras and omissions will be measured and priced. I can find no authority in this clause given to the architect to order extras. Undoubtedly extras are

contemplated, but they would of course, have to be arranged for with the consent of the building owner. Mr. Close admitted that upon the English authorities upon the law of building contracts, it would be difficult to maintain that under this contract the owner would be liable for extras ordered by the architect as architect, although he did not wholly abandon the point. In my opinion the weight of authority is to the effect that under such a contract the architect could not bind the employer for extras. Then it is argued that that may be so in England, but a different law prevails here based upon the custom that the builder is bound to perform any extras ordered by the architect, independently of the terms of the contract, and so to render the employer liable. Witnesses were called to establish this custom, and one of them gave it as his opinion that the builder must do whatever he is ordered to do by the architect. It is enough to say that upon the evidence in this case no universal long-established custom of the trade has been proved, amid the conflict of evidence among the experts. And even if such a usage had been proved, the Court, in my opinion, would refuse to sanction it on the ground of its being unreasonable. Then the plaintiff takes up another position. If custom fails, and no authority for extras is contained in the agreement, the defendant, it is said, is still liable, because Adamson, if he could not order extras as an architect, really did so as the agent of the defendant. Now, it seems to me that Adamson was under the circumstances empowered as agent to make this contract with the plaintiff, because the defendant sanctioned the specifications. If she had not sanctioned them, and Adamson had entered into a contract in excess of his powers, she would not have been bound, it being a duty cast upon the plaintiff to ascertain the powers of the agent he was dealing with. After the agreement was made, Adamson had no further power to meddle with the contract as agent, but his duties as architect commenced, and even if he had power to contract further he could not exceed the powers given him, that is to say, he could not make a contract for the execution of extras beyond the limited expenditure authorised by the defendant. The actual powers given to Adamson limited the expenditure to a fixed sum, and nothing was done, or allowed to be done, by the defendant, to lead the plaintiff to believe otherwise. It seems to me that the contract was expressly drawn without leave to the architect to order extras, because the very suggestion of such a clause would have been inconsistent with the agency which was exhausted by the items agreed upon without extras. The conclusion then follows that the contract does not provide for

the ordering of extras by the architect, that in the absence of such power no custom has been proved entitling the builder to payment for extras ordered by the architect without consent of the owner, and Adamson had no power as agent to order extras, nor did the defendant do anything to lead the plaintiff to believe that he had. It will be observed that I treat Adamson as a special agent, as to whose real powers any persons dealing with him are put upon inquiry; and not as an agent having a general power, limited by private instructions, which do not affect those dealing with him. But the plaintiff has still another ground upon which he relies, which touches, however, only a part of the extras. He says that, having contracted to place a girder upon two walls, he found the walls too weak to support the girder, and was obliged as a matter of necessity towards the completion of the work to put up stanchions to support the girder, and that he did so upon the instructions of the architect. There is a strange lack of authority upon this particular point, it may be because when such a state of affairs arises the owner is generally consulted, or because when the work is done the builder either does not claim for it, or when he claims he manages to convince the employer of its reasonableness. On the whole, I am of opinion that when such an emergency arises nothing can be done throwing any liability upon the owner without his consent, and it becomes necessary to consult his wishes. The absence of the defendant in England is urged as an excuse for not consulting her, but it was contemplated that it might be necessary to communicate with her there, and in her letter of the 21st of June to Adamson she says: "The above is my address up to the end of September, should you wish to communicate with me." As a matter of fact, Adamson did communicate with her in respect of the electric light. Anyhow, considering how anxious the defendant was to keep the costs within £1,700, it would have been only reasonable to consult her in the matter before burdening her with a further expenditure of £100 in the matter of the stanchions, even though some delay was occasioned thereby. I doubt whether the ground upon which this claim for the stanchions, as distinguished from the other items, is placed as a last resort, can be said to be covered by the declaration. I am of opinion that the defendant is not liable to pay for the stanchions any more than for the rest of the extras. Judgment is given for the defendant, with costs.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: Herold and Gie.]



### THIRD DIVISION.

[Before the Hon. Mr. Justice LAURENCE.]

#### PROVISIONAL ROLL.

LOWE V. MILNE BROS. { 1907.  
Feb. 26th.

Mr. Payne moved for the final adjudication of the partnership and private estates of the respondents.

Laurence J., said a debt of £75 was alleged, but judgment had only been given for £25 by the Resident Magistrate of East London.

Mr. Payne said that the position was that at the time of the summons there was only £25 due, but the arrears of rent had increased, and two subsequent months' rent had become due. The petition set forth that the sum of £76 19s. was owing to the petitioner.

Order for final sequestration granted, as prayed.

#### MARAIS V. CAPE TOWN WAREHOUSE SYNDICATE.

Mr. M. Bisset moved for provisional sentence for the sum of £6,250 on two mortgage bonds, with interest and costs. Counsel further applied to have certain property declared executable. Sentence was asked against defendant, Katerina Fowler and her husband, individually and in trust, she having bound herself as surety and joint principal debtor.

Laurence, J., said that as service was not proved upon one of the two trustees, it was difficult to see how judgment could be given against them as representing the syndicate.

Mr. Bisset said that one of the trustees, Henry, had disappeared altogether, and he submitted in the circumstances that service on the remaining trustee was sufficient. He would, however, take judgment against the members of the syndicate individually and against Fowler.

Provisional sentence was granted against defendants, with the exception of Henry and his wife, with costs and interest, the property being declared executable.

#### MARSH MEMORIAL HOMES V. VAN SITPERT.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £300.

Provisional sentence granted, the hypothecated property being declared executable.

#### DESVAGES V. EASTON.

Mr. Sutton moved for provisional sentence on a mortgage bond for £300 and for certain property to be declared executable.

Granted.

#### DE VILLIERS V. LOUBSER.

Mr. Lourens moved for provisional sentence for the sum of £1,850 on a bond, and for certain hypothecated property to be declared executable.

Granted.

#### ESTATE WEBSTER V. PARKER.

Mr. Gutsche said that in this matter a point arose as to the service. The return showed that the summons was served by posting at a certain shop corner. A supporting affidavit showed that this was a corner-shop formerly occupied by defendant.

Laurence, J., said he thought the service a good one, and provisional sentence would be granted as prayed.

#### SCARBROW V. ADAMS.

Mr. Roux moved for provisional sentence on a mortgage bond for £400, less £35 paid on account. Counsel also asked that the hypothecated property be declared executable.

Provisional sentence granted as prayed.

#### FAIRBAIRN V. JANDRELL.

Mr. Lewis moved for judgment for £250 on a mortgage bond, and for the hypothecated property to be declared executable.

Provisional sentence as prayed.

#### ESTATE MARSH V. SMITH.

Mr. Inchbold moved for provisional sentence on a bond for £200.

Granted.

#### ILLIQUID ROLL.

#### PARKER V. EASTON.

Mr. Sutton moved, under Rule 329d, for judgment for £42, rent.

Granted.

#### ZEEDERBERG AND DUNCAN V. MYBURGH.

Mr. P. S. T. Jones moved, under Rule 329d, for judgment for £20 4s. 1d., for goods sold and delivered.

Granted.



LESTER V. LESTER. { 1907.  
Feb. 26th

This was an action against the husband for restitution of conjugal rights, failing which, a decree of divorce.

Mr. Watermeyer was for the plaintiff; there was no appearance for the defendant.

Defendant was last heard of in Wellington, New Zealand, and had been sued by edictal citation. The petition set forth that the plaintiff resides at Kimberley. She was married to defendant at Port Elizabeth in June, 1904. In July, 1904, defendant was arrested at Kimberley on a charge of fraud. He was convicted at Cape Town of this offence, and was sentenced to six months' imprisonment. He was released in March, 1905, since when he had refused to support the plaintiff.

Plaintiff was not present in court, having obtained leave to give evidence by means of affidavit.

The affidavit of the plaintiff was read. It set forth that after the marriage the parties spent three weeks at Graham's Town, and on their going to Kimberley, the defendant was arrested. Upon his release the defendant wrote to her. The letter was couched in affectionate terms, and the defendant said, *inter alia*: "This is the last time I shall bother you. Good-bye for ever." The writer went on to speak of the shame and degradation he had brought on the plaintiff, and continued: "If you don't forgive the living, forgive the dead. It is better I should go out of your life as suddenly as I came into it." The writer referred vaguely to "the coming ordeal." Defendant wrote subsequently saying he was going back to England. Attempts had been made to find defendant, and it was discovered that he was in New Zealand.

In the second letter written by the defendant, allegations were made against the wife, which she in her affidavit denied.

Plaintiff was at present living with her mother at Kimberley.

Mr. Watermeyer for plaintiff. Defendant in default.

In reply to the Court, counsel said that defendant was a commercial traveller. He appeared to have married petitioner under a false name.

An order for restitution was granted, defendant to return to or receive the plaintiff by the 1st July, failing which, to show cause on the 14th July why a decree of divorce should not be granted.

It was further ordered that the rule be served by delivery at an address in Cape Town, to which defendant, before leaving, had directed that letters should be posted, and by publication in the "Gazette."

## GENERAL MOTIONS.

*Ex parte* ESTATE OLIVIER. { 1907.  
Feb. 26th.

Mr. Toms moved for leave to transfer certain property sold by auction, and to invest moneys belonging to minors. The property was purchased by the executor, and after paying a certain part of the purchase price to some of the beneficiaries, it was proposed to leave the balance belonging to the minors on mortgage. The grandfather, who was a wealthy man, offered security. The sum of £5,050 was due to the minors.

Laurence, J., said he would grant an order allowing £4,250 to remain on mortgage, the mortgage and security to be executed to the satisfaction of the Master, and the balance of £800 to be paid into the Guardian Fund.

## CAIRNCROSS AND ANOTHER V. FAGAN AND SOMERSET WEST-STRAND MUNICIPALITY.

This was an application to have the respondent Fagan declared incapable of being or remaining a Councillor of the Somerset West-Strand Municipality.

Sir H. Juta, K.C., was for the applicants; Dr. Greer was for the respondent Fagan.

Laurence, J., said he had read the papers, and he thought, on the whole, it was desirable that the case should be transferred to the First Division, where it could probably be heard one day next week.

Sir H. Juta said he was quite agreeable to this course. He had intended, however, to apply to the Court for leave to cross-examine the Town Clerk of the Municipality.

Laurence, J., said that could not be determined without going into details, and it had better be mentioned when the case came on in the First Division.

Dr. Greer said there were certain affidavits on new matter which he desired to put in.

Sir H. Juta said he objected to these going in.

Laurence, J., said there were certain affidavits put before the Court by the respondent, which he thought it deplorable should have been put on record. Counsel were aware of what he referred to.

Dr. Greer said these affidavits were put before the Court to show the relations which existed between the parties. They showed what lay behind the whole matter.

Laurence J., said there were most abusive documents, which ought never to have been put before the Court.

The case was accordingly ordered to stand over.

## OTTOSTROM V. ESTATE STEPHAN.

Mr. Gardiner moved on notice calling upon respondent to show cause why the assumed executor in the estate should not be allowed to intervene as co-defendant.

Mr. Van der Byl appeared on behalf of plaintiff to consent to the order, but contended that applicants should pay the costs.

Order granted, costs to be costs in the cause.

## JACKSON V. CAPE COLONY TATTERSALL'S SUBSCRIPTION ROOMS.

This was an application on notice of motion, calling upon the respondents, members of the committee of Tattersall's Rooms, to show cause why applicant's name should not be placed on the list of bookmaking members of the Rooms.

The applicant was a member of the club in 1903. He left the Colony in that year, and a month after he left a rule was passed to the effect that if a bookmaking member of the club was absent from the Colony for a longer period than three months without the leave of the committee his membership should lapse. Notice of the rule should have been posted to applicant at an address left by him in Cape Town, to which communications were to be addressed. The applicant alleged that in the cases of other members the rule had not been enforced. He further said that on his return in 1905 he tendered to the secretary his arrear subscriptions, but he was told that no committee was in existence, and nothing could be done until the annual meeting. Subsequently he was told his membership had ceased. The respondents stated that the defendant had forfeited his membership through absence from the Colony, and through not having paid his subscription, notwithstanding notice sent to him at the Rand Tattersall's, Johannesburg, where he was carrying on business.

Mr. P. S. T. Jones for applicant. Mr. Alexander for respondents.

Mr. Jones, in argument, said he submitted that the hostile attitude of the club towards applicant was because of certain ill-feeling against him. He contended that the respondents could not set up non-compliance with the rules against applicant, for the reason that they themselves had not complied with the rules.

Without hearing Mr. Alexander, the Court refused the application.

Laurence, J., said he thought it only right to say that Mr. Jones had put the case very ably, and had said everything that could possibly be urged in favour of the applicant. But after giving careful attention to what had been urged on

behalf of the applicant, he did not think such a case had been made out as would justify the Court in making the order prayed for. The question to be decided was whether the plaintiff's membership had lapsed, or whether he was still a member and entitled to privilege as such. Unless the applicant could make out a strong *prima facie* case, the Court would not interfere with the management of such an institution. The rule of the club required that the subscription should be so much per annum, payable in advance, and it was further stipulated that bookmaking members should pay an entrance fee, as settled from time to time by the committee. Now, when one of the rules of a club stated that an annual subscription was payable in advance, the natural conclusion to be derived from that was that if a member failed to comply with such an essential and vital provision of the club's rules, unless such failure be remedied within a reasonable time, or condoned by the action of the management, the membership became vacant. Applicant admitted that for four years, during the whole of which time he was resident in South Africa, being at no time further away from Cape Town than at Johannesburg, he took no steps to comply with the rule for payment of his subscription. Now, if subscriptions became due, and were in arrear, no doubt the ordinary practice of officials of a club was to acquaint the member with the fact, but he was not prepared to say that such an intimation from the secretary was a condition precedent to the loss of membership. As a matter of courtesy, such notice was given, but he thought it was the duty of every member to comply with such an essential rule as the payment of subscriptions, and he ran the risk of the consequences if he failed to do so. It seemed, on the affidavits, that all the conditions precedent to the erasing of the name of the applicant from the list of members had been complied with, with the technical exception that notices were not sent to him through the General Post Office, as they should have been, but were delivered by hand to his address at Tattersall's. He did not, however, regard the rule on this point as imperative, but as directory in its character, and it was not a vital omission unless the applicant could show he had been prejudiced, which was not the case here. But, apart from this question, it was impossible for him to say on the rules in force at the time of the applicant's election, that he had made out a clear right to be reinstated as a member of the club. If applicant thought it worth his while to bring an action for declaration of rights he was, of course, at liberty to do so, but the present application must be refused, with costs.

# SUPREME COURT

## THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIEBS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

MARSH V. JORDAAN. { 1907.  
Feb. 27th.

Mr. Marais moved for provisional sentence on a bond and on certain premiums of insurance, and for the specially hypothecated property to be declared executable.

Granted.

### DICEY V. SIMPSON.

Dr. Greer moved for provisional sentence for £46 17s. 7d., balance on a dishonoured cheque.

Granted.

### SANDERSON V. GLASER BROS.

Mr. Roux moved for the final adjudication of defendants' estate.

Granted.

### SCHOEMAN V. NOURSE.

Mr. Louwrens was for plaintiff; Sir H. Juta, K.C., was for the respondent.

De Villiers, C.J., said he had read the papers, and he hardly thought the matter could be dealt with on application for provisional sentence. On the whole, he thought the Court should make an order that the plaintiff should go into the principal case, and that the question of costs should stand over.

Order accordingly.

### ILLIQUID ROLL.

LIPSCHITZ V. PEARKS STORES (AFRICA), LTD. { 1907.  
Feb. 27th.

Mr. Alexander said that this was an application for judgment under Rule 319, but there was a motion on the roll to remove the bar and for leave to plead.

His Lordship said he would hear the motion.

Dr. Rainsford was for the applicant (Pearks Stores), defendant in the action.

The affidavits filed on behalf of the applicant set forth that when summons was served on the defendants' attorneys the matter had to be referred to Johannesburg. Defendants' attorneys wrote requesting extension of time within

which to plead, but the respondent (plaintiff in the action) replied stating that the request was only made after bar, and that he would only agree to the withdrawal of bar upon applicants paying the wasted costs. The action was for recovery of salary and of moneys alleged to have been paid by the plaintiff on behalf of the defendants. A letter was read, in which plaintiff's attorney offered to consent to the removal of the bar upon costs of bar being made costs in the cause. Applicants took up the position that the notice demanding plea was served prematurely.

Dr. Rainsford said that the rules of Court provided that notice demanding plea could not be served until after the expiration of eight days from the filing of the declaration. Eight clear days' notice had not been given in this case. Counsel cited *Montmort v. Board of Executors* (2 Juta, p. 307.) Applicant had offered to allow costs to remain costs in the cause in the first instance, but this having been rejected, applicant, he submitted, was not bound by that offer.

Mr. Alexander said there seemed to have been some misapprehension in the calculation of the eight days. The applicants were clearly not in a position to file their plea in time. It was not, he urged, so material that eight days should elapse before notice was served, and that a full 24 hours should be allowed after notice. He submitted that costs should be made costs in the cause.

De Villiers, C.J., said the terms of the rules were perfectly clear. Before the plaintiff could bar the defendant, he must show that his demand for plea was made after the eight days had expired, provided for in the rules, and then 24 hours further must be reckoned from the time he made this demand before defendant could be barred. In the present case demand was made before the expiration of the eight days, and that invalidated the proceedings. It would seem to him, moreover, that this hurry was wholly needless, considering it was quite impossible for the parties to go to trial until some months after the notice was given. Independently of that, however, the rule had not been complied with and the defendant was therefore, in his opinion, entitled to have the bar removed. Respondent would be ordered to pay the costs.

### PURCELL, YALLOP AND EVERETT V. SMOOKLER.

Mr. Inghold moved for judgment, under Rule 329d, for £183 18s., for goods sold and delivered. Defendant was surety for the joint principal debtor.

Granted.

## HASSAN V. ABDURAMAN.

Dr. Greer moved for the final adjudication of the defendant's estate.  
Granted.

JOHNSTONE V. JOHNSTONE. { 1907.  
Feb. 27th.

Mr. J. E. R. de Villiers moved, on behalf of the wife, for an order for restitution of conjugal rights, failing which for a decree of divorce on the ground of desertion.

Flora Johnstone said she was married to defendant at Liverpool, England, on the 24th September, 1901. Her husband was a plumber. In December, 1902, they came to Cape Town, and lived there for two years. They were not very happy, as her husband took to drink. In June, 1904, while they were living in Loop-street, Cape Town, defendant deserted her. He had not since contributed to her support. She had asked him to do so, but he had refused. He was now lodging with coloured people.

By the Court: She was a widow when she married defendant. She had two children by her first husband, but only one was alive. At present she was canvassing for medicine.

Defendant was ordered to return to or receive plaintiff, failing which to show cause on April 17 why a decree of divorce should not be granted.

## GENERAL MOTIONS.

*Ex parte* GABRIEL. { 1907.  
Feb. 27th.

Mr. Douglas Buchanan moved for leave to sue *in forma pauperis*. Applicant wished to bring an action for restitution of conjugal rights, or for divorce on the ground of desertion.

Applicant, a coloured woman, said she had been married ten years, and had five children, who were living with her. Her husband was living with a Malay woman.

A rule was granted calling on respondent to show cause on the 12th March why applicant should not be granted leave to sue *in forma pauperis*.

## WORCESTER MUNICIPALITY V. COLONIAL GOVERNMENT.

Grant of land for public purposes  
—Resolution of Houses of  
Parliament—Act of Parlia-  
ment.

*The Government was author-  
ized by a resolution of both  
Houses of Parliament to grant*

*a piece of land within the  
Municipality of W. to an  
Agricultural Society for public  
purposes connected therewith,  
but there was strong prima  
facie evidence, that long before  
the passing of such resolu-  
tion, the inhabitants of W. had  
acquired the right to use the  
land as common pasturage.*

*Held, that notwithstanding the  
resolution, the Government was  
not entitled to make a grant  
which conflicted with the prior  
rights of the inhabitants.*

This was an application upon notice by the Worcester Municipality to the Secretary for Agriculture representing the Colonial Government and the Worcester Agricultural Society, for an interdict restraining the Government issuing a grant in favour of the Agricultural Society of a certain piece of land alleged to be Crown land, or disposing of or alienating any portion of such land or commonage land, save and except, subject to, in terms of, and in conformity with the requirements of sections 160-165, inclusive, of the Municipal Act, No. 45, of 1882.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), was for applicants; Mr. Searle, K.C., was for the Colonial Government; Mr. Burton was for the Worcester Agricultural Society.

Mr. Schreiner said that the object of the application was to have it held and determined that the Government had no right, by a resolution of both Houses of Parliament, purporting to be a resolution under section 6 of the Crown Lands Disposal Act, to dispose of this ground without the formalities of the Act of 1882 having been complied with.

Mr. Searle said it was not admitted that this was municipal land within the meaning of the Act of 1882.

Mr. Schreiner said it was admitted that it was common pasture land.

A number of affidavits were read on behalf of the applicant Council, to show that the land in question was commonage or common pasturage, and that the Government had treated it as such.

On behalf of the respondents, affidavits were read setting forth that the land has not been used as a commonage, but more as a dumping-ground for refuse. The Municipality, it was contended, had recognised the right of the Government to deal with this as Crown land. These allegations were denied by applicants.

De Villiers, C.J., said he would like to hear Mr. Searle on the matter.

Mr. Searle said the case raised a very important question as to under what circumstances land might be taken to be the property of the Municipality. There must be some way in which the Municipality got land which it might call commonage or pasture land.

[De Villiers, C.J.: But it is not a question of whether the land belongs to the Municipality. The point is: Can the Government deal with that land without the consent of the Municipality?]

Mr. Searle said there was no evidence that the Council had acquired a servitude over this land by prescription, and they could not get title otherwise. The Municipality must fall back on some user, which he contended was not proved in this case. Counsel cited the case of the *East London Municipality v. Colonial Government* (17 Supreme Court Reports, p.p. 204. and 216-217). The mere fact of there being regulations referring to pasture lands did not vest these lands in the Municipality. The Municipality must acquire title to pasture lands in some other way than by means of regulations.

De Villiers, C.J., said that in the case quoted, there seemed to be no evidence that the land in question was used as common pasture land. Here there was evidence that from the time the town was laid out, the whole of this land was treated as common pasture land. Even for the purpose of prescription, would it not be almost conclusive evidence against the Government that eight years ago the Government, by sanctioning these regulations, acknowledged that this land was common pasturage?

Mr. Searle said it would put the Government in an extremely awkward position in regard to lands throughout the Colony if it were held that the regulations meant this. The Municipality must, he contended, show some way in which it had acquired title to these lands, and it did not acquire title merely by a Proclamation referring to municipal limits. Counsel referred to section 10 of Act 2 of 1860, to sections 12, 13, and 14 of Act 14 of 1878, and to Act 15 of 1887, more particularly sections 6 and 10.

[De Villiers, C.J.: Is there not *prima facie* evidence that this right has been acquired by prescription?]

Mr. Searle: That, I submit, is the only case they can set up. Counsel proceeded to deal with the evidence in reference to prescription, and urged that the Municipality had shown no title to the land by user. To succeed in this application, the Municipality must come in and show that what had now been done deprived them of a right they had held for thirty years. He could quote numbers of cases in which

the Court had held that the rights of the owners must always be protected, save in so far as express provisions of an Act override the rights of the owners and gave a municipality actual power; but no mere regulations could do that. That had been held by the Court over and over again. Counsel referred to the *Tarkastad case* (15 S.C., 371), the *Aberdeen case* (15 C.T.R., 661), the *Steytlerville case* (8 J., 12), the *Bredasdorp case* (1870, Buch.), and the *Srullendam case* (3 M., 578).

Without calling on Mr. Schreiner, the Court granted the interdict.

De Villiers, C.J.: It appears to me that the applicant Council has made out its right to an interdict. It seems that, purporting to act under the Act of 1887, the Houses of Parliament have passed a certain resolution authorising a grant of the land in question to the Agricultural Society at Worcester. The object of that grant, I presume, is to enable the society to use the land for the purpose of shows or otherwise, and, at all events, the effect of the grant would be to take the control of the land out of the Municipality and to prevent the inhabitants from using it as common pasture land. If, therefore, it would appear, from the evidence before the Court, that there is *prima facie* reason for believing that the inhabitants of the Municipality have acquired a common right to use this land as pasturage land, I am satisfied that it would not be in the power of Parliament by resolution to authorise the grant. His Lordship read the 6th section of the Act of 1857, and, proceeding, said: Now, if there is any land which has already been legally devoted to any special public purpose, there seems to me no power in the House of Parliament, by mere resolution, to set aside the existing public purposes, and to grant the land for other special purposes. Such power can only be exercised by Act of Parliament. If both Houses of Parliament had passed an Act authorising the Governor to make this grant, the municipality would have had no right to complain. But this was a mere resolution of both Houses, and cannot be held to be binding upon the municipality if that body has control over the land as the custodian of the rights of the inhabitants of the municipality. There has not been much evidence as to actual use of the land by the inhabitants, but this may probably be owing to the admissions made at different times by the Government as to the land being common pasture land of the inhabitants. The regulations which have been read assume that the land had been legally devoted to that purpose, and certainly since 1822 no one has seriously questioned the right of the inhabitants. Questions appear to have arisen from time to time between the



Government and the municipality as to the degree of control enjoyed by the municipality, but these questions did not affect the individual rights of the inhabitants. I am not prepared at this stage to grant a perpetual interdict to restrain the grant of the land to the agricultural society, but the *prima facie* evidence in favour of the rights of the inhabitants is so strong as to justify the granting of an interdict with costs, reserving, however, to the Government leave to institute an action to set aside the interdict with costs, and to have it declared that the Government is entitled to deal with the land in the manner proposed by it. Such action must, however, be instituted before the end of the present year.

[Applicants' Attorneys: Van Zyl and Buissinné; Attorneys for the Government: Reid and Nephew.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

KAHN V. SHAMSUDIEN. } 1907.  
Feb. 28th.

In this case the plaintiff sued the defendant as trustee in the insolvent estate of Isemil Shamsudien. He claimed that Shamsudien, before his insolvency, had sold and delivered to him certain stock-in-trade. After Shamsudien's estate was provisionally sequestrated, the plaintiff wrongfully and unlawfully attached the goods. Subsequently the trustee rectified the wrongful action, and there was an order restraining the trustee from parting with the goods. There was a plea admitting an attachment of the goods, and setting out, if there was any arrangement of this sort between the parties, it was not *bona fide*. There was no replication, and the plaintiff was barred from replying. Then, according to the Rules of Court, the plaintiff having failed to set down the case, the defendant could set it down the following term, and counsel now asked for absolution from the instance and the discharge of the interdict against the trustee.

Mr. Burton was for the defendant, and there was no appearance for the plaintiff.

Absolution from the instance granted, and interdict discharged, with costs of suit and interdict.

### FLAUM V. GERHARD AND HAY, LTD.

This was an application similar to the preceding, excepting that the plaintiff has not been barred from pleading; he had not set his case down, and so the defendant set the case down. The plaintiff got leave to sue *in forma pauperis* and by edictal citation. The defendants were merchants carrying on business in St. Petersburg. The plaintiff ordered a consignment of wood and timber from the defendants, and on arrival in Table Bay, there was a dispute as to the price. The defendant company then attached the wood and timber *ad fundandam jurisdictionem*. Owing to the alleged breach of contract by the defendant company, plaintiff claimed payment of £285, the value of the wood, after having made a tender to the bank, and £500 damages. The defendants denied that the bank had any authority to accept the tender, put in a counter-claim for the payment of the balance of their account (£357 1s. 9d.), and they asked for an order retaining the £114 11s., the proceeds of the sale of the wood, in part payment of their claim. The defendants had paid £25, and £357 1s. 9d. was the amount due.

Mr. Burton was for the defendants, and the plaintiff was in default.

Maasdorp, J., granted absolution from the instance on the claim in convention, and judgment as prayed on the claim in reconvention, and discharged the order of attachment.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. } 1907.  
Feb. 28th.

Mr. P. S. T. Jones moved for the admission of Sydney Moorcroft Connelly as an advocate.

Application granted, and oath administered.

### PROVISIONAL ROLL.

#### HANAU V. BUCHANAN.

Mr. Searle, K.C., moved for the final adjudication of the defendant's estate

as insolvent. Counsel said that personal service had not been effected upon defendant, who it was believed was in Johannesburg.

Return day extended to the 12th March, and rule granted, calling on defendant to show cause on that date, one publication in a Johannesburg newspaper.

KINSLEY V. KRAMER.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

FLEMING V. BOTHA.

Mr. Roux moved for provisional sentence on a mortgage bond for £100, with interest, bond due by reason of non-payment of interest since 31st December, 1904, and also for £1 5s. insurance premiums. Counsel applied for the property specially hypothecated to be declared executable.

Order granted.

GUTHRIE AND THERON V. TALJAARD.

Mr. Howes moved for provisional sentence on a promissory note for £40 8s. 6d.

Order granted.

DE VILLIERS V. VON HOLDT.

Mr. Rowson moved for provisional sentence on a mortgage bond for £700, with interest from the 1st July, 1906, bond due by reason of three months' notice having been given; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

WITHINSHAW V. ARENDS. { 1907.  
{ Feb. 28th.

Mr. Swift moved for judgment under Rule 329d for £240 14s. 11d., for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

CLARKE AND ANOTHER V. GREENBERG

Mr. W. Porter Buchanan moved for judgment under Rule 329d for £112 3s., less £35 10s. paid since issue of summons, for goods sold and delivered on or about the 20th July, 1906.

Mr. Lewis (for respondent) applied for a postponement of the case. Defen-

dant, he said was away in German South-West Africa, and the summons had been left at his house in Cape Town with his wife, who believed that her husband had a *bona fide* defence to the claim. Counsel cited *Townley v. Cameron* (1 Menzies, 134).

De Villiers, C.J.: Defendant left the country knowing that he had extensive dealings with the plaintiff, and that he might at any time be called upon to pay the debts which he owed to plaintiff. He left his wife here, and the summons was served in the proper manner by leaving it at his last known place of residence and serving it upon his wife. We must presume that she brought it to his notice, as it was her duty to do. I am not satisfied that it was not brought to his knowledge. In certain circumstances the defendant may reopen the case. I do not wish to prejudice it, but, for the present I am of opinion that the plaintiff is entitled to judgment by default, with costs.

Judgment accordingly.

INSOLVENT ESTATE WOLSTENHOLME V. ROUX.

Mr. Howes moved for judgment under Rule 319 in terms of summons for £545 and costs.

Order granted.

KELLY V. MOSSOP AND OTHERS.

Mr. W. Porter Buchanan moved for judgment, under Rule 319, against the defendant, McCrum, in default of plea for payment of £26 9s. 9d., balance of certain moneys due to plaintiff, who was a mining engineer, in respect to services in inspecting certain property in the district of Hay.

Order granted against defendant McCrum.

THWAITES V. HARRIS AND KING.

Mr. Watermeyer moved for judgment, under Rule 319, in terms of the declaration.

Dr. Greer (for defendants) applied for the removal of bar and leave to plead.

Affidavits having been read and Dr. Greer having been heard in argument,

De Villiers, C.J.: There is no doubt that the defendants have been in default. There is certainly a strong *prima facie* case in favour of the plaintiffs, and I cannot consent to any purging of default or leave to plead unless proper security is given. The Court will grant leave to purge default and file plea, but I think that within four days from this date defendants should give security to the

satisfaction of the Registrar of the Supreme Court for the due payment of the amount claimed, and costs in case judgment should be given against them, failing such security judgment to be entered as prayed, with costs.

On the application of Dr. Greer, defendant was allowed seven days within which to furnish security.

#### FERREIRA V. FERREIRA AND RESIDENT MAGISTRATE OF WILLOWMORE.

This was an action to have the respondent, Ignatius Wm. Ferreira, declared incapable of managing his own affairs, and a curator appointed of his property.

Dr. Rainsford (for applicant) read an affidavit by Mr. Hugo, Resident Magistrate of Willowmore, who, as *curator ad litem*, acquiesced in the application, and also affidavits by others to the effect that Mr. Ferreira was unfit to manage his own affairs. It was suggested that Mr. P. M. van Noorden, attorney, Willowmore, should be appointed curator of the respondent's property.

Order granted, declaring Ignatius Wm. Ferreira incapable of managing his own affairs and appointing P. M. van Noorden as curator of his property, provided that he gives security to the satisfaction of the Resident Magistrate of Willowmore for the due administration of the estate, costs of these proceedings to come out of the estate.

#### GENERAL MOTIONS.

JERVOISE V. JERVOISE. { 1907.  
{ Feb. 28th.

Mr. Struben moved for a decree of divorce, with forfeiture of benefits of the marriage, in default of defendant's compliance with an order of restitution of conjugal rights.

Order granted as prayed.

#### MECHAU V. MECHAU.

Mr. Payne moved for a decree of divorce, with custody of the children of the marriage, in default of defendant's compliance with an order of restitution of conjugal rights.

Order granted as prayed.

#### FLUCKIGER V. FLUCKIGER.

Mr. Rowson moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights.

Order granted.

#### DUNDAS V. BEUKES.

Mr. M. Bisset applied for an extension of the return day of a certain rule calling upon respondent to show cause why transfer should not be granted of certain property. Personal service had not been effected, and no publication had been made as directed in the Rule.

De Villiers, C.J., remarked that it was a pity that the directions given in the Rule were not followed, so that this further application might have been saved. He ordered the matter to stand over for information as to when the order of Court was sent down to Upington for service on respondent.

At a later stage Mr. Bisset informed the Court that the order was given on the 1st February, and was obtained from the Registrar on the 5th February, and on that day sent up to Upington. The Rule had been left at the respondent's last known place of residence, and there had not been sufficient time to allow of publication.

Return day extended until the 15th April, to enable publication in a newspaper as directed.

#### *Ex parte* STREETER.

Mr. J. E. R. de Villiers said that this was the return day of a certain rule *nisi*, but owing to the fact that respondents (Myers, Puxtey and Co.) were travelling about with a bioscope, it had been impossible to effect service. The application was for the attachment of certain funds.

Return day extended until the first day of next term.

#### KALK BAY MUNICIPALITY V. HURST.

Mr. Burton (for applicants) applied for a postponement of the matter until the 12th March to enable the applicants to file replying affidavits.

Dr. Greer (for respondent) urged that the Court should grant costs against applicants in view of the fact that notice of motion was only given on the 25th February for the hearing to-day.

Postponed until the 12th March, costs to be costs in the cause.

*Look in Sheriff 1925 O.P.D. 166.*  
ESTATE VAN DER MERWE { 1907.  
V. THORNE. { Feb. 28th.

Expenses of transfer — Lien —  
Tacit hypothecation — Retention —  
Insolvency — Preference —  
Mortgage bond — Equitable mortgage.

*The applicant acted as agent of A. in passing transfer of*

certain land, and in afterwards passing a special mortgage on such land in favour of the respondent. A. became insolvent, whereafter the applicant, as trustee of the insolvent estate, awarded to himself, in his individual capacity, a preference by virtue of a lien, which he claimed on the deed of transfer of the land, in respect of his expenses in effecting such transfer.

Held, that the applicant, being allowed the use of the transfer deed for the purpose of passing a bond on the property, was not entitled, in competition, to any preference in respect of the proceeds of the land.

This was an application upon notice calling upon respondent to show cause why he should not be ordered to proceed with the objection lodged by him with the Master of the Supreme Court on the 27th August, 1906, against the confirmation of the liquidation and distribution account framed by the applicant, as trustee in the insolvent estate, or withdraw the said objection, and why he should not be ordered to pay costs.

Mr. J. E. R. de Villiers was for applicant. R. A. Jansen, the trustee; Mr. P. S. T. Jones was for respondent.

It appeared that the trustee, who is also the secretary of the Graaff-Reinet Board of Executors, had filed a distribution account awarding the respondent £1.198 on a claim for £1,371, being the amount of a bond and interest in the estate, and awarding his Board a sum of £58 14s. 3d. as a preferent claim, alleging that this preference was by virtue of a lien which he held for costs incurred by the Board in connection with passing transfer to insolvent and a bond to respondent. Respondent objected to the preference, and he now appeared to show cause why the preference awarded by the trustee should be struck out of the account.

Counsel having been heard in argument.

De Villiers, C.J.: It is by no means clear to me that a lien exists in this case at all, but I will assume that the applicant Board would have been entitled to a lien as against the insolvent in respect of the expenses connected with the transfer. After the deed had been passed, the respondent advanced certain sums of money to the insolvent, and a bond was passed in favour of the respondent. It is quite possible that if the Board had insisted upon

having its claim discharged, it might have said: "We refuse to hand over these title deeds for the purpose of passing a bond until our expenses connected therewith have been paid." If there were a lien, that would have been the right of the Board. But the Board allowed this bond to be passed, apparently it was the agent for the passing of the bond, and in that way led the respondent to suppose that he was going to have a special hypothecation over this property, and that he would be entitled to all the proceeds of that land in case of sale, to the extent of the amount of the bond and interest due thereunder. Whatever rights of hypothecation the Board would have had as against the insolvent himself, it cannot enforce those rights in competition with the respondent as the *bona fide* mortgagee of the land. The applicants are practically claiming what in English law is called an "equitable mortgage" in respect of this property, a mortgage existing by virtue of a deposit of title deeds in the hands of the creditor. This Court has never recognised that such an equitable mortgage can have any effect as against even a subsequent special mortgage which had been duly registered. For these reasons, I am clearly of opinion that the applicant is not entitled to his preference, and that the objection made by the respondent to the account was a perfectly valid one. The mistake which respondent made no doubt was that he did not press his objection, and did not follow the procedure indicated by the Insolvent Ordinance. But, on the other hand, it appears to me that it was the duty of the applicant, as soon as this objection was raised by the respondent, to admit the correctness of the objection, and withdraw the item objected to, but instead of that, proceedings were taken in this Court to compel respondent to withdraw his claim but as the applicants are responsible for all the costs. I think they should also pay the costs. It is a case in which the trustee representing the Board acted entirely in the interests of the Board. No doubt he acted with perfect *bona fides*, but, in my opinion, he was entirely wrong in his reading of the law, and the result is that the applicant must pay costs. The application will, therefore, be refused with costs.

Mr. Jones asked his lordship whether it was intended that applicant should pay costs as trustee of the insolvent estate.

De Villiers, C.J.: Of course, all these expenses have been incurred on behalf of the Board, not *qua* trustee. I should think the Board must pay the costs *de bonis propriis*.

**MASTER SUPREME COURT V. TRUSTEE  
INSOLVENT ESTATE NORRIS.**

Mr. Howel Jones moved for an order of personal attachment against respondent for contempt of Court in failing to obey an order of Court to file plan of distribution, and account, in the insolvent estate Norris.

Respondent did not appear.

De Villiers, C.J.: The notice of motion indicates the ground of application. Order granted.

**REX V. HENDRICKS.**

Mr. Howel Jones moved for the removal of the criminal trial to the ensuing Circuit Court at Worcester.

Order granted accordingly.

**OTTOSTROOM V. STEPHAN BROS.**

Dr. Greer moved for the appointment of a Commission to take the evidence of certain sailors in Cape Town, and also of Dr. R. W. Griffin at Aliwal North.

Mr. Gardiner (for the assumed executor of H. R. Stephan) opposed the application, and pointed out that a Commission had already been granted for examining witnesses at Port Nolloth, and there had also been an application to fix a day for hearing. His client objected to the multiplication of costs in a pauper suit in this way.

De Villiers, C.J.: In this case I have to consider the interests of the plaintiff himself. If it is essential that these witnesses should be heard, I think I should give him an opportunity, as they are leaving the Colony, of calling them. In regard to the doctor at Aliwal North, it is a pity that counsel was not authorised to consent to an affidavit being used, that would have saved expense, but if such an affidavit cannot be used the only other alternative is to appoint a Commission.

Order granted appointing Commissions in Cape Town and Aliwal North to examine the witnesses named in the petition, Mr. Advocate Giddy to be Commissioner in Cape Town, and the R.M. of Aliwal North to be Commissioner at Aliwal North. No costs will be allowed for these applications which have been made.

**SUPREME COURT**

[Before the Hon. Mr. Justice MAASDORP.]

**FREARSON V. FREARSON.** { 1907.  
Mar. 1st.

This was an action brought by James Henry Frearson, contractor, Claremont, against his wife, Clara Frearson, also of Claremont, for restitution of conjugal rights, failing which a decree of divorce.

Plaintiff, in his declaration, set out that he was married in community of property to the defendant at St. Saviour's, Claremont, on the 2nd December, 1891. There was no issue of the marriage. On the 24th August, 1906, defendant wrongfully and without reasonable and just cause deserted the plaintiff, and had since refused to return to or cohabit with him, although requested so to do. He prayed for an order of restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits of the marriage.

Defendant, in her plea, denied that on the 24th August she wrongfully and without just cause deserted the plaintiff. Since December, 1905, plaintiff had been habitually addicted to the excessive use of intoxicants, and had cruelly ill-treated the defendant. In consequence she refused to return to him on the 24th August. Thereafter, she returned to him, but on the 8th September he again struck her. Since the 8th September she had refused to return to or cohabit with the plaintiff. She said that she had reasonable or just cause for refusing to return to or cohabit with him. She prayed that the claim may be dismissed. In reconvention she craved leave to refer to the allegations in the plea. She said that in 1897 she adopted a child, of which she desired to have custody. She claimed a judicial separation, with division of the joint estate, an order upon plaintiff to contribute £5 a month towards her maintenance and custody of the said child.

Plaintiff, in his plea to the claim in reconvention, denied that he was habitually addicted to drink, or that his wife had any reasonable or just cause to leave the house. He also urged that the child should be left in his custody.

Dr. Greer was for plaintiff; Mr. P. S. T. Jones was for defendant.

The plaintiff (James Hy. Frearson, a European) said that he was a jobbing contractor for gravel drives and tennis courts, and resided at Paradise-road, Claremont. He was married to defendant in community of property at St. Saviour's, Claremont. At that time they had no property. After some time he had a quarrel with his wife



in reference to a sum of £25, which witness said his wife's brother had robbed him of. On the 18th August he came home, and asked his wife for money to pay for some gravel that he required. She refused to give him any money; they had words, and he eventually told her to leave the house. He did not strike the defendant. She went out; he found the money (£15), and later in the evening he went to look for his wife, but could not find her. Next day he found her at the Police Station. She returned to him on the following Friday. The next quarrel they had was in reference to a letter of demand for £2 2s. that he received from Mr. Duncan, law agent. His wife said she had been to Mr. Duncan, but he did not know at that time what her business was. He had since learnt that she had been trying to have him locked up or ordered to keep the peace. His wife told him she would have him locked up. This occurred on the 8th September. He did not threaten or strike the defendant. He had not spoken to his wife since the 8th September. He told her at that time that she was a "bit of a fraud." Witness denied that he was addicted to drink, or that he had assaulted the defendant. He said he desired to retain custody of the child, who was off-coloured. He had bought certain land at Retreat, but had been unable to obtain transfer, owing to the death of the vendor and the sequestration of his estate. Witness earned 22s. a week, and had to pay a boy 12s. He got occasional jobs, that would average about 18s. a week.

Cross-examined: He had given his wife a "smack" on the jaw now and again, just to keep her quiet. He had been under the influence of liquor at home about once a week. His wife sometimes had a good deal too much to say. He had been convicted of assaulting the defendant, and fined £1. She raised £12 to get his discharge from the Army.

James Ruck, a gravel contractor, of Claremont, said that plaintiff was a steady, hard-working man. He was a man who liked his glass of beer just as any other man did.

Dr. Greer closed his case.

Defendant, a coloured woman, said that she tried to avoid the plaintiff when he came home under the influence of drink. On the 12th August he returned home and asked for his money, which she gave him. He used to leave his money under the care of witness. He ordered her to clear out of the house. Witness stayed all night in the yard. Afterwards she lodged a complaint at the police-station, Wynberg. The police advised her to see Mr. Duncan, and this she accordingly did. Plaintiff wrote asking her to come back, and upon his promising not to assault her again, she returned to him. On the

8th September he came home drunk, and in the evening he again called for his money, and ordered her to leave the house. She went out, and he tried to drag her back by her hair, and assaulted her on the head and arm. When she refused to return he tore up her clothing. As to the child, the mother asked her to adopt it, and witness, with her husband's consent, brought the child home.

Cross-examined: Witness had been prepared to return to the defendant if he would not assault her. She was not afraid of the plaintiff, except that he might beat her. Plaintiff has earned £3, £4, and sometimes £10 in a week, but at other times he had earned very little.

Maasdorp, J., granted a decree of judicial separation, with costs, and the plaintiff was ordered to deliver up the custody of the child to the defendant.

#### *In re* ESTATE PATTERSON AND MORRIS.

Mr. Douglas Buchanan moved for the appointment of Mr. G. W. Steytler as provisional trustee in the estate of Patterson and Morris. The application was made on behalf of certain creditors who wished the business to be carried on.

Mr. Steytler was appointed provisional trustee, with powers to carry on the business.

## SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE, the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

*Ex parte* JANSEN. { 1907.  
Mar. 4th.

Mr. Burton moved as a matter of urgency for an interdict restraining one J. J. B. van der Merwe from proceeding with certain works on ground at Bethesda, district of Graaff-Reinet. The petitioner, Johannes Jansen, of Bethesda, said that he owned a farm, close to which flowed a tributary of the Sundays River. From this river petitioner and the former owners of the farm had from time immemorial led water by means of a furrow. This furrow at point "c" on the plan used to be distant 30 yards from the river, but, owing to the stream, having widened its course, it was now only 25 ft. distant. Before the

river so widened its course a road used to cross it at about 25 yards above "c," but owing to the widening of the course a space of 75 yards, formerly the only available crossing, had been rendered impassable, and there was no possibility of making a crossing without raising the bed of the river, a step which could not be carried out without causing serious damage to petitioner's land. He had received notice that Van der Merwe, an adjoining owner, intended to repair the road. In spite of sanction having been refused by petitioner, Van der Merwe had gone on his property, and interfered with the furrow, and he was now engaged in repairing the road. Van der Merwe had no need whatever of this road as he could get to his ground by other roads. If respondents were allowed to proceed with the raising of the river bed, as he was doing, petitioner would be in imminent danger of having his furrow and lands swept away by the flood water.

The Court granted a rule to operate as an interim interdict in terms of the petition, rule returnable on March 19.

	1907.
ZIETSMAN V. REYNOLD'S	Mar. 4th.
VEHICLE AND HARNESS	" 11th.
FACTORY, LTD.	" 12th.
	" 23rd.

[For Head Note and report of case in the Court below, see 16 C.F.R., 1048.]

This matter came on for hearing on appeal from a judgment of the Chief Justice, sitting in the First Division of the Supreme Court.

The matter arose out of a motion which was heard before the Chief Justice for confirmation of the liquidators' report when appearance was entered on behalf of certain persons, whom it was sought to make contributories. Amongst these was Mr. L. F. Zietsman, the present appellant.

The judgment of the Chief Justice so far as it related to the present appellant was as follows: "As to Mr. Zietsman, I have no doubt whatever as to his liability. I consider that there is clear proof that the 2,000 shares were applied for by him. We have got the books of the company, and we have the pregnant fact that in the list sent to the Registrar of Deeds his name appears as the allottee of the 2,000 shares. He had an opportunity of denying this statement that he had signed that list, but he did not deny it. He simply said he did not sanction it. I am satisfied also that he would not—if he had intended to have only the 1,000 shares—he would not have paid the £125 for allotment, and in addition to the £1,000 for the remaining 1,000 shares. I am satisfied in respect of the 2,000 shares, as he has paid only £1,125, he is still liable for

the 875 shares which had been allotted to him, and stand in his name in the books of the company. Then, in regard to the other 500 shares, I am satisfied that he should be held liable in regard to them. He stands exactly on the same footing in regard to the 500 shares as the three other directors whom I have mentioned, but if there is any difference, all the difference is against Mr. Zietsman. He knew, and he had every opportunity of knowing, that these 500 shares formed part of the original number which had been awarded to Mr. Reynolds under an agreement which was never registered in terms of the 97th section of the Act of 1892. The order of the Court will be that Mr. Zietsman be placed on the list of contributories for 1,375 shares."

Mr. Close (with him Mr. Gardiner) was for appellant; Mr. Schreiner, K.C. (with him Mr. Benjamin), was for respondents, the liquidators of the company.

Mr. Close, in argument, said that one of the first contentions he wished to put before the Court was that it was wholly impossible for the Court to give a decision putting Mr. Zietsman on the list of contributories, unless it were in possession of facts which it was not in possession of at the present time. There were a large number of facts which were hotly disputed. There were oath and counter-oath, and strong statements made by both sides. The statements were made either on affidavit or they were made under circumstances which came before the Court practically in the nature of an inquiry. Mr. Syfret was the inspector appointed to go into the affairs of the company, on the application of Mr. Reynolds, in December, 1903, and for the purposes of inspection or inquiry, he had a number of witnesses before him, who were called and sworn, and they gave information upon a number of important facts. It would be almost an impertinence on his part to refer to the respect which was paid to Mr. Syfret's judgment, but, whatever information there was before Mr. Syfret, and whatever conclusion he came to, that information when it came before the Court was decided by the Court quite apart from any conclusions of Mr. Syfret's, and the Court could only weigh the evidence as it actually was given. In connection with a case of this kind, when a large number of issues really causing very serious consequences for the persons concerned, how could the Court, without having the points put to the witnesses, arrive at a conclusion as to which of the parties was telling the truth in regard to the disputed facts? Mr. Syfret put certain conclusions before the Court in his report as inspector. Then, in his report as liquidator, he incorporated that. Mr. Syfret was the original inspector, and Mr. Chiappinni was never an

inspector at all. He never had an opportunity of seeing the witnesses who were called before Mr. Syfret. One of the important features of the whole case was, what was the share register? There was no evidence as to whether certain books were or were not the share register. The conclusions of Mr. Syfret were adopted by Mr. Chiappini. Those conclusions comprised conclusions as to a supplementary share register. Now, the basis of the whole case in law against any person who was to be made a contributory was that he should be a member, and a member was one who was on the books and had agreed to become a member. Both those conditions were necessarily precedent. Now, what evidence had the Court as to what the real share register was? Then, it was said some other book contained it. His case was that they had never proved that that book was the share register of the company. It was the rough allotment book. The book bore no title at all. Mr. Syfret at one stage called it the share register, and some of the witnesses referred to it by that name. At the inspection proceedings this allotment book, as they called it, the rough share register as Mr. Syfret called it, the allotment book as Mr. Cosnett called it, all these referred to a book which had no name.

[Laurence, J.: According to this book, Zietsman does appear as the holder of 2,000 shares fully paid up?]

Mr. Close: Yes.

[Lawrence, J.: That being so, surely it is some *prima facie* evidence of the fact that he is the holder of 2,000 shares?]

Mr. Close: I do not admit that it is *prima facie* evidence. The best evidence is to be found in the share register proper.

[Laurence, J.: In that it only appears that 500 shares were transferred to him.]

Mr. Close: With that must be taken the supplementary share register, which was opened in due form by the company. My contention is that this is a case really in which there are so many points involved that the parties ought to be ordered to go to trial. This is a case in which it is impossible for the Court, on the information before it, to find out which was the register, to find out who actually were the shareholders. The Court, I submit, will be doing the best thing in the circumstances by ordering that the matter be gone into by trial. The issues may be raised by this form of proceeding, if the liquidator bring an action to rectify the register of shareholders. In that way he would have an opportunity of showing that the 2,000 shares ought to be put against Mr. Zietsman in the share register, and thereupon at the same time he would have an opportunity of proving—

[Lawrence, J.: You have not explained yet the omission apparently from the transfer of register of any reference to the 1,000 shares which you admit were allotted to Mr. Zietsman.]

Mr. Close: Mr. Sieg's evidence shows that what we call the share register is a book in which he entered the names of persons who received fully paid up shares, and the inference then is that that book was used purely and simply for the purpose of keeping a record to be entered up afterwards in the share register proper of persons who had applied for and taken shares, but had not fully paid up. Counsel went on to draw the Court's attention to section 74 of the Companies Act (No. 25, 1892) as showing who are members of a company. That section said that every subscriber to the memorandum of association should be deemed to have agreed to be a member of a company under the Act, and every other person who had agreed to be a member and whose name had been placed on the register of members should be deemed to be a member. Those two conditions, counsel submitted, were co-ordinate and co-equal, and one was just as important as the other. A member must not only be on the register but he must have agreed to be on the register. Unless Mr. Zietsman had agreed that he would become a member, Mr. Dominicus had no right to put him on the register.

Laurence, J.: The difficulty I felt was to understand clearly what was the consideration for the subsequent transfer of the other 500 shares.]

Mr. Close: That confirms perhaps the other branch in another form. What evidence is there on the record, and how can the Court determine whether the point your lordship has raised is or is not against Mr. Zietsman? He is put on the register for 2,000 shares before he gets the 500, but it all bears out my contention that the Court had to try a large number of questions of fact which it is impossible to decide on motion.

[Laurence, J.: Is it not an exceptional course to hear oral evidence in cases of this kind?]

Mr. Close said that he had authorities in support of that view. He felt more justified in putting that proposition before the Court because in the Court below, when the Chief Justice asked him whether, as a matter of fact, he could point out any specific denial by Mr. Zietsman that he had sanctioned the return, he replied that he could not. He found that was an inadvertence, because Mr. Zietsman had said that he did not sanction the return. If he did not sanction the return, then he had not acquiesced in a statement that he was the owner of those shares. Mr. Zietsman was coming in as a director, and why should he go out of his way to give this guarantee of £1,000 unless he was anxious to help the company. When

Mr. Zietsman protested that he had not taken these shares, the secretary was instructed by the company to credit him with the 1,000 shares. There was Mr. Zietsman's own statement that he had not received one penny in dividends, interest, or fees from the company. What proof was there that as a fact he acquiesced? There was the allegation that in the books of the company his name appeared, but he swore he did not see these entries in the books. Counsel referred to authorities on the procedure to rectify the register, in which oral evidence had been ordered, as follows: *Winston's case* (12 Chan. Div., 239), *Ward's case* (2 Chan. Appeals, 435), and *Sichell's case* (3 Chan. Appeals, 122). Let Mr. Syfret bring his action and rectify the register, as provided for in Buckley, page 47, 8th edition. Counsel referred to sections 86 and 157 of the Colonial Act. The former dealt with the method of rectification before liquidation had taken place, and the latter dealt with rectification after liquidation. These sections, he contended, corresponded very closely with sections 35 and 98 of the English Act of 1862. There must be a specific application on notice given to the parties interested to enable them to amend the register, and then on that application parties might set out such facts as they would in an ordinary application, and then the Court had the power to refer the matter back for trial in another form, where there were issues of fact involved, which it was impossible to deal with it on affidavits. The circumstances in the case, counsel submitted, were so involved and the facts so difficult to ascertain whichever way there might be *prima facie* proof, it was one which the Court would not accept. If the Court would look at what was called the rough allotment book, it would be found there was no provision for transfers. An interesting case was that of *Cammell* (1894, 2 Chan. Div., 392), in which it was held that the allotment sheets were not the register of the company. The case of *Weiker-shein* (8 Chan. Appeals, 836) was a strong one in favour of the appellant, as showing very cogent reasons for taking in another book as part and parcel of the complete register of members. On the law as to the agreement to take shares counsel cited *Townsend's case* (13 Equity, page 152). If Mr. Zietsman was liable at all, he must be liable on an express contract to take the shares, or by a sort of ratification of what someone had done for him. On the question of the forfeiture, counsel cited Buckley (pp. 161-2), and the case of *Myles* (1865, 11, "Law Times," 581). On the handing back of the shares *Hartley's case* (10 Chan. Appeals, p. 157) had a feature in common with the one before the Court. There was absolutely nothing to show that at the time the

arrangements were made there was any dissatisfaction on the part of anyone, and it was unlikely they were making any arrangements at the time, which did not appear to be good ones. Counsel referred the Court to *Allmark's case* (9, Chan. Div., 333), *In re Denham and Co.* (25 Chan. Div., 752), and *Bartlett's case* (19 "Law Times," 628), in support of his argument, and submitted that the liquidator had failed to satisfy the Court, and could not satisfy the Court that Mr. Zietsman had acquiesced or had knowledge of the fact that he was registered for these shares. In pages 52, 93, and 122 of the record, Mr. Zietsman actually denied both having sanctioned the return and having seen his name on the list. As to Mr. Zietsman's liability on the 500 shares that would depend on whether the agreement of the 30th August, 1904, was valid or not, and counsel submitted that the agreement was perfectly valid. The appellant ceased to be a member for over a year before the liquidation had taken place, and as to the effecting of transfers, counsel referred the Court to Buckley, page 32, which went far beyond what he had to establish in this case. Then, with regard to the non-registration of this agreement, it was interesting to bear in mind that section 97 of the Colonial Act had taken over section 25 of the English Companies Act. Counsel quoted the case of *British Farmers' Pure Linseed Cake Company, Ltd.* (7 Chan. Div., 533), *Blythe* (4 Chan. Div., 141), *Parbury* (1 Chan. Div., 100).

Mr. Close said that by mistake he gave the Court a wrong reference to *Simpson's case*, which he cited on the question of the discretion of the Court for rectification in regard to an action. The case would be found at 9, Equity, 96. Counsel also quoted Palmer on Company Law (vol. 1, p. 1,052). Proceeding, Mr. Close discussed the agreement with Reynolds, and submitted that, as regarded the transfers and re-transfers, everything was in order. He also quoted from the report of the case heard in the Court of first instance (16, C.T. Reports, 1,050). Continuing, he said that the case was touched by the 97th section of the Companies' Act, and he cited several English cases, including *Macdonald's* (1, Chan. Div., 94), *Parberry's* (1896, the Chan. Div., 100), *Blumenthal v. Ford* (197, Appeal Cases, 156), and *Barrow's case* (14, Chan. Div., 444).

A question having been raised as to whether Reynolds had by the order of the Chief Justice been placed on the list of contributories,

Laurence, J., put it to Mr. Schreiner whether the result of the order of the Court under appeal was to finally settle the list of contributories?

Mr. Schreiner replied that he unquestionably said that it was. Both Rey-



nolds and his sons had been fixed as contributories.

Laurence, J., said that, subject to any question which might arise at any future stage as to the construction of the order of the Divisional Court, at present the only thing they were concerned about was Zietsman's liability. As to the 500 shares, as at present advised, the only point on which they desired to hear counsel for respondents was as to the validity or effectiveness of the entry in what was called the supplementary share register, purporting to transfer to Dominicus and Sieg respectively in November, 1904.

Mr. Schreiner said the first point which he wanted to bring before the Court was as to the register of the company. There had been a misconception as to the facts. The thick book produced, which was denominated the share register, contained only the names of those who had fully paid up their shares. It did not contain the names of those who had been allotted shares, and who had not fully paid up those shares. Those names appeared in the thin book produced. The so-called supplementary share register was too ridiculous to be seriously considered. It was quite clear that there were 2,000 secret commission shares promised by Reynolds to Dominicus.

[Laurence, J.: Do you suggest then that Dominicus occupied a fiduciary position in relation to the company that was to be formed?]

Mr. Schreiner: Absolutely, and no other, for the company would never have come into existence except for his occupying that fiduciary position. These things were never disclosed to the company as a company.

[Maasdorp, J.: Do you suggest that Zietsman had any benefit from that?]

Mr. Schreiner: Yes, he got 500 of the 2,000 shares. Counsel (continuing) urged that the true position was that Dominicus had promised to give Zietsman £200 out of £2,000 in cash which he was to have received. The procedure was plain enough, if there was a *bona fide* mistake, section 86 provided how parties might have the register amended and altered. The 2,000 shares in the supplementary share register were simply secret commission shares. It was true that the company had done good business in the earlier stages, but later the company, as a going concern, was drifting towards winding-up in one form or another. On the 22nd October, 1904, Mr. Zietsman approved of the action of the secretary of the company in taking steps to record in the office of the Registrar of Deeds a forfeiture of 1,000 shares by reason of unpaid calls thereto, he took a solemn part in these proceedings, and here he asked the Court to listen to him in stating that he never had anything to do with

these 1,000 shares, and there was a condition precedent which Dominicus broke. Zietsman, it was clear, was endeavouring to make it out that the £1,000 were paid in cash for the first 1,000 shares, and he was anxious to take the line that £125 was for transfer duty. The £125 was paid on the first 1,000 shares in November, 1902, and the second 1,000 were paid for in full by him, which left £875 to be paid. The evidence went to show that there was a contract, and if there had been anything lacking in the formality, counsel submitted the appellant was estopped.

Counsel urged that if Mr. Zietsman was registered for one thousand shares, he was registered for the other. The letter of Dominicus was not consistent with the contention of Zietsman, because he (Zietsman) said that the £1,000 which he paid was for the 1,000 shares which he then applied for. The appellant was driven to this peculiar position: He evidently left the Rev. Mr. Vlok from December 31, 1902, when he got the money, until March 16, in a condition of uncertainty, and then paid him on the 6th April a dividend of 10 per cent. Up to the 16th March he could, on his own showing, only have 1,500 shares. Sieg, the secretary, and Dominicus, knew quite well there was no registered contract. On the subject of allotment counsel referred to *Levitt's case* (17, "Law Times," 337).

Mr. Close, in reply, said that one very strong justification of the contention that he put forth at the beginning, that this matter should be decided by trial, was approved by the line of argument adopted by his learned friend, who had devoted his attention almost solely to the facts. He submitted that it had not been proved that Mr. Zietsman ever agreed to become a shareholder for the second 1,000 shares. It lay upon his learned friend to prove conclusively that Mr. Zietsman agreed to become a shareholder in respect of those shares. This he had failed to do. As to the actual agreement, he submitted that counsel for respondents had hopelessly failed to show that there was any agreement. There had been no proof of the application for, or allotment of the second 1,000 shares. With regard to the conclusion which his learned friend sought to draw from the letters, Mr. Close said that those conclusions amounted to a charge of gross fraud against Mr. Zietsman. That, he submitted, was not borne out by the facts. It was wholly inconsistent with the report brought up by the liquidators, Mr. Syfret and Mr. Chiappinni, who said that although there had been great irregularities in connection with the company, no actual fraud had been committed by the directors.



In further argument, he protested against the general charges of fraud which had been insinuated against or levelled at Mr. Zietsman, and said that Mr. Zietsman should be given an opportunity, as he would have at a trial of meeting those charges. Counsel especially criticised what he described as the reckless charges made by Mr. Bishop. Dealing with the question of Mr. Zietsman having received shares out of secret commission paid to Dominicus and Sieg, he said that if his learned friend put it on the basis of secret commission, the position was dealt with by Vaughan Williams, L.J., in *Macdonald's case* and *Curling's case* (1. Chan. Div., 115). He also cited *Ex parte Sandys* (42, Chan. Div., 110).

*Cur. Adv. Vult.*

*Postea* (March 23rd).

Laurence, J.: This was an appeal from a decision of the learned Chief Justice, by which the appellant, Mr. Zietsman, was placed on the list of contributories in a company in liquidation, called the Reynolds Vehicle and Harness Factory, Ltd., for 1,375 shares. Some question has been raised as to the construction and effect of the order of the Divisional Court. It appears to me that the report of the liquidators and the list of contributories having presumably laid for inspection in the ordinary way, and the liquidators having in their report (record page 3) asked "that the list be now settled," the intention of the order must have been to settle the list, subject to the variations indicated therein. If, however, any doubt exists as to the interpretation of the order, the proper course would be for any interested party to apply to the Chief Justice, by whom it was made. The present appeal is confined to the question of the liability of Zietsman. There was a very exhaustive argument, and a prodigious number of authorities were cited, the collection of which does much credit to the industry of counsel. I have looked through them all, but I cannot say that I have derived much assistance from their examination. I am often reminded of a saying of Lord Cairns, who once remarked that, in his experience, the essential thing in the great majority of cases was to get a clear conception of the facts. When the facts are once ascertained, the law is seldom very difficult to apply. Most of the cases cited at the Bar simply involve an application of the well-known principles of equitable jurisdiction, which the Court applies in these matters to the special circumstances in which its aid is invoked. The facts in the present case, however, are far from easy to ascertain, and the main contention on the part of the appellant was that they were so doubtful and so obscure that it

would be unsafe finally to conclude the matter without the Court itself seeing the witnesses and trying the issue on oral evidence. So far as I am aware, that course has never yet been adopted in this Court in a matter of this kind, and the real question is whether sufficient ground exists for such exceptional procedure on the present occasion. In order to answer this question, it becomes necessary to examine the facts, as disclosed in the record, in considerable detail, and with special reference to the dates, which are so extremely material that I have found it convenient to construct a sort of chronological synopsis of the main features in the history of this ill-starred company, as to which it may be said that all those concerned in its promotion and management seem to "have done those things which they ought not to have done, and left undone those things which they ought to have done." There was no health in the company from its birth, which ought to have been treated as an abortion. It is fair to say that the liquidators are of opinion that no actual fraud was committed by any director in relation to the company since its formation, but it has brought nothing but misfortune on all concerned in it, while the vendor, who was the owner of what appears to have been a thriving business, seems to have lost everything he possessed, and to be now, with his sons, on the list of contributories for some 20,000 shares, on which, if the directors in general, and the appellant in particular, had discharged their obvious and elementary duty, there would have been no liability at all. The appellant was the company's attorney from the first. He was also from an early date the chairman of the Board. His responsibility for everything connected with the company subsequent to its flotation, and for all the irregularities which were committed, and for their disastrous consequences, is a very grave one.

The vendor, Reynolds, as I have said, appears to have carried on for some time a fairly good business at Claremont as a cart and wagon-builder and harness-maker. In 1902 trade was brisk, and he appeared to be prospering. About this time he seems to have made the acquaintance of one Sieg, who became engaged to, and I think married, his daughter. Sieg was a clerk in the employ of one Dominicus, who describes himself as a commission agent. About these men we know very little. Reynolds appears to have been a practical tradesman, but with little general education; he knew nothing whatever about shares; but he was persuaded by Dominicus and Sieg that it would be a good thing to take a favourable opportunity of converting his little concern into a limited company. He ac-

cordingly gave Dominicus, in September, 1902, an option for four months to buy his business with that end in view, on certain terms, which were afterwards embodied in a prospectus. The prospectus is a remarkable document. It bears no date. Dominicus (record, p. 37) says he thinks it was issued in November; but if the dates on which the first instalment was paid by three members are correctly entered (see 2, 4, 5, p. 241), it must have been issued not later than October 20. This prospectus fixed the capital at £110,000 in £1 shares, of which 17,000 were to be issued to the vendor and 40,000 offered to the public, the balance being kept in reserve. The assets were valued at over £40,000, but no mention was made of the fact that there was a bond on the property for £5,000. Neither was it thought worth while to mention that of the £40,000, in cash and shares, which the vendor was to receive, ten per cent. was to be paid as promotion-money to Dominicus, whose name appeared on the prospectus as one of the directors. This very material contract, between the vendor and one of the directors, was not disclosed, and no statement was supplied of annual or average profits. The one satisfactory feature in the business is that the number of simple persons who were induced by this prospectus to apply for shares was extremely small, even although the hook was baited with the additional attraction of a "guarantee slip" attached to the prospectus, by which the vendor guaranteed a dividend of ten per cent. for the first year. The directors, it seems, actually went to allotment on a subscription of some 7,000 shares, a figure obviously utterly inadequate to discharge the obligations to the vendor or provide the necessary minimum of working capital. The company was registered on November 21, and on that date the appellant applied for 1,000 shares, and paid £125, the amount due on application. Some question has been raised on the subject, but I find that Sieg states expressly (p. 23) that there was a written application. He also stated that the company went to allotment about December 5, and that a form of allotment, of which he identified a copy, was issued to all shareholders, including Zietsman (p. 85). There was thus a completed contract. Zietsman appears on the list of members as No. 30, with an entry of the first instalment as paid on that date. The suggestion subsequently made both by Zietsman and Dominicus (see pp. 45 and 118), that the £125 was advanced for the payment of transfer duty, etc., seems to have no foundation in fact. This duty was not paid till more than two months later, on January 29, and the amount was £600 (p. 180). The appellant undoubtedly became a shareholder at the beginning of December. He was pro-

posed for election as a director at the first meeting, on December 5, and at the first general meeting of shareholders, held on December 9, he was present, and his nomination as director was confirmed. This having been done, he seems to have conducted practically all the business of the meeting, proposing three resolutions, all of which were carried. These resolutions are not unimportant. By the first the flotation and registration were confirmed; by the second the nominal capital was reduced to £60,000; by the third the directors were authorised to borrow from the working capital any balance which could not be raised by loan to pay the vendor the £13,000 in cash, which it had then been arranged he should accept. "and to issue shares to replace this." In other words, the directors, on Zietsman's proposition, were expressly authorised to issue further shares in order to replenish the working capital which had been or might be depleted by payments to the vendor. These proposals having been unanimously adopted, the meeting came to an end. As a matter of fact, only two independent shareholders, who held between them sixty shares, appear to have been present. The next meeting of the Board was held on January 3, the appellant being present. At that time he was about to leave on a trip op-country. Reynolds wanted his money—£10,000 had been raised on loan and a balance of £3,000 in cash apparently was still due to him—and Zietsman, before leaving, drew a cheque for £1,000, which it seems was to be given to Reynolds should he press for a further payment during his absence. The main question in dispute is whether he agreed at this date to take another thousand shares in payment for his £1,000. If so, the transaction would appear to be within the scope of the authority contained in the third resolution, already quoted, which he had proposed at the shareholders' meeting. Now it is admitted that at this time the question of his taking another thousand shares was discussed. There is said to have been some question about a bonus of £200, to be paid him in that event by Dominicus out of his £2,000. It may be a mere coincidence that, if Zietsman at this time increased his holding to 2,000 shares, he would become entitled to £200 as dividend guaranteed by the vendor. Whether he got his £200 out of the £2,000 Reynolds was to pay Dominicus, or out of the dividend for which Reynolds was responsible, does not seem very material. It may also be a mere coincidence that, three days before, on December 31 (see receipt at p. 173), he had received from the Rev. Mr. Vlok the precise sum of £1,000, being a fund raised for that gentleman by public subscription, for investment on his behalf, and that, three months afterwards, when the dividend

was declared, he gave Mr. Vlok a cheque for £100. All this, taken together, seems most naturally explained on the supposition that Zietsman at this time agreed to subscribe for another 1,000 shares, used Mr. Vlok's cash for the purpose, and intended, as he himself admits he intended, if all went well, to regard it as appropriated to this particular investment. The cheque, as a matter of fact, was not cashed till after Zietsman's return, on February 13. On that day he attended a meeting of the Board and was elected chairman. At this meeting it was resolved "that the action of the chairman in having paid Mr. Reynolds the sum of £1,000 be confirmed, and that he be authorised to pay him further amounts, found out of the working capital that could be spared." Taking together the resolutions of December 9 and February 13, the natural conclusion seems to be that, when Zietsman handed Dominicus this cheque for the payment of Reynolds, it was regarded as a loan from working capital, for which he had to receive an equivalent in shares. Nothing, moreover, can be more explicit than the statement on the subject subsequently made by Dominicus himself. After an interview with Zietsman, on November 12, 1903, he wrote as follows: "Referring to your call this morning, you are quite correct. When you paid me a cheque for £1,000 on account of shares in the company, it was in full payment of 1,000 shares which you then applied for; this was subsequent to our conversation about the first 1,000 shares. The secretary is in error in not having credited you for the 1,000 shares as fully paid up." Than this, as I have said, nothing could be more explicit. But he goes on to say: "It is true that you did not sign the application for the other 1,000 shares, but promised to take them up when the £200 out of money I have to receive from Reynolds is paid to your credit. The £125 advanced by you against transfer duty, etc., should have remained to your credit in the general account, and the entry should be corrected." Than this, nothing could be more unintelligible. While it purports to confirm some statement made by Zietsman that morning, it does not in the least agree with the version given by him in his letter of the previous day to the secretary, and that letter itself appears to have been an amended version of another he had previously written, which he withdrew, and was unable to produce at the subsequent inquiry. While in Dominicus's letter the "other thousand shares" appear to relate to the earlier transaction, when the £125 was paid, Zietsman in his letter speaks of the later transaction as having remained conditional and incomplete. He expressly mentions "a second thousand shares." Dominicus says Zietsman signed no application for "the other thousand"—that seems to be

the first thousand—but as to this, he is contradicted by Sieg, and, as already pointed out, it is quite clear that Zietsman then became a shareholder, while his reference to an "advance against transfer duty, etc.," has already been shown to be incorrect.

*In emptis et redditis magis id quod factum quam id quod dictum sequendum.* The best evidence of what actually took place should be found in the share register, which, by Section 76 of the Act, the company is bound under heavy penalties to keep. Two books have been produced—a fat book and a thin book. There has been much question about their proper description. I will call them for convenience "A" and "B." In the record the fat book ("A") is described as "share register," and the thin book ("B") as "rough allotment book." The first is really an issue and transfer book, containing all shares which were fully paid up, or issued as such—except Zietsman's thousand (see Sieg's evidence, pp. 24 and 25)—and subsequent transfers, while the allotment book ("B"), described by the liquidators as a "rough share register," gives the names and addresses of members, and the amount paid on their shares, but does not distinguish the shares by their numbers, as required by the Act. On the whole, I think the two books, taken together, may be regarded as constituting a register, sufficient at all events in the case of a prosecution under the section, to make the position fairly defensible. Now, turning to book "B," we find that while Zietsman was entered as "No. 30" as the holder of 1,000 shares on which the application money had been paid on November 21, 1902, he appears again as "No. 63" on February 13, 1903, on which date the £1,000 seems to have been distributed by the secretary between the two numbers, showing £500 paid on 30 and £625 on 63. The entries contain references both to January 3 and February 13, being evidently the dates on which the cheque for £1,000 was drawn and cashed respectively. At this period, in terms of the prospectus, assuming an allotment, £500 would have been due on each 1,000. There is no clear explanation of these appropriations; but in all the circumstances it seems almost impossible to suppose that Sieg would have made them except under instructions from either Dominicus or Zietsman, or both, though, of course, it is possible that he may have misapprehended their effect.

The next date of importance in the history of the case is March 16, when the Board held a meeting, Mr. Zietsman in the chair. It was then resolved, on the proposal of Dominicus, that "Mr. Zietsman will receive 1,000 shares of the reserved capital for services rendered in connection with the flotation of the com-

pany." When the company was floated, his only apparent connection with it was as a member of the firm of Faure and Zietsman, the attorneys to the company. It seems probable that the services referred to were in connection with a guarantee of a loan on mortgage of £10,000, which was obtained from the Board of Executors in order to pay Reynolds. However that may be, it may be observed that such an issue as that voted by the Board to the chairman apparently required confirmation, under section 58, by a special resolution of shareholders, and that, although there is a passage in the directors' report, signed by Zietsman, as chairman, dated April 3, and adopted at a shareholders' meeting on that date, which may possibly refer to these shares, there is nothing which could be regarded as equivalent to such special resolution. The contract also, of course, required registration, under section 97, the provisions of which were ignored throughout. As a matter of fact, there is nothing to show that these 1,000 shares were ever issued, and I think I need say no more about them. It is not surprising that the report was adopted by the shareholders, as it recommended the promised dividend of ten per cent. It is, perhaps, superfluous to add that no dividend had been earned. The balance-sheet was a remarkable production, and reflected little credit on the accountant, one Wilmot, by whom it purported to have been "audited and found correct." There was no statement of profit and loss, and the dividend was evolved out of a supposed original under-valuation of assets.

The next fact to be noticed is that at this time the vendors' shares were issued. No such "formal agreement" between the vendor and the company as was specially provided for by the option to Dominicus had ever been executed; and no contract under section 97, with regard to the vendors' shares, was registered either "at or before the issue," or at any subsequent date, the result being, as the appellant, at all events, must be presumed to have been aware, that, though purporting to be fully paid up, they, in fact, remained liable for their nominal amount.

The next material date is April 20, when 300 shares, purporting to be fully paid up, were issued to Zietsman. These shares were transferred in the following month to one Cadby. It is not without significance that, according to Mr. Cadby's affidavit (p. 104), he purchased these shares from Zietsman "on or about" February 12, i.e., on the precise date when the £1,000 cheque was cashed, which, according to Dominicus, was in full payment for a thousand shares. The liquidators appear to have placed Zietsman on the list of contributors for 300 shares, in addition to the 1,375, assuming that those issued

and transferred to Cadby formed portion of the 1,000 allotted to him, for services rendered, in March. (See affidavit, p. 110.) But it will be noticed that the agreement with Cadby was made more than a month before the shares were voted. As a matter of fact, these shares do not appear ever to have been issued, and, at this period, if the entries as they then stood in book B were correct, Zietsman had no fully paid-up shares to transfer. If however, as Dominicus states, the second thousand had been fully paid up, that is, if the subsequent entries, to which I shall come shortly, were correct, he was entitled to transfer any less number. However, as he has not been held liable on these 300 shares, it is unnecessary to pursue the matter further.

I now come to the 29th of June, on which date a certificate that 29,915 shares had been issued and were fully paid-up was sent by the secretary, with the chairman's approval, to the Registrar of Deeds (p. 244). In connection with this certificate, a list of shareholders, with the amount of their holdings, was prepared, in which Zietsman appears as the holder of 2,000 shares. (List U, p. 170.) As there was some uncertainty on the point as to what was actually sent, the book was produced in court from the registry, and it appeared that, whatever the obligations of the company under the Act, as a matter of fact, only the return, and not the list, was actually sent in. It was sent by the secretary with a simple covering letter. Although counsel in the Court below was not able to find the reference, it does seem that Zietsman did deny having seen this list; at all events, he says he merely saw it in the hand of the secretary, and did not examine it. Sieg, however, is positive that he showed him the list (p. 87). However that may be, assuming that he did see it, he might possibly have thought that the 2,000 shares included the 1,000 voted to him for services by his colleagues on the Board. On the other hand, we must not overlook Bishop's statement, in his evidence before the inspector (p. 74), that, on August 31 Zietsman informed him that he held 3,000 shares. Mr. Close throws doubt on this evidence, and says that if there were 2,000 shares applied for and 1,000 voted, there were also 500 transferred by Dominicus, which form the other branch of the case, not yet considered, and that, therefore, the total would have been either 2,500 or 3,500—not 3,000. He seems, however, to have overlooked the fact that these 500 were not transferred to Zietsman till some months afterwards, namely, in November, 1903.

I do not however wish to place too much reliance, in all the circumstances of the case, on either the alleged exhibition of the list or the alleged statement to



Bishop. Let us assume that it was only, as he himself says, through Cosnett's report, dated October 31, that Zietsman, for the first time, became aware that he had been entered in book B as a member who had applied for 2,000 shares, all of which were partly paid up. He then took steps, as he says, to have the matter rectified at once. There were the two letters to the secretary, the conversation with Dominicus, and the latter's reply, already quoted. Then, on November 17, the Board resolved "that the sum of £1,000 paid cash for 1,000 shares be credited against 1,000 shares as applied for by Mr. Zietsman, and that Mr. Cosnett be notified to that effect." The entries in the book were altered accordingly. Thirty and 63 were both ruled through, and a new 30 and 63 entered. This was very shortly before the official inspection, applied for by the vendor, began, and they are the last entries in the book. According to the new entries, Zietsman is credited on No. 30 with £1,000, paid on February 12, 1903, and on No. 63 with £125, paid in the previous November, that is to say, on the later number with the earlier payment, which is quite irreconcilable with the history of the case and the previous entries. I suppose it was probably intended to leave the £125 standing against No. 30, and to put the £1,000 against No. 63. However that may be, it is difficult to suppose that Zietsman, at whose special instance these alterations were made, did not make himself acquainted with their tenor and effect. Doubtless, as has been laid down in the cases quoted, a director is not presumed, *qua* director, to be cognisant of entries in the company's books, even so far as they affect himself; but these particular entries appear to have been made in such circumstances that Zietsman must surely have felt bound to check their correctness in accordance with his own understanding of what had previously taken place, and of his then position. There does not appear to be any suggestion that the final entry, No. 63, was subsequently added. Whether, in accordance with the original entries, £625 was paid on one thousand, and £500 on the other, or in accordance with the later entries, £1,000 was paid on the one, and £125 on the other, really makes no difference. In either case there is a liability for £875 unpaid. All the facts taken together seem to point to the conclusion that Zietsman did, on November 21, enter into a contract, completed by allotment on December 5, to take 1,000 shares, and in the following January or February agreed to take a second 1,000. If the £125 was not paid for shares, it is impossible to understand why it was allowed to remain in book B, after the entries had been altered, and it is very significant that nothing was said

about that sum, which, on his own showing, should have been refunded long before, in the minutes of the Board meeting of November 17, which I have already quoted. Some further question might no doubt arise as to whether the January agreement with Dominicus was authorised or ratified by the company, and whether there was an effective and valid issue of shares under section 58. That, however, is a question which I do not think, in all the circumstances of the case, the appellant can be allowed to raise. Had the shares proved profitable, no one would have been in a position to dispute his right to them. The powers of the directors with regard to the issue of shares are very vaguely defined. The only references to the subject I can find are in memorandum of association, clause 4, and the articles, clause 33 (D), (pp. 192, 196), and the resolution of the shareholders, passed on December 9, and that of the directors of February 13, appear to constitute a sufficient authority for borrowing this £1,000, and issuing shares to the lender in consideration of the advance. The authority was given by the shareholders, and acted on by the Board.

Lastly, there comes the point as to forfeiture, on which we intimated that we did not wish to hear Mr. Schreiner. In October, 1904, when I think the company may fairly be described as moribund, a resolution was passed by the Board, the appellant being present to cancel all shares forfeited for non-payment of outstanding calls. A return of forfeited shares was thereupon sent to the Registrar, in which Zietsman appeared as the holder of 1,000 shares on which £125 was paid, "issued and forfeited as per subsequent resolution of the Board." As a matter of fact, although the balance had been long overdue there is no direct evidence of any call having been formally made, or of the regulations contained in clauses 17 and 18 of the third schedule to the Act having been complied with. Although at this time the books were in the possession of the Inspector, the then secretary seems to have ascertained, from some source, the state of the entries as to these shares; but it is difficult for the appellant on the one hand to deny that he had ever accepted these shares, and on the other to say that they were long afterwards forfeited by resolution of the Board. In any case, none of the authorities cited support the proposition that a director could get rid of his liability by a proceeding of this kind, and, apart from authority, the matter does not seem arguable. I notice that clause 21 of the schedule expressly states that "any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture."



Taking this view of what took place, on the facts before us, after very careful and anxious consideration, and a very minute scrutiny of the record as it stands. I have on the whole come to the conclusion that no advantage could be anticipated from directing an action to be brought, or an issue to be tried, if that were competent, on oral evidence. It seems perfectly obvious that it would be impossible at this stage of the proceedings for the appellant to give a satisfactory and coherent explanation, consistent with his admissions on record, with the dates, the documents, and the general history of the case, confining his agreement with the company to a contract to take one thousand shares, which were fully paid up. I feel certain that he would derive no advantage from such a procedure, but there would only be delay and much additional expense for which he would ultimately be liable. Although his conduct in connection with this company has been very unsatisfactory, he is of course entitled to his legal rights. But, with regard to this branch of the case, I think his liability has been established with reasonable clearness and that no sufficient ground has been shown for varying the order of the Divisional Court.

As to the 500 shares, the matter is much simpler, and I need say very little. Dominicus got his 2,000 shares from the vendor as arranged. Nothing was paid on them and no contract was registered. Of these shares, he gave 500 to the appellant and others to other directors, apparently in consideration of services rendered by them which are not indicated with any precision. At one place he says he provided some of the directors with their qualification shares. These shares were issued to him at the same time as Reynolds got his shares, in April, 1903, and 500 were transferred to Zietsman in the following November. Twelve months afterwards all these shares purport to have been re-transferred by Zietsman and the other holders to Dominicus or Sieg, his nominee, and by them again to Reynolds. It seems unnecessary to discuss the question whether this was part of a bona fide attempt gradually to liquidate the company and reinstate the vendor in possession of the business, or whether the object was to get rid of the liability attaching to these shares, and pass them on to a man of straw. In any case, in my opinion there was no valid transfer. The so-called "supplementary share register," of which we have not been favoured with an inspection, but of which a copy will be found on p. 106, is simply a piece of paper, which was obtained and used *ad hoc*. It was confined to these 2,000 shares, one hundred being inadvertently entered twice. There is no entry of the transfer in book A, which, according to the liquidators (affidavit p. 130),

was at the time available for the use of the directors. It is very easy to understand why no application was made for its use for this purpose. The so-called supplementary register seems to have been merely a private memorandum, and cannot be regarded as "a proper book, in which all transfers shall be noted," in terms of article 3 of the articles of association.

Apart from this ineffectual attempt to transfer, the liability of the applicant on these shares seems perfectly clear, and on this branch of the case nothing really need be added to the reasons concisely stated by the learned Chief Justice. Many authorities were quoted to show what is not disputed, that where shares on which there is a liability come into the hands of a *bona fide* purchaser without notice, or other *bona fide* holder for value, the liability cannot be enforced. To that principle full effect was given by the Chief Justice in the case of two of the persons on the list of contributors. It cannot be held to apply in the case of the other directors, who have not appealed, and least of all in the case of the present appellant. On the other branch of the case, as to the 875 shares, I confess that for some time I felt more difficulty, but the more closely I grappled with the facts the more strongly I was led to the conclusion that, as to those shares also, no sufficient ground had been shown for disturbing the judgment of the Divisional Court, and that the appeal must therefore fail.

Hopley, J.: I concur, and I am authorised by Mr. Justice Maasdorp to say that he is of the same opinion.

Mr. Benjamin (for respondents): I take it that the appeal is dismissed with costs?

His Lordship assented.

[Appellant's Attorneys: Zietsman and Bosman; Respondent's Attorneys: Syfret, Godlonton and Low.]

[Before the Hon. Mr. Justice HOPLEY.]

*Postea* (April 4th).

Appellant applied for leave to appeal to the Privy Council.

Mr. Close was for the applicant, and Mr. Benjamin was for the respondents. Counsel for the applicant moved under section 8 of Act 36 of 1896 for leave to appeal to the Privy Council. Mr. Benjamin appeared to have the amount of the judgment and costs paid over, the respondents undertaking to give security should the judgment be reversed. He could not find an instance where a judgment of the Court below, affirmed by the Court of Appeal had not been ordered to be carried into execution at once.

Hopley, J., pointed out that it was not always convenient for a man, however well off he might be, to meet such a judgment at once. He thought there were cases in which the Court had stayed execution subject to security.

Mr. Close submitted the matter was entirely within the discretion of the Court.

Leave was granted to appeal, the appellant to give security to the satisfaction of the Registrar for the principal, with interest and costs of appeal, including the costs of the application, the appellant to pay the costs which he had been ordered to pay in the Divisional Court and Court of Appeal, the respondents to give security to repay these amounts if so ordered eventually.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice LAURENCE and the Hon. Mr. Justice MAASDORP.]

CAIRNCROSS AND OTHERS V. { 1907.  
FAGAN AND OTHERS. { Mar. 5th.  
; 12th.

Municipal Council—Councillor—  
Contract with Municipality—  
Attorney—"Interested" in  
contract"—Act 45 of 1882,  
Sec. 17.

*A., a contractor with the Municipality of S., owed certain moneys to respondent, a councillor of the Municipality. Money was due to A. from the Municipality. Respondent drew on the Municipal funds for a portion of the money due to A., sufficient to cover A.'s debt to himself, and shortly afterwards A.'s estate was sequestrated.*

*Held, that even if respondent had been delegated by A. to draw this money, such delegation did not constitute him a person "interested in" A.'s contract,*

*Respondent had sold a typewriter to the Municipality.*

*Held, that this transaction constituted respondent a contractor with the Municipality; but that, as this contract was now "executed," respondent was relieved from his temporary disqualification as a councillor (diss. Maasdorp, J.)*

*The respondent was a partner in an attorney's business with one M., who collected rates and did other legal work for the Municipality. M. and respondent had agreed by articles of partnership that the latter should not participate in any profits which the firm might derive from Municipal business. Respondent had also appeared in Court for the Municipality in certain cases, but had neither demanded nor received fees for such appearances.*

*Held, that by these acts, coupled with the fact of his partnership with M., he was "concerned in" contracts with the Municipality, and was, therefore, disqualified as a councillor.*

This was an application calling upon Fagan to show cause why he should not be declared incapable of continuing as a councillor of the municipality, because he had been concerned in or had participated in the profit of various contracts with the municipality.

The applicants in their affidavits alleged that the respondent, the Mayor Somerset West Strand, had in December, 1905, been in partnership with one De Villiers, who had acted as attorney for the municipality in various matters. Later, on March 29, 1906, the respondent had taken Markotter into partnership, and Markotter had collected arrear rates for the municipality, and had received 5 per cent. commission for collecting them. In December, 1906, the respondent had sold a typewriter to the municipality for a sum of £7. In December, 1906, the Council was indebted to one Immelman for a sum of £250. This sum was in the hands of the Council, and bearing interest at 5 per cent. At that time one Nolte instructed Fagan and Markotter to raise a sum of £250 on second mortgage, and Fagan drew on the municipal banking account the sum of £250 belonging to Immel-

man to advance to Nolte. Immelman objected, and the money was returned to the municipal account. A similar transaction was entered into by Fagan on behalf of the Dutch Reformed Church. In May, 1906, one Ebrahim Arnold, sanitary contractor to the municipality, was indebted to Fagan for a sum of £14, and the municipality was indebted to Arnold, so Fagan drew £14 from the municipal account and paid himself. It was also alleged that Fagan had appeared to conduct a case for the municipality in the Court of the Resident Magistrate of Stellenbosch.

The respondent alleged that he had been Mayor for six years, that the applicants were neighbours, and the first one did not possess the qualification of a voter. As far as the partnership between him and Markotter was concerned, there was a clause in the deed of partnership that he (Fagan) was not to participate in any profit derived from the municipal work, but that all the work was to be done by Markotter, and the remuneration for it paid to his private account. As far as the typewriter was concerned, it belonged to his son, and he instructed Markotter to sell it for him. As far as the Immelman transaction was concerned, he was acting as agent for Immelman and Nolte, and not for the municipality. Ebrahim Arnold had authorised him to draw the £14 from the municipal account. As far as the appearance in the Resident Magistrate's Court of Stellenbosch was concerned, no charge was made for appearing.

Sir H. Juta, K.C., appeared for the applicants; Dr. Greer for the respondent Fagan.

Sir H. Juta applied for leave to cross-examine De Beer, under Rule 355 (c). Leave was granted.

Andreas Z. de Beer said that he was the Town Clerk of Somerset West Strand. Fagan had informed him at the municipal office that he had a typewriter for sale. The municipal clerk's machine had broken down. He asked the price of the machine, but Fagan said that he could ask the price from Markotter; he (Fagan) would tell Markotter the price. Fagan told him to buy the machine.

By the Court: He would not have liked to refuse the machine. If the machine had not been worth the money he would have been in an unpleasant position. The money was paid by cheque to Markotter.

Sir H. Juta said that the application was founded on Section 17 of the Act. The section disqualified any councillor who was "concerned in or participated in the profit" of any contract with the municipality. The policy of the law was clear; it was to prevent any councillor being concerned in any transaction between the Council and anyone else.

[Laurence, J.: Suppose the municipality purchased a councillor's property by public auction, would that disqualify the councillor?]

Sir H. Juta: The Legislature has not provided for that.

Continuing, counsel said that Section 3 of the Divisional Council's Act contained the same clause, but the old Divisional Councils Act 4 of 1865 contained a different clause. He contended that "concerned in" meant "interested in" either directly or indirectly.

[Laurence, J.: Does not "concerned in" mean "concerned in the making," because a man may be concerned in the making of a contract, yet not participate in the profit, and vice versa?]

Sir H. Juta: No. A concrete example may be given. If a mayor lent money to a contractor to carry out the contract he would be concerned in the contract. The meaning of "directly or indirectly interested" is illustrated in the case of *Arnholz v. The Divisional Council of Tulbagh* (1868, B. 37). The meaning of this section was also considered in the case of *Schlag v. Barry* (16 C.T.R., 172). Fagan was clearly concerned in and participated in the profit of the sale of the typewriter. Fagan used his position as Mayor to obtain the money for Immelman and advance it to Nolte, and so make a commission on raising the money.

[Laurence, J.: As a matter of fact, no commission was charged.]

Continuing, counsel said that, as far as the partnership between Fagan and Markotter was concerned, the respondent, if not interested in the profits of municipal work, was concerned in the work itself, and was consequently disqualified from acting as councillor by the second part of the section, especially as the partnership deed did not provide for the losses to be paid by Markotter alone.

[Laurence, J.: You mean if the municipality sued Markotter for negligent work and succeeded, then Fagan would have to pay part of the costs?]

Sir H. Juta: Yes.

The Court said that it only wished to hear Dr. Greer on three points: (a) the question of the £14 due to Arnold which had been drawn by Fagan from the municipal bank account; (b) the question of the typewriter; and (c) the question of partnership between Fagan and Markotter.

Dr. Greer said that even if the respondent were liable for losses of the partnership, he was not disqualified. In support of that contention he cited the *Maidstone* case referred to in *Rogers on Election Petitions* (vol. II., p. 26). Fagan appeared in the Resident Magistrate's Court of Stellenbosch, not as partner of Markotter, but as Mayor of the Strand. The only construction which the Court could put on the words

"concerned in" was "financially concerned." The case of *Arnholz v. The Divisional Council of Tulbough* did not apply here, because in that case money was advanced to a municipal contractor on the security of a contract, but here there was nothing to show that money had been advanced by Fagan to Arnold. Counsel also referred to *Ohlsson and Others v. The Municipalities of Woodstock and Claremont* (18 S.C., 63). He cited *Winterbach v. the Worcester Municipality* (16, S.C., 247) and *Lewis v. Carr* (34, L.T., 393). The meaning of "contract" was explained by section 104 of the Act.

Sir H. Juta was heard in reply.

*Cur. Adv. Vult.*

*Postea* (March 12th).

Laurence, 6.: This is an application by certain ratepayers of Somerset West Strand for an order declaring the respondent Fagan, who is and has been for some years the Mayor of that municipality, to be disqualified as a Councillor under the provisions of section 17 of the Municipal Act of 1882. That section provides that "no person holding any office or place of profit . . . under or in the gift of the Council of any municipality, or concerned in, or participating in the profit of, any contract with any municipality, or concerned in or in the profit of any work to be done under the authority of any such Council, shall be capable of being or continuing a Councillor of such municipality." The affidavits on both sides are very numerous and lengthy, and enter into much intricate detail as to the various incidents and transactions on which the application is based. The broad question for the decision of the Court is whether any conduct on the part of the respondent has been admitted or proved which amounts to a disqualification under the Act. After hearing counsel at length for the applicants, the Court intimated that there were only three points on which it desired to hear the respondent, namely, firstly, as to the incident in connection with one Ebrahim Arnold; secondly, with regard to the purchase by the second respondent, the municipality, of a certain typewriter, alleged to have been the property of the respondent Fagan; and, lastly, as to the effect of the business connection of the latter with one Markotter, an attorney, who was employed by the municipality to collect and sue for rates, and to do conveyancing and other legal work on their behalf. As to the other matters referred to in the affidavits, I shall say very little. What we have to do is first to ascertain what is the proper and reasonable construction of the material words of the section, and then to decide whether it has been established that the conduct of the respondent falls

within its ambit. The material words appear to be: "Concerned in, or participating in the profit of any contract with any municipality, or concerned in or in the profit of any work to be done under the authority of any such Council." No direct authority has been cited as to the meaning of the words "concerned in." They are not technical words, and must be construed in their ordinary sense. Their construction may perhaps be assisted by the alternative preposition which follows in each sub-clause of the sentence. When the Legislature, or the draftsman, adds an "or," this may sometimes be ascribed to an apprehension lest the preceding words should not be sufficiently wide to include some matter which is contemplated by the enactment. It might in the present case have been argued that the words, "concerned in any contract or work," standing by themselves, meant actively concerned, in entering into or performing the contract, or undertaking and carrying out the work, and that it might not cover the case, for instance, of a sleeping partner, who, without being actively concerned in the matter, nevertheless participated in the resulting profit. Sir Henry Juta contended that the Court must go further and hold that they were intended to include the case of anyone interested, whether directly or indirectly, in such matters. It is perhaps worth observing, as pointed out by Mr. Greer, that the words, "directly or indirectly interested," do occur in the old Divisional Councils Act 4 of 1865 (not 6 of 1865, as erroneously reported in the case cited from *Buch.*, 1868, at pp. 38 and 39), but they are not to be found in section 17 of the Municipal Act of 1882. They do, however, as I shall have occasion to show presently, occur in another section, which has an important bearing on the present case, and which I am rather surprised was not cited from the bar. Mr. Greer also stated that they were not to be found in the present Divisional Councils Act 40 of 1899. As to this, however, it is unfortunate that he appears to have been under a misapprehension of fact. I had some trouble to ascertain the exact state of the case, especially as the old Statute is not only wrongly cited in *Buchanan*, but is omitted from the consolidated edition, which was the only one I had at first available for reference. On examination, however, it appears that the former statute provided, by sec. 14, that no contractor under any subsisting contract should be eligible for election as a member, while sec. 75 provided that no member shall "become a contractor with the Council . . . nor shall such member be directly or indirectly interested in any such contract." Section 30 to 40 of 1889 copied verbatim from 17 of the Municipal Act, but 82,



which deals with vacancies in Divisional Councils, does especially provide, by clause (g), that the office of any Councillor shall become vacant when he shall "become a contractor . . . with the Council . . . or be interested in any such contract directly or indirectly, or become surety for any contractor under such contract." The important part for the present purpose is that while 30, as I have said, is copied verbatim from 17 of the Act before us, 82 is adapted from 22 of the Municipal Act. Clauses (a) to (d) of the former correspond verbatim with clauses (1) to (4) of the latter; clauses (e) and (f) correspond, with certain modifications, to clauses (5) and (6), but the above-quoted clause (g) is an addition, to which there is nothing corresponding in sec. 22, although portion of its substance will be found included among the causes of disqualification in 16 and 17. The whole thing is rather a tangle, which it has taken me some time to unravel, but the upshot is that the phrase "directly or indirectly interested" in every such contract" does occur in both the Divisional Councils Acts, and does not occur in section 17 of the Municipal Act. I may observe that the same expression is also to be found in the English Statute, 5 and 6 William IV., cap. 76, which was considered by the Exchequer Division and the Court of Appeal in the case of *Lewis v. Carr* (1 Ex. D., 484), 28 of that Statute containing the words, "Nor shall any person be qualified to be elected or to be a Councillor of any such borough. . . during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of such Council." I shall have to consider that case very carefully later on; for the present I will only observe that as the words "directly or indirectly" do not occur in the section now under consideration, I do not think we should read them in by implication, neither do I regret that we are under no obligation to do so. Questions of indirect interest may lead to many ramifications and much subtle definition and to an extension of disqualifying conditions, which might be thought undesirable. In a small country municipality, under the general Act, the number of eligible persons, both willing and competent to take part in local administration, must usually be small. It seems inadvisable to limit too narrowly the area of selection or to fence the field of choice with too many incapacitating restrictions. The most suitable persons are probably as a rule engaged in carrying on some business of their own. If any interest, however remote or indirect—that, for instance, of the supporter of a storekeeper, or the creditor or surety of a contractor—were sufficient to disqualify, the only persons to

whom no such objection could be taken might not be the best men to do the work, and might be confined to the category of those who had retired from business or those from whom business had retired. What the Court must do is to take a common-sense view of the facts in the case before it, and to decide whether they are equivalent to "concern" or "participation" in the ordinary meaning of those words.

With these preliminary remarks, I now proceed very briefly to refer to the principal points on which we did not call on the respondent. And first, as to the Blake incident. It seems that a small strip of land, registered in the name of the municipality, was claimed by one Blake. The matter was referred to the municipal surveyor, who reported in favour of Blake's right, and, acting on this report, the municipality re-transferred the land to him for a nominal consideration. Had this not been done, it seems probable from the affidavit of his attorney, Mr. Cluver, that they would have been involved in litigation without having any good defence. Shortly afterwards Blake sold certain property, including this strip of ground, by public auction, and the respondent was employed by Cluver as the auctioneer. I can find no evidence in this of the respondent being concerned or interested in the formal contract of sale by the Municipality to Blake. It is altogether too remote and far-fetched. Then it seems that the Dutch Reformed Church, on the advice of the respondent, left some spare cash for a period at interest, as a floating deposit, with the municipality, and subsequently, also on his advice, withdrew it and lent it on mortgage to certain persons named Nolte and Scholtz, for whom he appears to have acted in the matter. It is not suggested that he received any commission on the temporary loan to the municipality. There was also a sum of £250 in the possession of the municipality, belonging to one Immelman, which the respondent, purporting to act on behalf of the latter, withdrew in order to lend it to Nolte on a second mortgage. Immelman denied having authorised this step, and the amount was returned. The respondent's conduct in this matter was, to say the least, unbusinesslike, and, if Immelman's statement is correct—as to which I express no opinion—it was also highly improper. There was, however, no concluded contract with Nolte, and neither in the case of the church funds, nor in that of Immelman, can I find any proof of Fagan being interested in any contract with the municipality or of any conduct on his part disqualifying him as a Councillor within the meaning of the section. Then it is alleged that he was elected trustee of certain insolvent estates, on which the



municipality had proved a claim for rates, and that the municipal proof was used in his favour. If so, his allegation that it was not required to secure his election is immaterial, but the contention that for a municipality to vote for the election of a Councillor as a trustee in an estate places the latter in any contractual or profitable relation with the former, appears to me a startling and quite untenable proposition.

I now come to the three points which seemed to be of some substance, and upon which the Court reserved its judgment. And, first, with regard to the Arnold incident. One Ebrahim Arnold, it appears, was the sanitary contractor to the municipality, and in May last, some money was due to him in that capacity. At the same time he owed money to Fagan, who says that Arnold authorised him to draw the sum of £14, being portion of the amount so due to him, in the circumstances explained in paragraphs 3 to 5 of his affidavit of February 15, and paragraphs 3 and 6 of that of De Beer of the same date. This took place on May 22 last, and the amount though not at the moment actually due and payable, was deducted from the sum due to Arnold at the end of the month, such occasional advances on account of his contract having previously been authorised. The respondent, however, does not allege that he obtained any written authority from Arnold, Arnold denies having given him any authority at all, and, as he shortly afterwards assigned his estate, it is possible that Fagan by this proceeding may have gained some advantage over the other creditors. Apart from authority, however, I think it would be going very far to hold that a creditor of a creditor of the municipality, would, if delegated to receive payment on his behalf, become concerned or interested in the contract of his debtor. On this point we were referred to the case of *Amholzer v. Tulbagh Divisional Council* (Buch., 68, 37). That was not an application for an order of disqualification. It was an action brought by a Councillor as cessionary of a debt due to a contractor. Unfortunately for him, it appeared that he had been anticipated by the secretary to the Council, who had already paid the amount to another gentleman, with whom he was himself connected in business, and had obtained a receipt from the contractor himself. The facts in other respects were to some extent analogous, but that case was decided under sec. 75 of the D.C. Act of 1865, the majority of the Court being of opinion that the words "directly or indirectly interested" were sufficient to cover the case of the cessionary of a debt, and precluded the plaintiff from recovering. Bell, J., however, held that, even under that section, Amholz was not interested

in the contract, and there seems much to be said for his view. However that may be, I cannot regard the decision of the other judges as a clear authority for holding that Fagan, assuming him to have been duly delegated by Arnold to receive the money, thereby, in terms of section 17, became concerned or participated in the profit of the contract of the latter. His conduct in this matter, and also in that of Immelman, may have been open to criticism, and may even have been actionable on other grounds. But the facts are in dispute, and, in any case, it is not a matter in which, in dealing with the present application, it is necessary for the Court to express an opinion.

I now come to the matter of the typewriter, a very petty matter in itself, but one on which, since it has been brought to our notice, we must apply the law as we construe it, to the facts as we find them. The allegation is that, in November last, Mr. Fagan, being Mayor at the time, sold a certain secondhand typewriter for the sum of £7 to the Municipality. This amount was paid by De Beer, the Town Clerk and treasurer, to Markotter, Fagan's partner, who gave his receipt for "£7, being in settlement of amount due for a typewriter sold to the Strand Municipality by H. A. Fagan." I regret to say that, with respect to this transaction, I cannot regard the respondent's explanation as ingenuous. He suggests, but does not state specifically, that the machine belonged to a minor son of his, for whose use he had bought it. But he does not assert that he ever actually gave it to his son, or that the latter authorised him to sell it, or received the purchase money. He states that Markotter told him that he had an offer of £7 for the machine, which was at the office at the time, that he authorised him to accept it, and subsequently received the cash from a clerk of the firm. He adds that "even had my partner told me that the offer was from the Town Clerk, I would not have hesitated to allow him to sell, as, in my opinion, there would have been nothing wrong in such a transaction under the circumstances, and because I never looked upon the typewriter as my property." This version appears to be irreconcilable with the oral evidence of De Beer, which was given very fairly, and which is to the effect that he purchased the machine, in the circumstances he mentions, on explicit instructions from the respondent himself, at a price fixed by the latter. There was, in my opinion, a clear contract of purchase and sale between De Beer, on behalf of the Municipality, and Markotter, as agent for Fagan, both acting under the instructions of the latter. The next question is whether such a contract

comes within the statutory prohibition on the subject. Some hesitation may naturally be felt in holding that prohibition to embrace ordinary cases of purchase and sale—over the counter, so to speak—of articles required by a municipality for current use, which a Councillor, who was also a local store-keeper, was the only person who could supply, or could supply on better terms than anyone else. For instance, as I suggested during the argument, if a Councillor, who happened to be the only person in the place who stored such articles, sold the municipal stable keeper a bottle of embrocation for a cow or mule, it would almost seem a *reductio ad absurdum* to hold that an isolated transaction of that character involved a disqualification. A similar point seems to have been raised last year before the Chief Justice, in the case of *Schlag v. Barry* (16 C.T.R., 172), but not decided, the matter having been postponed for further information as to the facts, and apparently not having afterwards come up for decision. The observations of the Chief Justice, as reported in that case, would seem to suggest that he recognised the possibility of drawing a distinction between such sales and a continuing contract for the supply of some article required by the municipality. It does not, however, appear to me that section 104, referred to by Mr. Greer, which deals with the power of the Council to make contracts, has any bearing on the meaning of the word "contract" in section 17. The latter section contains a proviso that it shall be lawful for any Councillor to purchase municipal property at public auction. It seems clear that purchase by private contract is prohibited, and there is very good and obvious reason for such prohibition. On the whole, it appears to me that the same principle must apply to the case of such a sale as that now in question. There is no reason to suppose that this particular transaction was other than a fair and mutually advantageous bargain. But it was not, I conceive, the intention of the Legislature that whenever a Councillor had some article which he wanted to sell, and which he sold by private treaty to the municipality, the Court should have to determine whether that bargain was or was not a fair one. The Act does not, like some other enactments, give any discretion to the Court or any power to relieve from the consequences of any infringement, and I can come to no other conclusion than that this was a contract within the meaning of the section.

But the question still remains whether this finding is sufficient to establish the right of the applicants to the relief sought. So long as a contract is executory, or in course of execution, or uncompleted,

it disqualifies the contracting party from "being or continuing" a Councillor; but what is the effect of a contract of sale after it has been executed, the price paid, the article delivered, and the *dominium* transferred? The question is not free from difficulty. I suppose it would scarcely be contended that, if the respondent's seat were vacated, and he stood, on an opportunity arising, for re-election, he would not be eligible as a candidate, or that the fact of such a transaction having taken place would involve a permanent disqualification. He is not therefore, in that sense, incapable of "being" a Councillor. He is not incapable of "being elected" under the concluding clause of the previous section, section 16. If he can be, or be, elected, can he not also continue to be, or is it necessary that his seat should be vacated before his qualification revives? In other words, was the transaction in November, though no bar to his "being" a Councillor, a bar to his "continuing" as such at the end of January, when these proceedings were instituted? On this point, it seems to me that the judgment in *Levis v. Carr*—the unanimous decision of the Exchequer Division and the Court of Appeal—is of much importance. Carr was an alderman of Macclesfield, and a tallow-chandler by trade, and on several occasions sold goods to the Corporation. He was sued for penalties for acting as an alderman after such sale. If he was liable to the penalties, it was for acting when disqualified; if he was not liable, then it is clear that the sales did not disqualify him from so acting. I have already quoted section 25 of the English statute, and the other material sections will be found at p. 485 of the report. The Court held that he was not liable to the penalties sued for. The first question was the same as that raised in *Schlag v. Barry*, namely, whether such sales were contracts within the meaning of the Act. On this point Lord Bramwell, who gave the leading judgment in the Exchequer, said: "Whether the Legislature intended that such contracts should or should not be within the Act is another matter, but I think if a shilling's worth of stationery were bought of an alderman, that would be a contract between the Corporation and that alderman. Probably, if they had intended it, they would have used the word 'dealing' or some such word. However, it is a contract, and independently of any reasoning upon the matter, I think it is concluded by the case of *Nicholson v. Fields*, when a somewhat similar contract was involved. There it was a bill for lime supplied to certain commissioners. In this case it is a casual supply of candles, or some such thing" (p. 487). And Cleasby, B., at p. 491, illustrated the stringency of

the section as it stood by reference to a subsequent statute, which expressly exempted newspaper advertisements. Apart from this exemption, apparently anyone having an interest in any newspaper in which the Borough Council advertisements appeared would have been held to be in a contractual relation with the borough. Then the next question was whether Carr was liable to the penalties. The Court held that, as he was qualified for election, so also he was not disqualified from continuing to act, as soon as he had ceased to be interested in any current contract. That is the substance of the decision, and I need not quote the reasons given by the judges at considerable length. They seem, if I may venture to say so, to be good law and good sense. It is, I think, sufficient to quote one passage in which the pith of the matter was put very concisely by James, L. J., who says at p. 494: "When we turn to the 28th section there is no sufficient reason for applying only to the election the limitation of the disqualification to the time during which there is an interest in a contract. We must give full effect to all the words of the section, and doing so we find that the defendant was not qualified to be an alderman during the time of his interest in these contracts, that is to say, the disqualification is temporary." Similarly, in the present case it appears to me that, however undesirable such transactions as the private sale by a Councillor to the Council of second-hand property may be — and I do think they are highly undesirable, and might lead to grave abuses. The Court cannot hold that the temporary disqualification attaching thereto is still operative or that the respondent is now concerned in any contract with the municipality, within the terms of section 17, or that his seat must be declared vacant by reason thereof. I should like to add that it by no means follows from this decision that the law on the subject of what may be described as transitory contracts is nugatory or ineffective. Such transactions have a disqualifying effect so long as they remain in any respect incomplete; any Councillor voting or taking part in the discussion of any matter in which he has any interest renders himself liable to penalties under section 87; and it would seem, from the decision in Arnholz's case, that he would be unable to recover any amount due to him on such a contract.

I now come to the question which appeared to me, when I first perused the papers, and still appears to me, to be the most substantial and important matter—I mean the question of the effect of the respondent's business relations with Markotter. Under the English Statute, which

speaks of having "directly or indirectly, by himself or his partner, any share or interest in any contract, etc.," no question could arise as to the disqualification. There are no such words in the section before us, though it may be worth observing that the identical words do occur in section 87, where it is provided that "no Councillor shall vote upon or take part in the discussion of any matter in or before the Council in which he has directly or indirectly, by himself or his partners, any pecuniary interest. And any Councillor contravening the provisions of this section shall, for every offence, be liable to a penalty not exceeding £50." In any case, it seems to me that the existence of such a partnership raises a *prima facie* presumption of interest, which it lies with the respondent to rebut. What are the facts as disclosed in the affidavits? It appears that, in December, 1905, an attorney named De Villiers was appointed attorney to the municipality. Immediately afterwards he entered into partnership with Fagan, who states that their agreement provided that the latter should not participate in the profits made by De Villiers out of his legal work for the municipality. Shortly afterwards De Villiers disappeared. He is supposed to have been drowned, and his death has been presumed. There was a substantial amount due from De Villiers to the municipality for rates collected, and this sum Fagan himself paid, less the commission due for collection. He was acting, he explains, on behalf of the estate, though no executor had then been appointed. On March 29, 1906, Markotter, who described himself in a letter to the Council as having "taken his (De Villiers') place in Mr. Fagan's office," was authorised to collect and recover rates. I should have thought myself that in a small place this would have been the business of the town treasurer, and that the employment of an attorney would be only occasionally required. It may be pointed out that a simple method of recovering rates in arrear, without calling in legal assistance, is provided by section 129 of the Act. It does not appear that Markotter has been, like De Villiers, formally appointed attorney to the municipality, but he was also employed to do certain conveyancing work on their behalf. On April 2 a partnership was entered into between Fagan and Markotter. In his case, as in that of De Villiers, the partnership with the Mayor, if not an immediate consequence, was at all events an immediate sequence to his entering into a contract with, or undertaking work under the authority of the Council. The deed contained a clause by which it was agreed that "all earnings to and charges paid by the municipal-

ity, for any work done for them in which, by statute or otherwise, the said Fagan as a Councillor or officer is not allowed to share, be the property and earnings of the said Markotter for his personal use and benefit to do with as he may think fit." The agreement, however, must be considered as a whole. The existence of a formal renouncing clause is not in itself sufficient to dispose of the matter. There is, I find, another clause (14), by which it was arranged that, in consideration of being admitted as a partner on equal terms, Markotter should pay Fagan the sum of £250. In agreeing to make this payment, it is impossible to say that he may not have been more or less influenced by the arrangement embodied in clause 8. That hypothesis, however, would not in itself, in my judgment, be sufficient proof that Fagan was concerned or interested in Markotter's contract. I will only say that agreements of this nature should be very jealously scrutinised, as in such circumstances direct proof of such interest or concern must obviously be difficult to obtain. Moreover, apart from such direct proof, I fail to see how, so long as this partnership existed, the respondent could properly and effectively discharge his duties, as Councillor and Mayor, without exposing himself to penalties under section 87, which I have already quoted. Questions, at all events, and it may be important questions, must from time to time arise in which he would be unable, without exposing himself to a penalty, to give the Council the benefit of his advice. There are also two specific matters which weigh with me a good deal. In the first place, there is the incident of a small payment received by the respondent, for rates due from one Roos, for which he forgot to account, in consequence of which inadvertence the municipality was put to certain legal expenses, which he subsequently refunded. With regard to this, Fagan says: "To the best of my recollection the said Roos handed over the money at the Strand on my way to Somerset West. I received it from him as a personal favour, as my rule is not to accept money outside my office." From this statement it is a natural inference that it would have been quite in the ordinary course for Fagan, when in the office, to receive payments from ratepayers, on which his partner, De Villiers or Markotter, charged a commission. Had he not done so, the latter would have had to give more of his own time, or of that of some clerk of the firm, for this branch of the work. On the whole, it appears to me that such a state of things was tantamount to Fagan being concerned in the performance, even if not directly participating in the profit, of his partner's contract with the municipality. Again, with regard to the case of Ahrendse, Markotter, under instructions from the Muni-

cipality, sued Ahrendse for rates. The case was heard at Stellenbosch, and Fagan appeared for the plaintiffs. He explains that he made no charge for such appearance, or even for his expenses—a fee of 10s. 6d. for "attending Court" was included in Markotter's bill, but afterwards erased, it does not appear when or by whom—and I see no reason to doubt his explanation that his motive was a disinterested one, and his object to do his best for his Council. Still, whatever the motive, the effect seems to be that he was actively concerned in the performance of Markotter's work for the municipality, while Markotter himself was left free to exert himself elsewhere for the benefit of the firm. Moreover, the respondent himself explains that Ahrendse's was not an isolated case. He says that: "I have on several occasions conducted cases, which I considered important, for the Municipality, free of charge." I do not think it necessary to go further into the facts of the case. They are of such a nature that it has been impossible to avoid a detailed analysis of their nature and effect. On the whole, I am of opinion that the respondent has not succeeded in so clearly dissociating himself from his partner's engagements with the Municipality as to escape the disqualifying consequences. I think, therefore, that the application must succeed. I am free to say that I have come to this conclusion not without regret. There seems no reason to doubt that Mr. Fagan has done useful public work in the locality for a considerable period—work of a nature which often involved a great deal of anxiety and responsibility, a great deal of unreasonable and unfair criticism, and very scanty recognition or appreciation—and that the severance, even though it prove only a temporary severance, of his connection with such work, may well be a misfortune to his fellow-townsmen. It may also be the case, as he alleges that these proceedings may not have been uninfluenced by motives of professional rivalry, or of a personal nature. With regard to costs, the general costs of the application must be borne by the respondent, Fagan, save in so far as, in the opinion of the taxing officer, they have been increased by the allegations as to which the Court did not call for counsel for the respondent. With regard to such increased costs, we think in all the circumstances that there should be no order.

Maasdorp, J.: The applicants in this matter pray that the respondent may be declared to have forfeited his seat as a Councillor of the Municipality of Somerset West Strand, on the ground that he has been concerned in, or has participated in, the profits of contracts with the Municipality, or has been con-



cerned in, or has participated in the profits of work done under the authority of the Municipality, and is therefore not capable of being or continuing a Councillor. A great deal of the argument in the case was devoted to the consideration of the meaning in the abstract of the terms employed in section 17 of Act 45 of 1882, under which the Municipality is at present governed, but for my part I consider it expedient to determine first what are the facts proved in the specific transactions which are challenged by the applicants, and then to ascertain whether they fall plainly within the terms of the section. The most direct case of a contract in which the respondent is said to be concerned is the sale of the typewriter. It is admitted by Fagan that he did sell to the Municipality in about December, 1906, a typewriter for the sum of £7, and the account was received by him through Markotter from the secretary of the Council. He says the instrument was really the property of his son, and that he received the money for his son, but it is not denied that the whole transaction was carried through by Fagan without any instructions from his son, and that Fagan must be regarded as a principal in the business, and at the very least he must, in terms of the section, be taken to be concerned in the contract. But, then, it is contended that this sale is an isolated transaction, which cannot be called a contract within the meaning of the section. The case of *Barry*, decided in this court, was cited for the purpose of showing that in that case the opinion was there held by the Court that it would be necessary to prove more than casual sales by a storekeeper, who happened to be a Councillor of the municipality, to the municipality, and that evidence was required to establish something in the nature of a running contract for supplying goods from time to time. But no judgment was ultimately given in that case, which cannot therefore be regarded as an authority upon the point. In the case of *Lewis v. Carr* (1 Exch., 484), it appeared that the defendant, who was a tallow chandler, while holding the office of Alderman, sold goods on several occasions to the Corporation. At a time thereafter when all the goods had been supplied, and the defendant had obtained a settlement, he acted on several occasions as Alderman. Upon these facts, the plaintiff, a burgess of the borough, claimed the penalty from the defendant for acting as an Alderman, under the 53rd section of the Statute, which provided that any person who shall act as Alderman after he shall cease to be qualified, according to the provisions of the Act, or after he shall be disqualified to hold any such office, shall forfeit a certain penalty. The section under which the disqualifi-

cation is alleged to have occurred is the 28th, which provides as follows: "Nor shall any person be qualified to be elected or to be an Alderman of such borough during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, or on behalf of such Council. Bramwell, B., doubted whether the contract mentioned fell within the terms of the section, and thought the Legislature had in view one of those continuing contracts, that is to say, a contract for the supply of coal for a year, or a contract to do a large piece of building. The other judges did not agree with him. Cleasby, B., said he felt to some extent that the case is within the mischief pointed at by the Act, and comes within the terms of it, and Amphlatt, B., seemed to have no doubt that the contract in question came within the section. The only question the Court had to decide in that case was whether the defendant had acted as Alderman during the time he was disqualified by being interested in any contract or employment with the Council, and the conclusion they came to was that the acts complained of were done after he had ceased to be interested, and consequently he was not liable. There are obvious differences between the terms of the English Act and our Act, but however that may be, the English Court was not asked to decide whether the seat of the defendant was vacated by his conduct. Bramwell, B., seems to me expressly to draw a distinction between the man who may on a *quo warranto* be found to have forfeited his seat as alderman by reason of his being interested in a contract with the Council, and one who acts as such after the period when he has ceased to be interested in a contract, and who is sued for the penalty. Under our law no person concerned in any contract with the Council shall be capable of being or continuing to be a Councillor, and in my opinion such Councillor, even though the contract has been finally performed, may thereafter be declared by the Court to have, because of such contract, and at the time he entered into the contract, become incapable of being a Councillor and to have in law at that time forfeited his seat. The disqualification may not be a continuing one, and the Councillor may be eligible for re-election; nor does there appear to be any way of having his seat declared vacated except on order of Court; but when application is made to the Court it cannot do otherwise than declare that the Councillor forfeited his seat when he became concerned in a contract with the Council. As to the concern of the respondent, in the work done by his partner for the Council, I desire to state briefly



that he himself saw the danger of his position and attempted to avoid it by providing in the contract of partnership that he should not share in the profits of such work. But that was obviously not enough. It is clearly proved that he in one instance did part of the work in one of the Council's lawsuits, while his partner did the rest. He made no charge for his work, but without his portion of the work his partner could not have earned his fees for the rest. This admittedly happened in other lawsuits of the Council, and in my opinion, by his conduct, he became concerned in work done under the authority of the Council. As to the other charges, I may say generally that in receiving money from the Council which the Council owed to third parties, either in satisfaction of a debt due to himself or to invest for such parties, does not amount, in my opinion, to being concerned in a contract with the Council. I wish to state that all the transactions of the respondent took place openly, and with full knowledge of the municipality, all parties feeling satisfied that they were keeping outside the terms of the 19th section of the Act. This, however, they failed to do, and, in my opinion, it must be declared that at the time the typewriter was sold, and again when he took part in the work his partner did for the Council, he forfeited his seat, whatever his position may now be in regard to re-election.

[Applicants' Attorneys: Walker and Jacobsohn. Respondents' Attorneys: Van Zyl and Buiesinné.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### ADMISSIONS.

( 1907.  
( Mar. 5th.

Mr. Benjamin moved for the admission of Henry Telfer Low as an attorney and notary.

Application granted and oaths administered.

Mr. Sutton moved for the admission of Hendrik Jacobus Raubenheimer as an attorney and notary. Counsel mentioned that applicant had not been able to obtain a certificate from the Registrar of the University, but he appended to the papers a copy of the "Government Gazette" showing that he had passed the examination.

Application granted and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Cornelis Johannes Strydom as an attorney and notary,

Application granted and oaths administered.

Mr. Alexander moved for the admission of Joseph Barnard Shacksnovis as an attorney and notary.

Application granted and oaths administered.

#### LIPSCITZ V. SELIGMAN.

Mr. Alexander moved for the removal of this case to the Circuit Court to be held at Middelburg on the 30th March. The parties consented.

Case removed accordingly, costs to be costs in the cause.

#### PROVISIONAL ROLL.

#### REYNOLDS V. EXLEY AND ANOTHER (TRADING AS CHARLES EXLEY AND CO.)

Mr. Hawes moved for the final adjudication of the estate of Charles Exley and Co. and the private estate of Charles Exley.

Order granted.

#### PATERSON AND CO. V. LEVIN.

Mr. Payne moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

#### VAN DER BYL AND CO. V. VENNER.

Mr. Palmer moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

#### STREETER V. MYERS AND ANOTHER.

Mr. J. E. R. de Villiers moved for a decree of civil imprisonment upon an unsatisfied judgment for £20 6s. 3d., with interest and costs. Counsel (in answer to the Court) said he took it that each of the partners would be liable *in solidum* under the judgment. The defendants were touring in the Colony with a bioscope, and it was impossible to effect service upon them.

Decree granted, with costs of this application.

#### MARAIS V. BOSMAN.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,700, with interest from 1904, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**MOLTENO V. MACBETH.**

Mr. W. Porter Buchanan moved for provisional sentence on a promissory note for £200, with interest.  
Order granted.

**KEYS V. SAMUEL.**

Mr. Philipson Stow moved for provisional sentence on a mortgage bond for £300, with interest from 8th July, 1905, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.  
Order granted.

**ILLIQUID ROLL.**

**TABLE BAY HARBOUR BOARD ( 1907.  
V. NEUGEBAUER. ( Mar. 5th.**

Mr. M. Bisset moved for judgment under Rule 329d for £29, for demurrage of certain trucks, with interest *a tempore morae* and costs.  
Order granted.

**GENERAL MOTIONS.***Ex parte* **LYON.**

Mr. De Waal moved, on the petition of the executors dative for leave to take over, on behalf of the minor children, a certain erf at Carnarvon in satisfaction of a debt of £600, due from one Barnett to the estate. The ground was valued at £500, but it was considered that the proposal was in the interests of the minor.  
Order granted as prayed.

*Ex parte* **TURF HALL ESTATE, LTD.**

Mr. Schreiner, K.C. (with him Mr. Struben), moved for an order authorising the petitioner to receive from one Charles Hy. Wolff seven shares in the company, which Wolff had had handed over to him as secret commission on a sale that he had negotiated with one S. M. Christie. Counsel said that Mr. Wolff acted in a fiduciary relationship to the company about to be formed in the purchase of the Turf Hall Estate from Mr. Christie. Mr. Wolff, it was only fair to add, was misled as to what he might do, and when he found that the legal position he occupied was entirely erroneous, he entered into a consent, and so litigation was avoided. Counsel read a consent by Mr. Wolff to the order prayed for.  
Order granted as prayed.

*Ex parte* **ESTATE STOCKHAM.**

This was an application for confirmation of a certain arrangement entered into with reference to the restaurant business carried on at the Theatre Buildings under the style of Stockham and Hurst.

Mr. Schreiner, K.C., was for petitioners; Mr. W. Porter Buchanan appeared for Tom Loveridge Stockham; and Mr. Russell appeared for J. E. P. Close, as *curator ad litem* of the minors. The facts appear from the judgment.

Hopley, J.: The first point that arises in this matter seems to me to be the construction of the interest that Thomas Stockham has in the business of the Grand Parade Restaurant as a partner with his late father. It appears to me to be quite clear, that the arrangement was a reasonable and natural one between the father and the son, whereby the father, wishing to go away to England and also to take his son into partnership, stipulated that he should from the date of the agreement become a full partner in his share of the Theatre Restaurant business. He also stipulated, as was again very natural, that as long as the father should live, the son should be content with only £100 a year as his share of the partnership, stipulating, further, that at the moment of his father's death, he should come into a full half share of all that the thing was worth. The father died in 1906, and it seems to me then that Thomas Stockham has a right to claim under that agreement that a half of whatever is his father's interest belonged to him absolutely without any fresh payment on his part or anything of that sort. That being the case, it appears to me that the agreement which has been entered into might receive the sanction of this Court, and the Court might order that the arrangement be confirmed subject to the following safeguards, viz., that it be confirmed upon a full and valid release being granted to the estate of all liability to the lessors of the portion of the building which is occupied by the applicant, and also by Mr. Frye on any deed of suretyship which might entail any liability upon the estate. As a further precautionary measure, it be understood and ordered that the capital sums which are guaranteed to be paid by the new firm or by Mr. Hurst, should be paid to the executors, to be dealt with by them in terms of the will, always subject to the modification that £100 of such sums is ear-marked for the expenses of Mr. Frye (one of the executors), in coming out from England. It is, of course, quite understood that this estate is in no sense liable after the agreement is approved, for any liabilities in this restaurant business. The estate hereafter, according to the agreement, might come in for some further amounts if the business is properly sold,

but they are not in partnership in any sense to make them liable for any losses incurred in the business in case of a disastrous issue to the present enterprise. I think on those terms the agreement might be confirmed and sanctioned.

Mr. Buchanan asked that the respondent's costs should be allowed out of the estate.

Hopley, J.: I should think each party should pay their own costs. The Court orders that the contention of Thomas Stockham as to the agreement of the 20th April, 1901, is upheld, that the proposed agreement be confirmed subject to a valid release by the lessors from all liability in respect of suretyship, and that the capital sums when paid be paid to the executors to be dealt with under the will, with the exception of £100 for Mr. Frye's expenses, costs of the *curator ad litem* to come out of the estate.

*Ex parte* HANAU, REPRESENTING THE KALK BAY FISHING COMPANY (IN LIQUIDATION).

Mr. Roux moved for a rule restraining the sale of certain goods advertised to take place to-morrow. The respondents were certain judgment creditors.

The Court granted an order restraining any further proceedings upon the attachments, with leave to any party interested to have the order set aside or modified.

ECHMIDT V. SCHMIDT.

This was an application by the husband for leave to sue by edictal citation for restitution of conjugal rights.

The petition set forth that the parties were married at Glasgow in 1895. In 1904 petitioner came to this country, having arranged that his wife should follow him. She had, however, refused to join him, and had written to say she would never return to him.

Mr. J. E. R. de Villiers was for the applicant.

Order granted, giving leave to sue by edictal citation for restitution of conjugal rights, returnable on May 21; personal service to be effected, with leave to apply for substituted service, if necessary, before the return day.

*Ex parte* VAN DER WALT.

This was an application for an order confirming a certain arrangement as to the disposition of property in the joint estate of the petitioner and his deceased wife. The will gave the survivor the usufruct of the property, and provided that it should go, after the death of the survivor, to the children or the next-of-kin. The property had been realised

with the authority of the Court, and it was now sought to pay the children, of whom there are eight, £3,000 each, and to allow petitioner, who was otherwise without means, to retain the balance of £8,000. A sum of £3,000 had to be paid to each of the children, who had bought land with the money. The property was estimated to be worth £10,000 at the time of the wife's decease, but a syndicate had bought it for £36,000.

Mr. Benjamin moved.

Hopley, J., said he noticed that the Master referred, in his report, to *ex parte Zondagh* (11, C.T.R., 767).

Counsel referred to the case, and said that in the present case the children had got the property already. He submitted that if they gave an undertaking that they would not dispose of the properties otherwise than in terms of the will that would meet the case.

Hopley, J., said he might grant an order authorising the arrangement so far as the grandchildren who had become heirs were concerned, but making the order in respect to the others, subject to the children of petitioner giving security that they would not dispose of the property. The point was whether the sons were prepared to enter into some sort of security not to alienate their children's rights before the death of the petitioner. Of course, the grandchildren had to be protected against the possible dissipation of the property before their grandfather's death, because a son might die before the petitioner, and in that case the former's children might be deprived of the £3,000, which was rightfully theirs in case their father died before their grandfather.

Mr. Benjamin said his suggestion was that the arrangement should be sanctioned subject to the children of the petitioner giving such an undertaking.

[Hopley, J.: Would they give the children a mortgage on the farm for the £3,000? The bond could be worded so that it would only run until the death of the petitioner.]

Mr. Benjamin said he would see his attorney and would mention the matter again.

At a later stage Mr. Benjamin said that his attorney had telegraphed to the client and no reply had yet been received.

The matter was ordered to stand over.

*Ex parte* TRUSTEE IN THE INSOLVENT ESTATE DE VILLIERS.

Mr. Roux moved for the appointment of a commissioner to examine the insolvent's wife and one L. P. Steenkamp as to the ownership of certain goods alleged by the petitioner to belong to the insolvent estate, but which were claimed by the wife.

Order granted, the Resident Magistrate of Venterstadt being appointed commissioner.

#### LEHR V. NICHOLAS.

Mr. Gardiner moved for an order restraining respondent from disposing of his stock. It was alleged that respondent was disposing of the stock otherwise than in the ordinary course of business. Respondent was a fruiterer carrying on business in Somerset-road, Cape Town, and was indebted to petitioner, who was about to take proceedings for the recovery of the debt.

Order granted, pending action.

#### BOYES V. BOYES.

Mr. De Waal moved, on the petition of Johanna M. Boyes, of Prince Albert, for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which, a decree of divorce. Petitioner said that she was married to respondent in July, 1904, and that he deserted her in February, 1905, and was at present residing in India.

Usual order granted, rule returnable on the 5th June.

#### *Ex parte* INSOLVENT ESTATE STUCKE.

Mr. Swift moved for the appointment of Mr. D. P. Smit, representing Blayne and Co., as sole trustee in the insolvent estate.

Mr. Inchbold (for Mr. Maxberg) applied for the matter to stand over until the 26th March, to enable replying affidavits to be filed. He said that there was some competition as to the appointment of trustee.

Hopley, J., said that if the parties were sensible, they would come to an arrangement for the working out of this insolvency.

Mr. Swift consented to the application standing over, but applied for the appointment of petitioner as provisional trustee.

The matter was ordered to stand over until the 26th March, applicant to be provisional trustee, with power to sell the perishables.

#### *Ex parte* ESTATE CONRADIE AND ANOTHER.

Mr. De Waal moved, on the petition of the executrices testamentary, for leave to mortgage certain property. The Master recommended that the petitioners should be granted leave to raise on mortgages such amounts as may seem to him necessary.

Order in terms of Master's report.

#### *Ex parte* ESTATE JORDAAN.

##### *Fidei-commissum Residui.*

*Brown v. Rickard* (2 Juta 314) followed.

Mr. Molteno moved, on the petition of Catherina F. Jordaan, as executrix testamentary in the estate of her late husband, for an order authorising her to deal with or alienate the landed property in the estate in such manner as she may deem fit during her lifetime, or so long as she may remain a widow. Petitioner said that the Registrar of Deeds took up the position that she could not legally sell any of the property in the estate, on the ground that she had only a life interest. She said that she had no intention of remarrying, and submitted that the Registrar of Deeds' ruling was incorrect. Counsel said that it was proposed to sell a portion of the ground to one of the sons. Petitioner was appointed sole and universal heir under the will, and counsel contended that she was the *domina* of the property, and cited *Brown v. Rickard* (2 Juta, 314) and *Klopper v. Smit* (9 Juta, 167). There was an absolute devise to the survivor of the whole estate.

Hopley, J.: The terms of this will are by no means free from ambiguity and perplexity, but I see nothing in them to distinguish the case from the facts upon which *Brown v. Rickard* cited by Mr. Molteno was decided. In that case, as in the present one, the survivor of two spouses was left sole and universal heir of certain property, with the remainder over to somebody at the death of the survivor of whatever there was of the estate then left. It was held in that case, as I understand it, that the survivor may spend and alienate it at his pleasure, and the heir, the applicant in that case, had to take his chance of what there might be left at the death of the survivor, in strict terms of the will. It seems to me that the terms of the present will are much the same. The survivor is instituted sole and universal heir in very strong terms, almost as strong as one could imagine, in the following terms: "I, the testator, do nominate and appoint as my sole and universal heir my wife, the second undersigned, all property to be relinquished by me on demise, movable as well as immovable, nothing excepted, to be assumed and possessed by her as free and personal property, without the contradiction of any one." The next clause of the will, after saying that the property need not be appraised, and that it should be registered without sending an inventory to the Master, says that the survivor might remain in undisturbed full possession of the estate until the death of such survivor, and enjoins that after giving three months' notice there should be a public auction,

so that all their heirs should obtain possession equally of their inheritance of what is then to be found in the estate. Now, it seems to me that the proper reading of this will is the same as the reading put upon the will in the case of *Brown v. Rickard*. The survivor is made the absolute heir, with power, it seems to me, to use the estate in any way which appeals to her as being the proper way to use it, and thereafter, after her death, I think then the heirs, the children of the marriage, come in for what may be left of the estate. I think she is entitled for a good purpose to deal with the property. She asks leave in this petition to sell portion of this estate, and I think she cannot be stopped from doing so. Therefore, I think the Registrar of Deeds should be authorised to pass transfer. It will be ordered that the sale by her be approved and authorised by the Court, and that the Registrar of Deeds be authorised and directed to pass transfer of the property sold.

[Applicant's Attorneys: Syfret, Godlonton and Low.]

#### HAWKINS V. HAWKINS.

Mr. W. Porter Buchanan moved for removal of this case to the ensuing Circuit Court to be held at East London on April 8, in terms of consent.

Removal of case ordered accordingly.

#### VAN DER MEULEN V. GREEFF AND ANOTHER.

This was an application brought by Greeff and wife to set aside an order interdicting Mrs. Greeff and her husband from parting or in any way dealing with the sheep and goats, and progeny of such sheep and goats, taken by them from the possession of the applicant (Van der Meulen), pending a final account between the parties as to the restoration of the original sheep and the progeny, and the wool which arise out of the possession of the sheep, and pending an action to be brought for such sheep as are claimed by Van der Meulen and Zacks, during the February term, costs reserved.

Mr. Gardiner was for applicant; Mr. Alexander was for respondent Zacks.

Mr. Alexander applied for a postponement pending the return of certain affidavits from Laingsburg.

Mr. Gardiner opposed a postponement on the ground that Zacks had had ample time to bring an action as allowed by the Court when the order was granted. He added that Van der Meulen, upon whose application the order was granted, had consented to the present application.

P

Rule discharged, with costs, such as could be shown to be caused by the intervention of Zacks up to the present stage.

#### *Ex parte* MARCHIANO AND ANOTHER.

Mr. Lewis moved as a matter of urgency for the attachment of certain furniture at Highcliffe, Sea Point, pending an action to be brought by petitioners against Hugh Ross Sharpe to recover £60 4s. 10d. Petitioners alleged that respondent owed them £36 10s. for rent of premises, and £23 14s. 10d. for goods supplied by the firm of Joseph Marchiano. They feared that respondent intended to dispose of his assets, more particularly the furniture.

Ordered that the respondent be interdicted from removing the furniture in the premises pending action for the recovery of £36 10s., due for rent of the said premises.

Hopley, J., added that, of course, if respondent paid £36 10s., the furniture must be released.

#### REX V. VAN RENSBURG. { 1907. Mar. 5th.

#### Scab—Duties of owner of sheep.

*An owner of sheep who has reasonable cause to suspect that any of his flock are infected with scab, is bound both to give notice to the inspector and also to make proper efforts to cleanse the infected sheep.*

R. v. Van der Walt (16 C.T.R., 782) followed.

This was an appeal from a judgment of the Resident Magistrate of Colesberg, who had convicted appellant of contravening section 21 of the Scab Act (No. 20, 1894), in that on or about the 8th December last, having become aware, or having reasonable grounds for suspecting scab in his flock, he failed or neglected within seven days thereafter to give notice thereof to the inspector, and forthwith to proceed to make proper and diligent efforts to cleanse such sheep. The Magistrate had imposed a fine of £10.

Mr. Benjamin was for appellant, Nicolaas Albertus van Rensburg; Mr. Howel Jones was for the Crown.

Mr. Benjamin argued that there was no evidence to show that appellant did not give notice, and cited *Rex v. Van der Berg* (16 C.T. Reps., 216).

[Hopley, J.: The whole question is, did he cleanse?]

Mr. Benjamin: On the authority of your lordship's decision in *Van der*



Berg's case, I submit that if he had given notice previously, then he had fulfilled his duty according to the section.

[Hopley, J.: I never placed such a ridiculous construction upon the Statute. I never said that if a man chose to let the inspector know that there is scab amongst his flock, he could then sit with his arms folded for months and not cleanse.]

Mr. Benjamin contended that on the evidence appellant had apparently taken some steps to hand-dress his sheep. Counsel also cited *Rex v. Van der Walt* (16 C.T.R., 782).

Hopley, J.: I do not think there is any necessity to hear Mr. Jones in this case. The circumstances seem to be that the inspector, on coming to the farm of the appellant on the 23rd October, found a considerable amount of scab in his sheep, and properly ordered him to cleanse. It was on that occasion that the appellant told the inspector that there was scab amongst his flock. His telling him at that stage, as far as I can see, was certainly not the notice contemplated in the 21st section, because the inspector was there, and would find out for himself that scab was there. However, it had then come to the knowledge of the inspector, and he then gave him six weeks in which to cleanse the flock, serving him with a notice to that effect. More than six weeks after, on the 8th December, the inspector again visits, and he says that there had been some hand-dressing, but that the scab had increased, and was worse than before. He was then asked by the owner for an extension of time. The owner did not say anything more; he did not say, "I am coping with this disease"—he could not say so; the disease was increasing, but he asked him, as a matter of favour, to give him an extension. The inspector said he was not in the habit of doing that, but he gave him four weeks more. More than four weeks after, the 17th January, he goes again, and he is this time accompanied by another inspector, Mr. Cronwright, and they found the sheep worse than ever; they had not been shorn, the scab had increased, and altogether they were getting to be in a deplorable condition, and, moreover, the owner was so little regarding his duty that he had actually gone away from his farm, leaving his son in charge, with very lax orders as to what he should do; in fact, as far as I can see, he ordered them not to dip, not to cleanse, but simply to go on on a sort of patch-work system, simply getting the wool off the sheep. Even then one could have understood that if he had shorn prematurely and then proceeded to dip, he would have been doing his duty. It seems to me that he was not in any way doing his duty under the section of the Act, that the hand-dressing that

he ordered was not by any manner of means the cleansing of the sheep that he had been ordered to do; it was wholly inadequate, and it was not a proper and diligent effort to cleanse the sheep, as he had been ordered to do. He clearly contravened the 21st section, and the appeal must, therefore, be dismissed. But with regard to the reading of the case of Van der Berg, which has been quoted, I wish to say that I want that case to be confined to its own particular facts, and not to be extended to such a reading as has been endeavoured to be put upon it in the present appeal. I never meant anyone to infer, if an owner once gave notice, or somehow brought it to the notice of the inspector, that there were scabby sheep at his place, that thereafter he could neglect any other steps and still be free from prosecution under that section. I say again, as I said in that case, that the duties are concurrent, and if, when he has given such notice, he is told to do certain things in the way of cleansing his sheep, he should make diligent and proper efforts to cleanse such sheep. If he fails to do that, he ought to be prosecuted, and he may be prosecuted under this Act. The facts in Van der Berg's case were different from those in this case, and the decision was wholly upon that case. There the man had given notice, and he had also actually cleansed before he was prosecuted; in fact, he had done both things which the Act enjoins him to do, and any expressions of mine which are reported in that case must be taken to be confined only to that particular case. This appeal must be dismissed.

**SUPREME COURT**

**FIRST DIVISION.**

[ Before the Hon. Mr. Justice MAASDORP. ]

*In re* ESTATE KING BROS. { 1907.  
Mar. 6th.

Mr. Watermeyer moved as a matter of urgency for the appointment of a provisional trustee in the estate of King Bros., of Durbanville. The estate was sequestrated on the 27th February, 1907, but prior to that King Bros. petitioned the Court to surrender the estate, and it was agreed that the estate should be

liquidated under Mr. G. W. Steytler, but a creditor for £149 had declined to concur. The business was a large one, and it was absolutely necessary that Mr. Steytler, who was thoroughly conversant with the business, and enjoyed the confidence of the bulk of the creditors, should be appointed. The closing down of the business would be prejudicial to the creditors. The petition was signed by creditors to the value of £12,000, out of a total of £18,000.

Maasdorp, J., granted an order appointing Mr. G. W. Steytler provisional trustee, with power to carry on the business.

### APPEAL CASES.

#### REID AND CO. V. FEDERAL SUPPLY AND COLD STORAGE CO., LTD.

##### Landlord and tenant—Broken window.

*R. & Co. leased a certain shop to the F. Co. When the premises were handed back to R. & Co., it was found that during the tenancy a certain window had been cracked. There was no conclusive evidence to show how the damage had been caused or whether it had been broken from within or from without.*

*Held, that the tenants were not liable.*

This was an appeal from a judgment of the A.R.M. of Cape Town, in which absolution from the instance was given in a claim by the plaintiffs for £6 9s. 4d., as damages done to a window.

The plaintiffs leased certain premises to the defendants at 224, Long-street. The defendants took tenancy under the plaintiffs on the 1st December, 1903. The tenancy terminated on the 30th November, 1906. On the 1st December, 1903, a plate glass window was handed over intact by the plaintiffs to the defendants. Upon the vacation of the premises by the defendants the window was handed back in a broken condition. During the tenancy the plaintiffs called upon the defendant to make good the damage amounting to £6 9s. 4d., which the defendants refused to pay. The Magistrate, in his reasons for judgment, said the plaintiffs admitted they had to keep the outside of the premises in repair. It had been urged for the plaintiffs that the breakage was due to portion of the window being painted, and thus causing unequal expansion. On the evidence he could not come to any

other conclusion, but that the plaintiff must fail. The premises were let for a butcher's business, and the plaintiff admitted the defendants had the right to advertise their business by painting on the window.

Mr. Benjamin was for the appellants, and Mr. Close was for the respondents.

Mr. Benjamin said there was not a word that the issue was confined to the breakage of the window from paint. The summons was perfectly general. There was no word on the record to show whether the window was broken by being painted upon, or not. All that was necessary was to show that the premises were handed over in a sound condition, and when handed back they were in a damaged condition, and the onus was on the defendants to show that they were not liable. Counsel quoted *Van der Linden* (1, 15, 12, 4), *Voet* (19, 2, 32), and *Grotius* (3, 19, 11). *Grotius* said: "The lessee is bound also to make good all damage caused to the leased property through his own dealing, or the negligence of his household, or even by others out of hatred to the lessee." Counsel relied upon the general doctrine that the premises must be handed over in a sound condition. The Magistrate was wrong in giving absolution from the instance, because if the plaintiffs again went into the case they could not adduce further evidence.

Mr. Close said the Magistrate was wrong in giving absolution from the instance, he ought to have given judgment right out for the defendant. Taking the English law, generally speaking, if there was a question of dealing more leniently it dealt more leniently with the landlord. Even had there been no evidence for the defence, the Magistrate would have had to give absolution from the instance. The manager of the plaintiff company admitted the defendants had a right to paint on the window as they did. The lessee was legitimately using the premises to the knowledge of the landlord. According to *Voet* (19, 2, 29, 30 and 31), the onus was on the owner to prove that the damage happened from the concurrent fault of the lessee. Taking what he submitted was the common law, and the position by agreement between the parties in this case, the tenant was not at all liable and the onus was strongly on the landlord generally, under the common law, and specially in this particular case, under the agreement to show that what happened was not something which did not come under repairs, and was the fault of the tenant.

Mr. Benjamin having been heard in reply,

Maasdorp, J.: In this case the plaintiff sued the defendant in the Magistrate's Court for a sum of £6 9s. 4d., in

respect of damage suffered by him through injury caused to a plate-glass window in his house. In the summons the ground which is stated for the claim is that when the premises were taken possession of by the defendant as tenant this plate-glass window was intact, and that upon the expiration of the lease, when the premises were handed back, it was broken. There is no allegation that the damage was caused through the default or negligence of the defendant. However, the action proceeded upon the summons, without any exception being taken, and it was then presumably considered necessary by the parties to prove that the damage was actually caused by the negligence and default of the defendant. The ground which the plaintiff seems to have rested his case upon in the evidence was that this plate-glass window was painted for the purpose of lettering by the defendant in such an improper manner that the natural result was that the glass got cracked. He called certain witnesses as experts to express their opinion that in such a way glass could get cracked through partial and improper lettering. On the other hand, witnesses were called by the defendant, who seem to be of equal standing as experts, and who said that under the circumstances they came to the conclusion that the injury was not caused by the painting. The Magistrate was of opinion that it had not been proved that the damage was caused in that way. Thereupon the case, as it was narrowed down by the plaintiff himself before the Magistrate, utterly failed because the only act on the part of the defendant which was urged as being negligent was the manner in which he treated the window in painting it. But Mr. Benjamin now urges that, notwithstanding the failure of the plaintiff on that ground, he ought to succeed on that summons, even if he failed to prove that the manner of painting the window caused the damage. Still, the injury remained, and the only natural inference could be that that injury, even if it did not arise from the painting, must have been caused by the negligence or wrongful act of the defendant. Now, I quite agree with Mr. Benjamin in this, that there are certain cases in which, from the very nature of the damage, it will be concluded that it must have arisen through the fault of the defendant, or of some other person for whom he is responsible. Supposing the damage had occurred inside the house, to which only the defendant and his servants had access, and it was in itself of such a nature that it could only have arisen from gross ill-usage of the property, then the Court would come to the conclusion, merely from the nature of the damage, that the defendant had been guilty of negligence, through which the plaintiff suffered injury. This case, however, is different.

An injury is done to the window which may be looked upon as part of the building, which requires external repairs, and the injury could be caused from outside as well as from the inside. And from the whole nature of this case, it appears that both parties are wholly ignorant as to how the damage occurred, and it is not a case in which, from the mere fact of the window being broken, the conclusion must be deduced that it was caused through the negligence of the defendant. Mr. Benjamin also tried to extend his rights rather further, by stating that it was the duty of the tenant, under all circumstances, to hand back the property to the landlord in the same state in which he received it. Now, it appears quite clear from the authorities that when a house falls out of repair, the duty of repairing it so as to keep it habitable for the tenant falls upon the landlord, unless the disrepair is the result of a wrongful act on the part of the tenant. The only conclusion on the whole of this evidence one can come to is that for some unknown reason this window has fallen into disrepair, and it is not the duty of the tenant to hand it back to the landlord in the same condition in which he received it, unless there is some proof, positively, that the injury arose from the negligence of the defendant, or unless there is proof of certain facts from which it must necessarily be concluded that there was such negligence as to cause the injury. The Magistrate, finding that no negligence of the character stated by the witnesses for the plaintiff had been proved to his satisfaction, gave absolution from the instance in this case, and I think he was correct in his decision. The appeal must be dismissed, with costs.

[Appellants' Attorney: J. Buirski.  
Respondents' Attorneys: Fairbridge,  
Arderne and Lawton.]

#### REX V. KRUGER.

This was an appeal from a judgment of the Acting Assistant Resident Magistrate of Woodstock in a case in which the appellant, Benjamin Kruger, a European youth of 16 years of age, was charged with the theft of five ducks belonging to one Newman. The Magistrate found accused guilty of the theft of two ducks, and fined him £5, with the alternative of fourteen days' hard labour. The appeal was brought on the grounds that certain evidence admitted on behalf of the Crown was inadmissible, that evidence tendered on behalf of the accused was wrongly rejected by the Magistrate, that the weight of evidence was against the decision, and that the balance of evidence was in favour of ac-

quittal, or raised such doubt that the Magistrate should have given appellant the benefit of it, and have dismissed the case.

Mr. Close was for appellant; Mr. Howel Jones was for the Crown.

Counsel read the record of evidence, and in argument, submitted that, even if the Magistrate was right in finding the accused guilty, the case was eminently one which should have been treated under the First Offenders' Act. The accused was a lad of 16 years, and there was nothing previously against him. He contended further that the Magistrate was not justified, on the evidence, in convicting accused.

Maasdorp, J.: In this case there were certainly some circumstances in the evidence which required to be very carefully weighed by the Magistrate before he could arrive at a satisfactory conclusion, but I have no doubt that the Magistrate did weigh all the difficulties which he had to bear in mind in considering the case. After all, there is a certain portion of the evidence which, if it is accepted by the Magistrate, is conclusive of the fact that the two ducks were stolen from Mr. Newman, and that these two ducks were found in Mrs. Kruger's yard. These ducks are positively identified by the owner by the description and the colour, and in one case by a special mark on the web of one of the ducks. The ducks were produced in court, and I have no doubt that the Magistrate saw what the nature of the birds was, that he would have considered whether the colour was such, and the general appearance was such, that they could be with any certainty identified by the owner. That he must have taken into consideration when he had to consider whether these ducks belonged to Newman. He must have come to the conclusion upon the positive statement, and on all the other circumstances, that they were Mr. Newman's ducks. If they were, then they were found, within two days of their loss, in the yard belonging to Mrs. Kruger, the mother of the accused. The question then arises: how did they come there? We have the positive statement of two servant girls who were about the premises that these two ducks—these very ducks—were brought there by the accused. There is proof, therefore, that within two days of the birds disappearing from Mr. Newman's place, the accused was seen to carry them into his mother's yard. There is evidence given also that upon the day when one of the ducks was missed by the owners, the accused was in the neighbourhood of the place, with his two little brothers not far off, and that, while they were catching a duck, he was apparently watching a portion of the premises of Mr. Newman, to ascertain whether there were any persons about. It is said that the witness who gives

that evidence, being a young boy, can hardly dive into the motives of another boy, who is simply seen observing certain premises, but at the same time that he saw the accused watching, he saw the duck being caught, and I see no difficulty in believing that he connected the act of one of the brothers with the act of the two other brothers. Now the Magistrate came to the conclusion that they were then acting jointly, and that one of the ducks then disappeared. From the manner in which they acted, the Magistrate came to the conclusion that the ducks clearly belonged to Mr. Newman's poultry yard, and that they were Mr. Newman's property; and it being once established that they were Mr. Newman's property, then all other difficulties in the case disappear. It has been pointed out that the Magistrate might have dealt with this case in a more lenient way if he had proceeded under Act No. 10 of 1906, but it is perfectly clear that under that Act, the mode of dealing with the case is left almost wholly in his discretion, and it is a discretion that this Court cannot now interfere with. He would have been justified in acting under the terms of that Act if he had found any extenuating circumstances or if the nature of the offence was very trivial, but evidently he did not regard the act as a trivial offence, and I myself do not consider that the theft of poultry, considering the great deal of trouble it causes to the community, can be regarded at any time as a trivial offence. But I do not express the opinion that, under the circumstances, this case might not be more leniently dealt with. I merely point that out as a reason why I am not in a position to say that the Magistrate should have regarded this particular act as trivial. The appeal must be dismissed.

#### MANSELL V. HARTMANN.

This was an appeal from a decision of an Assistant Resident Magistrate of Cape Town.

The appellant appeared in person; there was no appearance for the respondent.

The facts appear from the judgment. Maasdorp, J.: In this case it appears that the plaintiff sues the defendant for the recovery of £3 6s., as damages suffered by him through injury caused to certain photographic plates belonging to him. It is alleged that the injury was caused by the defendant wrongfully and unlawfully causing water to run over these plates and thereby rendering them unfit for use. The defendant, through his agent, put in a plea of the general issue, and the plaintiff then proceeded to call witnesses to prove his case. He led evidence to show that there was a tank situated above the room belong-



ing to a Mr. Dart, in which he stored his photographic plates, and that the portion of the premises where the tank was situated was then occupied by the defendant, who had hired it from Mr. Dart. It was discovered that water had issued from the premises above into the room belonging to Mr. Dart, where the plaintiff kept his photographic plates, and upon inquiry it was admitted by the defendant that he had forgotten to turn off the tap of this tank and that had caused the flow of water. Evidence was also called to the effect that the plates belonging to the plaintiff were in such a state that they were unmerchantable through the damage caused by the water. This, to my mind, amounts as far as the evidence went to proof of negligence on the part of the defendant; proof that such negligence caused the damage to the plates; and proof that the damage to the plates was a material injury to the plaintiff. When the evidence for the plaintiff was closed application was made by the agent for the defendant for absolution on the ground that no negligence was averred in the summons. It is quite true that there is not an averment of negligence in so many words. The summons avers wrongful and unlawful conduct on the part of the defendant. Possibly exception might have been taken on this ground, but upon that I do not express my opinion. If the summons was somewhat defective, exception might have been taken in the first instance, and the Magistrate might have dealt with it before the case proceeded. But after the defendant's plea, and after the evidence was led, it appeared quite clear that the parties had come prepared to try an issue as to whether the plaintiff had suffered from the negligence of the defendant, and the words in this summons sufficiently cover that allegation, although the summons may be said to be not very artistically drawn. Under these circumstances, the Magistrate was wrong at that stage of the case to allow the exception to the summons. It now appears in the reasons given by him, that he dealt to some extent also with the merits of the case, and he states that upon the evidence he finds no proof of any damage having been done to the plaintiff. Now that finding of the Magistrate is wrong, because there is evidence, at present uncontradicted, that the plaintiff has sustained damage. It is quite possible that it may be disproved by the defendant, but until such evidence has been called the evidence of the plaintiff must be taken for the present to be true. The Magistrate's finding, therefore, is quite incorrect that there is no proof of these photographic plates having been damaged by water. Under the circumstances, the case must go back to the Magistrate, and he must proceed with a trial of it upon its

merits. I would like to point out now that if there is any doubt whether serious damage has been done to the defendant in this case, he should still have the opportunity to produce on his behalf all the cases containing the alleged damaged plates. It seems to me that the Magistrate went wrong in dismissing the case upon an exception and then proceeding to deal with it upon its merits. Having dealt with it upon its merits, in the face of his finding that there is no evidence of damage, opportunity must be given to the plaintiff, in addition to the evidence he has already given, to produce the plates for proper examination and investigation, if necessary. The appeal will be allowed and the case sent back to the Magistrate to be tried on its merits, an opportunity to be given, if necessary, for the plaintiff to put in the alleged damaged packets of plates. I add this because it may be held that the plaintiff's case is closed and no more evidence is to be allowed on his behalf.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

COLLINS V. KING. { 1907.  
Mar. 6th.

This was an appeal from a judgment of the A.R.M. of Piquetberg in an action in which appellant claimed from respondent £5 for drawing plans of a certain house, working out estimates, and preparing specifications, and £14 12s. for services rendered in supervising building operations and granting certificates on £713 at 2 per cent. The Magistrate had given absolution from the instance.

Mr. Gardiner was for appellant, W. C. Collins, of Piquetberg; Mr. J. E. R. de Villiers was for respondent.

Collins had sued King in the Court below for £5 for drawing certain plans for a house, and for £14 12s. for supervising the building of the house. The Magistrate had given absolution from the instance, and on December 11 Mr. Justice Hopley remitted the case back to the Magistrate for further evidence on: (1) Why the three certificates (if they were certificates by surety merely) were given before the clause of suretyship were added to the agreement; (2) the exact date of the agreement itself; and (3) for how much did the plaintiff give certificates, and why did he cease giving them? (16, C.T.R., 1,119.)

The evidence taken on these points was conflicting.

Mr. Gardiner said that the probabilities were in favour of Collins. The words "according to architect's note of



hand" showed that an architect was contemplated.

Hopley, J., asked if Collins, who was a missionary, could be called an architect. He might perhaps be what Mr. McGregor would call an "al-fresco" architect.

After further argument on the facts:

Hopley, J.: I do not think it is necessary to call upon Mr. De Villiers today. When the case was last heard before me I was inclined to look upon the conclusion which the Magistrate had come to as not an unreasonable conclusion, and his judgment of absolution from the instance as one which was, in the circumstances, a just and proper result to arrive at. But there were one or two points which seemed to me to rather tend in an opposite direction, and it was to get an explanation of those difficulties, if possible, by fresh evidence that I remitted the case to the Magistrate. The facts seem to be that somewhere about August, 1905, one Bell contracted with King (the respondent) to build him a house. It is quite clear that Mr. Collins intervened considerably in this matter, either as a professional man or as a sort of mutual or common friend of the parties. He is a missionary, and he seems to have some little skill in drawing plans for houses. one can hardly dignify it by calling it "architectural skill," just ordinary drawing skill, and he certainly was a friend of Bell's. Now, he seems to have busied himself in this matter, and it is quite clear that he and King had speech of each other—one could hardly call it "negotiations"—about this matter before the contract was actually entered into. He drew either for Bell or King the plans of the house, which were subsequently adopted, and one of the questions which arise in this case is whether he is entitled to any charge for drawing those plans. The charge he makes is reasonable, considering the skill exhibited. The Magistrate, however, quotes evidence taken from Mr. Collins's own mouth, evidence which was apparently conscientiously given. He said: "I did not make any charge at the time for the plans and specifications, but the defendant said he hoped I would not charge him too much. I had not at that time made up my mind what to charge." That is not a professional man's way of doing business, not an architect's way, and, as far as that goes, he would probably leave it to the generosity of the defendant to give him something or other for the plans if he adopted them. Then he says that he made this claim for £5, and the rest of the claim from the defendant for the first time when the latter summoned him for £5. That was at a much later date than the completion of the building, long after the respondent had possession of and was living in the house. There, again, the Magistrate had the conduct

of the plaintiff himself to go upon, and he not only says he did not make any charge at the time for the plans, but he did not send in a bill or try to get anything from the defendant for a considerable time after the whole thing was finished, and then under the somewhat suspicious circumstance that the defendant had sued him for a sum of £5. But the evidence does not stop there. Plaintiff says: "I did not draw this plan for any remuneration. I did not have an agreement with Mr. King, except that he said 'I hope you will not charge me too much.'" All that induced the Magistrate to feel and believe that this work was done gratuitously, at the outside that the plaintiff might have thought that the defendant would be generous enough to recognise his services by giving him some small amount for what he had done. Then, as to the supervision, I cannot say that if the plaintiff busied himself gratuitously about the drawings or plans, there was any other understanding as to the supervision, except perhaps that a point that is more strongly against the plaintiff is that he had a personal object to serve in giving his supervision to the work. The builder was a friend of his, and the Magistrate comes not unreasonably to the conclusion that one of the objects was to assist the builder, to help him along, to give him a name in Piquetberg, so that possibly he might get one or two other works, certainly one good work, and, more than a week after the work had been begun and the original contract had been signed, a clause was added to the contract whereby Mr. Collins himself became a surety for the builder's work and for the builder's carrying out the work in this matter. Therefore it became his interest to see that the work was properly looked over, and that not too much money was drawn, and the Magistrate came to the conclusion that that was the reason why he gave these services of supervision and the certificates for drawing money which he gave. Now, three of those certificates were given about the date when the contract was supplemented by the addition of the surety clause, and it was that that rather weighed on my mind in sending back the case for further evidence. But the evidence of the respondent, which I have now elicited, explains that fact. He says that he gave these on the verbal undertaking that Mr. Collins would be the surety, and simply trusted to his good faith, and that, after the time when the certificates had been given, he thought it better to have it put on a more businesslike footing. He caused this clause to be added to the contract, and that explains what seems to be an inconsistency in the matter. I cannot say, under the circumstances, that the Magistrate was wrong in giving absolu-

tion from the instance. They are both parties of good standing in the place, occupying a reputable position, and they give contradictory explanations of a loosely-drawn set of documents. The Magistrate may have been in a position to decide exactly who was speaking the truth. He gave absolute from the instance, and I see no reason to interfere with that judgment, and the appeal will, therefore, be dismissed with costs.

## SUPREME COURT

### FIRST DIVISION.

[ Before the Hon. Mr. Justice MAASDORP. ]

MARTIN V. ROBERSON. { 1907.  
Mar. 7th.  
" 15th.

Attorney acting as agent for another attorney—Client—Liability for fees of agent—Practice.

*Respondent had instructed one C., an attorney residing at Somerset East, to conduct a case for him in the Magistrate's Court at Butterworth, and signed a power of attorney in blank. C. instructed the appellant, a Butterworth attorney, to act for him, and sent to him the power of attorney. The appellant, having conducted the case, demanded payment for his services from C. But on the refusal of C., who was in financial difficulties, to pay him, he sued the respondent on a taxed bill of costs.*

*Held on appeal, that respondent's power of attorney in blank having been lawfully made over to appellant, respondent was liable to him for his fees.*

*Semble, the practice that the attorney who employs another as his agent, and not the client,*

*is liable to the agent for fees exists only in the case of London attorneys employed by Country attorneys, unless in other cases the agent waives his rights against the client by his conduct or otherwise.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Somerset East in an action brought by appellant against respondent to recover £2 12s. 4d. for work done and professional services rendered at defendant's special instance and request, as per taxed bill of costs annexed to summons.

From the record it appeared that the plaintiff (appellant), who was an attorney practising at Butterworth, sued the defendant for £2 12s. 4d., for work done and professional services rendered in a suit between Roberson and one Greeff. Plaintiff had received his instructions in the case against Greeff from Attorney Cohen at Somerset East, but the power of attorney under which he acted was signed by defendant in favour of plaintiff. Plaintiff rendered the services and demanded payment from Cohen, whom he had debited in his books, but Cohen had left Somerset East, and plaintiff then sued defendant. Defendant had admitted that he had signed a blank power of attorney, which he gave to Cohen to proceed against Greeff, and he also admitted that the power in favour of Martin (plaintiff) bore his signature.

The Magistrate dismissed the case, with costs, and, in his reasons, said that defendant, at the request of Cohen, who had all defendant's accounts to collect, signed a blank power of attorney, which was the usual practice by long usage amongst legal practitioners when they undertook to collect moneys for their clients from distant parts. Defendant was not prepared to pay plaintiff, as he did not employ him. The case cited by plaintiff's attorney (*Wright v. Williams* (8 J., 166) did not rebut the country attorney's liability. He had not found any cases decided in this colony bearing on the question at issue, but on reference to the procedure in England he found "that where one solicitor does business for another, the solicitor who does the business invariably gives credit to the solicitor who employs him and not to the client for whose benefit it is done. If the solicitor in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client. But such notice, though it may protect the solicitor from liability, will not necessarily make the client liable." and he was of the opinion that the evidence

was clearly in favour of the contention of the defendant.

Mr. Close informed the Court that a similar point was involved in the case of *Estate Ross v. Trollip*, which was standing over for judgment.

Mr. J. E. R. de Villiers was for appellant, Attorney G. M. Martin, of Butterworth; there was no appearance for respondent, Albert O. Roberson, a blacksmith, of Somerset East.

Mr. De Villiers, in argument, said *inter alia*, that the only question was whether Martin could sue Roberson on the power of attorney signed by Roberson in favour of Martin, and under which Martin disbursed moneys and rendered services. Roberson could not vary his written contract. There was no proof of a custom that one attorney should look to the other. Even if the local attorney guaranteed the costs that did not deprive the town attorney of his action against the man employing him. He cited Story on Agency (sections 201 and 217a), which had been adopted in our Courts in the case of *Murray v. Cummeck* (3 H.C., 12). In this case Martin was acting on direct authority given by Roberson. The magistrate did not give the reference to the English law quoted by him, but the case of *Serace v. Wittington* (2 B. and C, 11), in which a London attorney sued the country attorney and recovered, seemed to cover part of what the magistrate said was the English law, but it did not go so far as the magistrate went. He could find no authority for the sentence, "Such notice, though it may protect the solicitor from liability, will not necessarily make the client liable."

[Maasdorp, J.: Supposing Martin had sued Cohen?]

Mr. De Villiers said that then the custom of attorneys in this country would have to be gone into. The London attorneys looked to the country attorney, and not to the country client, but this was a custom peculiar to London attorneys. He quoted Cordery on the Law of Solicitors (p. 254), and Van Zijl (Judicial Practice, 2 ed., 783) was quite inconclusive, but as far as he went in appellant's favour, he said that the local attorney was taken to guarantee the town attorney's expenses.

*Cur. Adr. Vult.*

*Postea* (March 15th).

Maasdorp, J.: The plaintiff, who is an attorney, living at Butterworth, conducted a case in the Magistrate's Court there on behalf of the defendant, who resides at Somerset East, against one Greef. After the close of the proceedings he had his bill of costs against his client duly taxed, and upon his client refusing to pay, he sued him for the amount in the Magis-

trate's Court at Somerset East. At the trial he put in his taxed bill of costs and a power of attorney in his favour, signed by the defendant. The defence was set up that the defendant never engaged the services of the plaintiff, but employed an attorney named Cohen, residing at Somerset East, and was therefore not indebted to the plaintiff. The Magistrate dismissed the case, and gave as his reason that, according to the common practice, attorneys are responsible to one another for the bills of costs of their clients, and that under English law, "where one solicitor does business for another, the solicitor who does the business invariably gives credit to the solicitor who employs him, and not to the client for whose benefit it is done. If the solicitor in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client. But such notice, though it may protect the solicitor from liability, will not necessarily make the client liable." The Magistrate does not say from what authority he has taken this passage, but it obviously has reference to the custom of dealing between country solicitors in England and London agents. The matter is briefly disposed of by a passage in "The Annual Practice" for 1904, vol. 2, page 380: "As between London agents and country solicitors the client is deemed to employ and to be liable only to the solicitor whom he retains. If this solicitor employs another, the latter must look to the solicitor employing him, and not to the client. But this depends upon special custom, and does not apply where the solicitor retained employs a solicitor in Ireland." If any custom does exist in this colony as between the country attorneys and those practising in the seats of the Higher Courts, it will have to be established by evidence, or judicial decision as to its existence must be adduced. But there is clearly no evidence in this case of any custom as to the dealings of attorneys in different villages in this country. The Court can only look to the contract and the conduct of the parties concerned. Here we have a limited power of attorney from the client at Somerset East to the attorney at Butterworth, and if that were all the attorney would be entitled to look to the client for his remuneration. It is quite possible that there may be a practice among attorneys to let the settlement be effected between them, and their conduct in any special case may vary their rights. For instance, supposing in this case the plaintiff had acted in such a manner as to induce the defendant to believe that he looked only to Cohen for a settlement, and the defendant had in consequence paid Cohen, I think he could have pleaded such payment in an action by the plaintiff. But he has neither

paid nor pleaded payment. There is no evidence that anything was paid to Cohen in respect of the costs of this case. The defendant only goes to the length of saying that Cohen has several sums of money due to him. The plaintiff in this case debited Cohen in his books, and looked to him in the first instance for payment, but when Cohen got into difficulties he thought it only fair that Roberson should pay the costs. There is no doubt that by the power of attorney given direct to the plaintiff privity of contract was established between the plaintiff and defendant, and unless plaintiff by his conduct induced the defendant to do anything to his own detriment, he would not lose his right under the original contract of agency. Van Zyl, in his "Judicial Practice," page 783, has a passage which in so far as it refers to English law and the English case cited, is based wholly on custom, and in so far as it refers to our law, it may refer to a custom of which there is no evidence in this case, and for which no judicial authority is cited. In my opinion the plaintiff was entitled to succeed upon the evidence. The appeal will be allowed and judgment entered for the plaintiff for £2 12s. 4d., with costs in the Court below and with costs of appeal.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLBY.]

REX V. SHEAR AND SHEAR. ( 1907.  
Mar. 7th.  
Act 28 of 1883, Sec. 75.

*Principal and agent cannot  
both be convicted of the same  
offence under the above section.*

This was an appeal from a judgment of the Resident Magistrate of Uniondale.

The appellants had been charged on five counts with contravening section 75 of Act 28 of 1883, as amended by later Acts, by selling liquor without a licence. The first count alleged a sale on September 9, 1906, to one Amos at Haarlem, the second on October 4 to Amos at Ongelegen, the third on October 3 to Pieter Sellig, the fourth on October 13 to Pieter Sellig, and the fifth at divers dates to Finch.

The Magistrate found the appellants guilty, but he did not specify in his judgment on which counts he found them guilty. He stated, however, in his reasons for judgment, that he found

them guilty on the second and third counts, but gave them the benefit of the doubt on the other occasions.

The appeal was brought on two grounds; the first was, that the appellant, A. Shear, acted as agent for Z. Shear, and so both could not be convicted of the same offence; and the second ground was, that the conviction was against the weight of evidence.

Mr. Gardiner appeared for the appellants; Mr. Howel Jones for the Crown.

Mr. Gardiner contended that a principal and his agent could not both be convicted of the same offence, and referred to *Rex v. Willem* (9 H.C., 242) and *Rex v. Nokitshini and Drari* 13 S.C., 413). The Magistrate had not apportioned the sentences to the various counts, so the case ought to be remitted to him to apportion the sentences to the various counts. He cited *Rex v. Loots* (13 S.C., 121). Counsel also argued that the conviction was against the weight of evidence.

Mr. Howel Jones said he would not contend that the appellants were guilty on counts 1, 4, and 5, and it was also clear that the Magistrate only meant to convict A. Shear on count 2 and Z. Shear on count 3, and so he would agree to the sentence being quashed, and the case remitted to the Magistrate to apportion the sentences to the various counts.

Hopley, J.: In this case the appellants, Z. Shear and A. Shear, who stand in the relation towards each other of father and son, managed different shops near Uniondale, apparently along the line of railway. Z. Shear was the head of the business, but the shop managed by A. Shear was licensed in A. Shear's name. They were charged together on five counts, with contravening the 75th section of the Liquor Act 28 of 1883, and the Magistrate, after hearing the evidence, found them generally guilty, and fined the father in £25, or three months' imprisonment, and the younger man in £15, or two months' imprisonment. The general finding as it stands means, of course, that he finds them guilty on all five counts. It is clear from the Magistrate's reasons that he did not mean to find these accused guilty on all the counts. From his reasons it would appear on the first, fourth, and fifth counts he entertained doubts, and he would have no objection to these counts being set aside, and so the conviction on these counts will be quashed. On the second count the Magistrate found them both guilty, but it is clear from the evidence that A. Shear sold the liquor to Amos, that Z. Shear was not present, and there was no evidence to show that he authorised the sale. Even if he had authorised it as principal, principal and agent could not both be convicted of the same offence, so the conviction of Z. Shear on the second count will be quashed, and



the conviction of A. Shear confirmed. On the third count there is more to connect them both with the sale. Sellig ordered the brandy from Z. Shear, and Z. Shear sent the order to A. Shear, who delivered the brandy to Sellig. It is clear that A. Shear acted only as his father's agent, and both of them could not be convicted on that count. The conviction against A. Shear on that count will be quashed, and that against Z. Shear confirmed. The case will be remitted to the Magistrate to pass such sentence as he thinks proper under the circumstances.

VAN DEN BERG V. RIDDELL.

Billiards—"Good for"—"Entertainment"—Act 28 of 1883, Sec. 69.

*Where the lessee of a hotel billiard room sued on a "good for" for charges for the use of a certain billiard table.*

*Held, that he was entitled to succeed.*

*Semble: In view of the use of the word "entertainment" in Sec. 69 of Act 28 of 1883, it is doubtful whether the landlord could have recovered on a similar "good for."*

This was an appeal from a judgment of the Assistant Resident Magistrate of Aliwal North, sitting at Lady Grey, in an action brought by appellant against respondent to recover £1 11s. on a certain good-for and 10s. money advanced.

From the record it appeared that appellant was the sub-lessee of the billiard room at the Commercial Hotel, Lady Grey, and that respondent, a local tailor, had been a frequent patron of the table. When the case came on for hearing before the Magistrate, exception was taken by defendant's attorney: (1) That the good-for was in the name of Mr. Rose, proprietor of the Commercial Hotel, and that plaintiff had no cession; (2) that the good-for was for billiards and could not be sued upon in terms of section 69 of the Liquor Act No. 28 of 1883; (3) that no date was disclosed on the summons as to when the advance was made. The exception was upheld, with costs. Certain evidence was, however, taken, from which it appeared that plaintiff said defendant had signed the good-for sued upon for billiards, and that he also owed him (plaintiff) 10s. money advanced. Defendant admitted that he owed plaintiff 10s. for an advance and also 15s. for billiards.

Section 69 of Act 28, 1883, reads: "No person shall receive in payment, or as a pledge or security for any liquor or entertainment supplied in and from his licensed premises, anything except current money, cheques on bankers, or orders for payment of money."

Mr. Upington was for appellant, George S. van den Berg; respondent, James Riddell, did not appear.

Mr. Upington submitted that the Magistrate's finding was wrong, that it was not necessary for appellant to have had cession of the good-for, that a billiard debt was not excluded under the 69th section, and that the third point was not material seeing that defendant himself admitted the loan. It was not plaintiff's desire, however, that the case should be remitted to the Magistrate, in view of the small amount involved, but he would prefer that the Court should give judgment for the amount of indebtedness admitted by the defendant.

[Hopley, J.: There is nothing in the Act which says you shall not give a man credit for billiards?]

Mr. Upington: I am not aware that there is

[Hopley, J.: Does "entertainment" mean billiards or a dance or anything else, or does it mean provisions merely?]

I have looked into the Act, and there is no definition of "entertainment."

[Hopley, J.: "Entertainment" very frequently means food rather than anything else. It does not mean amusement necessarily, does it?]

The section was certainly never intended to apply, for instance, to a dance being held. Sections 68 and 69 are merely aimed mainly at the running up of credit for liquor supplied. I submit that an I.O.U. is really to be classed, for the purpose of this section, as an order for the payment of money.

[Hopley, J.: Oh, no.]

Mr. Upington, in further argument, remarked that the section was certainly not very artistically drawn. He added that the judgment of the Magistrate was most technical, and the Supreme Court had never encouraged technicalities, but had said that substantial justice should rather be done. The technicalities in this case were worthy of two centuries ago.

Hopley, J.: It is a pity that this small, paltry amount should have had to come in appeal, or that the technicalities with which it is interwoven should have been raised in such a small dispute between the parties. The plaintiff sued for £2 1s.—£1 11s. upon a certain good-for made in favour of the plaintiff by the defendant, and 10s., being the amount of cash advanced, as is alleged, by plaintiff to defendant. Exceptions were taken, first of all, that the good-for is headed Commercial Hotel, and that the name of C. W. Rose appears below, and that, presumably, it would be a good-



for to Mr. Rose, and that there was no cession from Mr. Rose to the plaintiff. As to that, all one can say is that it is a disingenuous exception, because all the parties, including defendant and his attorney, who took the exception, knew from the start that it was a good-for to Van den Berg, who was simply using that card bearing Mr. Rose's name until he got some printed for his own purposes. The facts seems to be that Van den Berg was the lessee of the billiard room from Rose, who was the licensed victualler of the Commercial Hotel. He, apparently, did not want to have the trouble of managing the billiard room, so he let it to Van den Berg. At the date when the debt was incurred there never was any set of circumstances which would have necessitated a cession from Rose to Van den Berg. That exception was badly taken, and cannot be sustained. The next exception that was taken was that in terms of the 69th section, if the good-for in question is for billiards, the said section provides that only current money, cheques, and orders for the payment of money should be taken. The exception there is curiously worded. It would have been better if it had been taken as a special plea, not an exception at all, because in itself a good-for is a document which is a proper document. To set up a defence upon such a good-for he should have said that the amount, in so far as it is admitted, was for billiards, and that, therefore, in terms of that section, the plaintiff could not recover. The Magistrate seems to have treated it as a special plea, and to have taken evidence, and the facts are that a certain amount was incurred for billiard debts, that is, for the use of the table and the room by the defendant, who was a tailor, and who seems to be fond of billiards. When the billiard debt had reached a certain amount, it was put upon a good-for, and it is that good-for which is now sued upon. Now, the Magistrate seems to have upheld that exception also simply on the ground that billiards would come under the heading of entertainment supplied in and from licensed premises, and that therefore a good-for ought not to have been taken for it. Well, that may be, but there is also force in what Mr. Upington says to begin with: that there is nothing in the section which makes it impossible for the licensed victualler himself to recover payment by process of law for such a thing as an amount run up for the lease of a billiard table in these licensed premises. The 69th section of the Act says that a licensed victualler shall not receive anything but money, cheque, or order for money for entertainment in his licensed premises, but it does not say he shall not recover in law such amounts as may be due on

behalf of such entertainment in his licensed premises. Such entertainment does not stand on the same footing as liquor supplied on credit, which is dealt with by the 68th section. With regard to such entertainment, I think it is correct, reading the 69th section as it stands, and the Act as it stands, for a person to sue for entertainment supplied in his licensed premises, but in this particular case the case is less strong for defendant than it would be if Rose himself were suing. Here we have a person who has nothing to do with the licence, excepting that he has taken over the responsibility and expense of managing the billiard-room, for which he pays the rent, and from which he earns a living. He allows people to play on the table, the licensed victualler does not interfere, though he would be responsible for the orderly conduct of that room, and I see nothing in the Act which prevents such a lessee of a harmless form of entertainment in public premises from suing for any debt that is incurred to him for the use of such a thing as a billiard table. The Act certainly does not say so, and it is not for us to make an Act more strict than its own words necessarily imply. Therefore it seems to me, with regard to that portion of the exception, the Magistrate also was wrong. With regard to the exact amount which is due, there is a dispute, but it would be well at once to put an end to the paltry litigation between the parties. There is a conflict of evidence on this point, and the good-for is certainly not in such clear terms as one might wish. The defendant admitted to the Magistrate that he owed the sum of 25s. Nothing of that was incurred in *ex turpi causa*, or in disgraceful consideration, and the Magistrate may well have said: "Well, subject to any further evidence that may be led, I will give judgment for the plaintiff for 25s." There is conflict as to the amount, but Mr. Upington has said that, to put an end to the matter, he is perfectly willing that the Magistrate's judgment should be changed to one for the plaintiff for 25s. The appeal will be allowed, and the judgment in the Court below changed to one for the plaintiff for 25s., with costs in this Court and in the Court below.

[Appellant's Attorney: P. A. M. Cloete.]

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

STRAUSS V. VAN DER BERG. } 1907.  
Mar. 8th.

Trespass—Poundmaster—Tender  
—Costs—Act 15 of 1892,  
Sec. 49.

*Respondent's stallion donkey had broken into appellant's camp, in which there was a number of mare donkeys. Appellant sent the stallion to the pound and sued respondent in the Magistrate's Court for £10 damages. Respondent had released his stallion by paying pound fees, and also, under protest, £5 into the hands of the poundmaster. The Magistrate held that this £5 was a tender made by respondent to appellant in terms of Sec. 49 of Act 15 of 1892, and gave judgment in £5 for appellant, but ordered him to pay costs.*

*Held on appeal, that the £5 was not a tender to appellant, but the security mentioned in Sec. 49, and that the Magistrate's judgment must be varied by ordering respondent to pay costs in the Court below and also costs of appeal.*

This was an appeal from a judgment of the Resident Magistrate of Prieska in an action brought by appellant against respondent to recover £10 damages, sustained by reason of a certain stallion donkey having broken into and trespassed in a camp occupied by donkey mares from which appellant intended to breed mules.

The Magistrate had given judgment for plaintiff for £5 damages, but had ordered him to pay costs, holding that £5 had been tendered by defendant through the poundmaster. The present appeal was brought solely on the question of costs.

The Magistrate, in his reasons for judgment, said that from the evidence brought forward it appeared that the donkey stallion was sent to the pound by the plaintiff on or about the 27th April, 1906, along with a letter claiming £5 as damages. The poundmaster

released the stallion some time after payment of the £5 had been made by the defendant. The Court gave judgment for plaintiff for £5, but ordered plaintiff to pay the costs, the judgment being arrived at by virtue of the provisions of section 49, Act 15, 1892.

Dr. Rainsford was for appellant, Jacobus C. Strauss; Mr. Roux was for respondent, Johannes A. van der Berg.

Dr. Rainsford submitted that there was nothing on the record to justify the Magistrate's finding that defendant had made anything in the nature of a legal tender. The Magistrate was under the impression that the sum of £5 was given as a tender under the 49th section, instead of being, as counsel contended it clearly was, security for any judgment that might be given under the section. On the question of whether the poundmaster had power to pay over the money to plaintiff, he cited *Schultz v. Spala* (9 S.C. Reports, 423). From that decision it was clear that the poundmaster had no power to pay over trespass money which had been paid under protest, as in the present case, and that he simply held such trespass money as security. Counsel also cited *Van der Spuy v. Colonial Government* (14 S.C. Reports, 410).

Mr. Roux said that the mistake in this case was made by the Magistrate in not handing over to plaintiff the sum of £5 paid by the defendant. It seemed that when the defendant demanded the stallion from the poundmaster, it was refused unless £5 was paid as damages or security. The defendant went and demanded the donkey and paid over £5 to the poundmaster, as well as mileage and pound fees. The donkey, however, was not released, and it was not until he had commenced proceedings that defendant got the animal from the poundmaster. As soon as defendant got the stallion donkey there was no protest, and the money should have been handed by the poundmaster to the plaintiff. The cases cited by his learned friend were not in point.

Maasdorp, J.: In this case the plaintiff sued the defendant in the Magistrate's Court for damages sustained by him for trespass by the defendant's stallion in a camp in which a number of the plaintiff's mares were running. The following plea was put in to this claim: "Denied the debt and pleaded that the sum of £5 has already been paid to the poundmaster." Under strict rules of pleading, this plea would be regarded as inconsistent in terms. A general denial of a debt cannot be pleaded at the same time with a tender of part of the amount, but if it appears clear to the Court that the parties understood the issue that they had to meet, then the Court would not apply any strict rules of pleading to the process of the Magistrate's Court.

This is contended to be a plea of a tender of £5 in satisfaction of the damages suffered by the plaintiff. On the face of this plea, there is no tender to the plaintiff of anything. The statement is that a certain sum was paid to the poundmaster without any further allegation as to what the relationship was between the poundmaster and the plaintiff, but here, again, if upon the evidence as it stands it should appear that the poundmaster, to the knowledge of both parties, received the money from the one for payment to the other, then the form of the plea may also be disregarded in this respect. It appears that after the stallion had trespassed upon the plaintiff's property and had been sent to the pound, the defendant sent a sum of £5, together with pound fees, to the poundmaster. The poundmaster received this amount, and informed the plaintiff afterwards that this amount has been received by him merely as security for a penalty which might possibly be recovered by the plaintiff if he instituted an action against the defendant. The poundmaster himself now says that he did not quite understand why the money was deposited with him, but he received it upon instructions from a justice of the peace. Well, in all probability, if the poundmaster merely received this money in the exercise of his duty as poundmaster, upon some advice he received from a justice of the peace, as a friend, then he must have acted under section 49, and under the provisions of section 49, the owner of any stallion is entitled to its release upon his depositing with the poundmaster the pound fees and a certain amount of security, or should give security for the payment of any penalty that the injured person might recover. The plaintiff himself says that he handed the money to the poundmaster under protest, and that such money was only to be paid over to the owner of the farm upon proof being given that he had suffered damage. The poundmaster himself says that he received this money as security, and that he could not pay it over to the plaintiff, who could only obtain it by proceedings at law. The plaintiff was informed of this by the poundmaster. Under all the circumstances, it is difficult to discover any evidence that any tender of this amount was made by the defendant to the plaintiff. The money is in the hands of the poundmaster, and the poundmaster is not the defendant's agent for the purpose of paying, nor is he the plaintiff's agent for the purpose of receiving, and he, having received the money from the defendant, very properly refused to pay it over to the plaintiff. Under the 49th section, it was his duty to retain that

money for the purposes of the suit which might be brought for the recovery thereof, unless, of course, the parties had consented that the money should be paid over, and the matter had been settled by such consent. The Magistrate made a mistake in holding that he really proceeded under section 49. There is a provision in section 49 that where the owner of a stallion tenders a sum which is subsequently found to be sufficient to cover the damages, costs will not be awarded to the plaintiff, but this tender is not the payment of the money to the poundmaster, as the Magistrate seemed to imagine, it must be the tender of the money to the injured party direct. Such tender has not taken place, and consequently the Magistrate was wrong in finding that the defendant was not liable for the costs, because he had made a legal tender. The appeal must be allowed, and the judgment varied by ordering the defendant to pay costs in the Court below. Defendant also to pay costs in appeal.

[Appellant's Attorney: P. de Villiers;  
Respondent's Attorneys: Mostert and Son.]

#### FICK V. ABEL.

This was an appeal from a judgment of the Assistant Resident Magistrate of Malmesbury, sitting at Hopefield, in an action brought against appellant by respondent to recover £20, paid for and on behalf of defendant at her special instance and request in October, 1903.

Plaintiff alleged that he made a payment of £20 to Mr. W. J. H. Wilson, to be paid over to the Colonial Mutual Life Insurance Co. on the 3rd October, 1903. Defendant denied the debt. The Magistrate gave judgment for plaintiff, with costs of suit as prayed.

The Magistrate, in his reasons for judgment, said that this appeared to be a perfectly *bona fide* transaction. Mr. Abel, the plaintiff in this action, actually and *bona fide* paid the sum claimed, viz., £20, on behalf of the defendant, to the Colonial Mutual Insurance Co., and Mrs. Fick, the defendant, actually requested Mr. Wilson, a highly-respected resident of the village, to obtain the money for her to pay her premiums on a certain life policy, either from Mrs. Wilson or any other source. Mr. Wilson, acting with the best intentions towards the defendant, and being under the impression that the life policy would lapse, with some difficulty managed to obtain the money on her behalf from Mr. Abel. The money was actually paid, but Mrs. Fick failed to inform Mr. Abel or Mr. Wilson that she had already paid the sums due.

Mr. J. E. R. de Villiers appeared for appellant, Mrs. M. Fick; Mr. W. Porter

Buchanan was for respondent, Richard Abel, a general dealer.

Mr. De Villiers said the defence was that defendant was quite willing to settle with the Insurance Co. for any amount which might be due, but that she was not liable to the plaintiff. Possibly it was a technical defence, but there might be substantial reasons for the defendant's attitude. Counsel argued that Mr. Wilson had not a general authority from defendant to raise money from any source, but only from Mrs. Wilson. Defendant raised all the money she required, except £20, by her own efforts after she had been informed by Mr. Wilson that he could not raise the money. Counsel contended that plaintiff was not entitled to interest from the 3rd October, 1903, as allowed by the Magistrate.

Mr. Buchanan (in reply to the Court) said that he did not press the point as to interest.

Maasdorp, J.: In this case the Magistrate has found a certain number of facts as proved by the evidence, and as there is evidence to support such finding, the Court will not interfere with his finding upon such points, with the exception of one point upon which there may be some doubt as to whether the evidence really supports his finding, and that point I may have to refer to. It would appear that in 1903 the defendant owed certain money to the Colonial Mutual Insurance Society, and her circumstances were such that she found it difficult to pay the amount. She approached Mr. Wilson, from whom she endeavoured to obtain assistance in raising that amount. Shortly after the debt was paid on her behalf by the plaintiff, and the dispute between the parties now is as to the circumstances under which that debt was paid. Mr. Abel contends that the amount was paid at the request of Wilson, as the agent for Mrs. Fick. Mrs. Fick says she did not appoint Wilson as her agent to raise the money from anyone, but only from Mr. Wilson's wife. It seems to me quite unnecessary now to decide that single point upon which the Magistrate's finding upon the facts may be doubtful, because in consequence of the subsequent conduct of the parties, there is no doubt that the debt arises between Mrs. Fick as debtor and Abel as creditor. A dispute having arisen as to the conduct of Wilson in obtaining this money from Abel, Wilson, considering himself responsible, instituted an action to recover the amount from Mrs. Fick, and when it appeared during those proceedings that the money had actually been paid for a debt that was due by Mrs. Fick to the insurance company, the action was dropped on the general understanding that Mrs. Fick would admit her liabilities to Abel himself. Now, the Magistrate finds that, after that Mrs. Fick did actually acknowledge to Abel that she

did owe this debt to him, and requested that more time should be allowed her by Mr. Abel to pay. She was not immediately pressed, so I take it that request was complied with—that time was allowed her by Mr. Abel to pay a debt which she admitted to be due. After that, the defendant is debarred from taking up the attitude that the debt arose from the action of an unauthorized agent. Her subsequent conduct is full ratification of anything that had been done previously, and she is indebted to Mr. Abel in the sum of £20. Some suggestion is made now that the Magistrate in dealing with the interest in the matter exceeded his jurisdiction. It is too late now for the appellant in this case to raise the question of jurisdiction. As the respondent has abandoned the claim for interest, it is not necessary further to mention that matter, except this, that if the Court had disallowed the interest as against the defendant, it would not have affected the question of costs. The main question between the parties raised in appeal was whether £20 was due by the defendant to the plaintiff. The appeal will be dismissed, with costs.

#### MCGREGOR V. PHILLIPS.

##### Evidence—Shop-keeper's books.

*A shop-keeper's books are not per se evidence of the indebtedness of a customer, unless, owing to special circumstances over which the shop-keeper has no control, they are the best evidence which it is possible to produce.*

This was an appeal from a judgment of the Resident Magistrate of Matatiele in an action brought against appellant by respondent to recover £18 11s. upon an account for goods sold and delivered.

The Magistrate, who had given judgment for the plaintiff, said that he considered the evidence of the books sufficient proof of the debt.

Mr. Benjamin was for appellant; Mr. Sutton was for respondent.

Mr. Benjamin said that the account was of a very stale description, and dated back to 1901. On the main point in the case, he submitted that there was no evidence upon which the Magistrate could give judgment for the plaintiff in the case. The only evidence of the debt was given by a bookkeeper, who had never anything to do with serving the goods, and who apparently was not employed by plaintiff at the time of the alleged sales. On the authority of *Fan Nickerk v. Fagan* (14 S.C. Re-



ports, 47), judgment should have been given of absolution from the instance.

Mr. Sutton pointed out certain features of dissimilarity between the present case and the case cited. At the hearing in the Court below, defendant was legally represented, and he allowed the books to go in, and, as he had taken no objection, those books, upon which no discredit had been thrown, must stand for what they were worth. Counsel quoted "Kenny on Criminal Law" (p. 359) and "Taylor on Evidence" (pp. 365 and 623), and submitted that the rule laid down in section 37 of Ordinance 72, 1830, was only intended to apply to the contents of written documents.

Maasdorp, J.: The plaintiff, who is a shopkeeper, sues the defendant in this case, for the price of certain shop goods alleged to have been sold and delivered to him. The defendant denies the purchase of a certain specified number of these articles, and as to the remainder of the goods he does not admit that they were purchased by him, and puts the plaintiff to the proof. He adds that as to such articles as he might have from time to time purchased from the plaintiff he duly paid for them, but he is unable now to produce the receipts. It now becomes necessary for the plaintiff to prove that the goods in the account were actually sold and delivered to the defendant, and he proceeds to do so by calling a bookkeeper, who is at present in his service, to put in an account taken from the books. This account the bookkeeper alleges is a correct statement of the items as they appear in the books. The bookkeeper, who is now in plaintiff's service, is not the person who kept the books at the time when the transactions in question took place, and he is, therefore, unable, from his own knowledge, to give any evidence as to the sale of the goods. The result is that the whole of the evidence produced by the plaintiff in this case may be said to be the books without any proof at all of the correctness of these books. Now, generally speaking, the books of a shopkeeper are not in themselves evidence of their contents, but in certain circumstances the rule is somewhat relaxed, and when those circumstances are established, the books are taken to be the best evidence that could be produced. Now, none of these circumstances exist here at all. I may only instance one of these circumstances, and that would be this, that where a bookkeeper whose duty it is to make entries of transactions which are clearly brought to his knowledge, made those entries, and has since died, the books may be used for evidence of those transactions. I do not state the case with all its qualifications, because that is not a case which arises here, but I merely state it as one of the circumstances which might make the books admissible in evidence. Under

the circumstances of this case, there is no proof that the persons who actually sold the goods cannot be produced to give evidence of the sale, or that the bookkeeper, whose duty it was to make entries of transactions which were brought to his notice by the proper persons, cannot now be produced, because of their death. It is very unfortunate for the plaintiff that he is now in this difficulty, that the only persons who might have assisted him in the matter are no longer in his service, but for that he has himself only to thank. Here we have got a shop account for a number of trifling items running over a period of five years, and under the circumstances it is only to be expected that the plaintiff would find himself in great difficulty in establishing his case. He has not in the present case overcome those difficulties, and the Magistrate was wrong in holding that the sale of the articles was proved. The Magistrate should have given absolution from the instance, and the appeal will now be allowed, and the judgment altered to one of absolution from the instance, with costs in both courts.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MOSTERT V. LUNDERSTEDT. { 1907.  
Mar. 8th.

This was an appeal from a decision of the Resident Magistrate of Stellenbosch, in which judgment was given for the defendant, with costs, in an action brought by the plaintiff to recover £2 10s., agreed to be paid in lieu of notice.

The plaintiff sued the defendant for £2 10s. for rent due in lieu of notice for the month of October, 1906. The defendant hired a house from the plaintiff at a monthly rental of £5 a month, and it was agreed that £2 10s. was to be paid by the defendant in lieu of notice. The only evidence given was that of the plaintiff. The Magistrate, in his reasons for judgment, said: In this case it appears that the plaintiff hired a house to the defendant from 1st April on a monthly tenancy of £5. The rent was paid regularly up to the end of August, 1906. On the 3rd September, a message was left with the plaintiff that the defendant intended to vacate the premises. To this the plaintiff objected, and at an interview with the defendant he stated he required a full month's notice. On paying his rent on the 28th September, plaintiff alleges it was agreed to reduce the rent in lieu of notice to £2 10s. The defendant refused to do so. I consider reasonable



notice was given by the defendant, and it would be a hardship to the defendant if she was compelled to occupy the house another two months. In the absence of any evidence of custom as to a clear month's notice, there would be judgment for the defendant, with costs.

Mr. Benjamin was for the appellant, and there was no appearance for the respondent.

Mr. Benjamin having been heard on the facts,

Hopley, J.: In this case the defendant was sued in the Court below on an agreement stated in the summons to pay £2 10s. to the plaintiff in lieu of further rent. The summons states: Summon Mrs. Lunderstedt for £2 10s., which the plaintiff complains that the defendant owes him for rent due in lieu of notice for the month of October, 1906, it having been agreed that the sum of £2 10s. be paid by the defendant in lieu of notice. To that the defendant pleads the general issue. The only evidence that was given is that of the plaintiff on this point, and he says we agreed to reduce the rent to £2 10s. in lieu of notice. This she promised to pay, but asked for time. The facts seem to be that the defendant hired from the plaintiff a house, paying him by the calendar month £5. The tenancy had begun on the 1st of the month, and the rent was always paid for the calendar month. On the 3rd September, the tenant came and told the landlord that she gave him one month's notice, and that she was vacating the premises. He replied next day that he wanted his full month's notice, in other words, he wanted a month's notice terminating a calendar month. She only said she did not think he would insist upon that. She remained on for a part of September, and then left, going to her new tenancy, I suppose, at all events, leaving that house somewhere about the middle of September, on which date she returned the key to the landlord. He did not ask for it, except for a special purpose, to view the house. She told him he might keep the key. On the 28th September she came and paid him £5 for the month of September, 1906, and on that day or the next day she received a receipt from the plaintiff, in the following terms: "Received from Mrs. Landerstedt, £5 10s., for the month of September, 1906. Balance due for October, £2 10s. (Signed) D. P. Mostert." This receipt she must have received and made no demur as to its terms. She does not deny the agreement to pay £2 10s. in lieu of notice, which the plaintiff demanded. That is the whole point the Magistrate had to consider. I do not understand how he can possibly come to such a decision. It does not seem to me that the legal point can possibly come up

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for decision on these facts. It is not necessary for me to decide here whether or no the notice must end with the calendar month if the house is hired by the calendar month. All the facts indicated are that there was a contract to pay £2 10s., that the £2 10s. was sued for in definite terms, and that it was not paid. It seems to me that the appeal must be allowed, and the judgment of the Magistrate changed to one for the plaintiff for £2 10s., as prayed, with costs in this Court and the Court below.

#### GUNKEL V. TURNER.

This was an appeal from a decision of the Resident Magistrate of the district of Port St. John's. The plaintiff sued on two contracts for the delivery of certain tobacco, and claimed delivery of 5,000 lb. of tobacco, or £64 1s. 9d., as loss sustained. Judgment was for the plaintiff for £64 1s. 9d., but if the defendant delivered the amount of 5,127 lb. of tobacco to plaintiff within thirty-one days from date, this delivery would be held to satisfy the judgment.

Mr. Howes was for the appellant, and Mr. Benjamin was for the respondent.

Mr. Howes said the contention of the appellant was that there was no agreement of intention between the two parties. There was no proof that the defendant knew of such an agreement as plaintiff suggested was made. He contended that the defendant imagined that the contract he was entering into was quite a different thing from the contract upon which the plaintiff claimed. The corroboration of the plaintiff's version mentioned by the Magistrate was hardly corroboration at all. The plaintiff's evidence, it was said, was supported by the entry in his firm's diary, but it was in evidence that it was plaintiff's custom to have witnesses to an agreement of this sort.

Hopley, J.: I do not think it necessary to hear Mr. Benjamin for the respondent. The appeal is purely on a matter of fact. The plaintiff, in the Court below, alleged certain facts on certain two transactions in tobacco with the defendant, who is a Kafir trader or a trader among the Kafirs, and the defendant denied these transactions, and tried to put a different construction on the dealings between himself and the plaintiff. It is sufficient for me to say, in spite of the able argument of Mr. Howes in this matter, that I see no reason to disagree with the Magistrate's finding on fact. He had the witnesses before him, and heard their explanation. He also had the original books, from which these accounts are taken, and the result was that he had a very much better

power of discerning as to the merits of the evidence than we have in this Court. That being so, he gave judgment for the damages for breach of contract. He also gave the defendant the opportunity, if he so chose, to fulfil his contract by delivering the tobacco. There is nothing to show that the defendant is so ignorant or so little acquainted with the English language to misunderstand the contract. However, the Magistrate had a better opportunity of forming an opinion on this point than this Court, because the defendant was actually before him, and the Magistrate would know if he was the sort of man likely to misunderstand the contract. The Magistrate decided that the contract was as alleged by the plaintiff, and I see no reason to interfere with his judgment. The appeal will be dismissed, with costs.

*In re* LOCKED OUT CIGARETTE WORKERS' COMPANY.

Dr. Greer moved, as a matter of urgency, for leave to the provisional liquidator in the estate of the S.A. General Workers' Union Locked-Out Cigarette Workers' Co-operative Society, Limited, to sell certain cigarette-making machinery in the estate. The machinery was stored in the premises of the South African Newspaper Company, and further rent was accruing.

Hopley, J., said this would practically mean the winding up of the company by a provisional liquidator.

Dr. Greer: We might minimise the expense by storing the machinery in a place at a lower rent.

[Hopley, J.: I do not think there is anything to prevent him doing that if the rent is paid. There will be no order.]

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### ADMISSIONS.

{ 1907.  
{ Mar. 12th.

Mr. Searle, K.C., moved for the admission of Robert M. Exham as an advocate.

Application granted, oath to be taken before the Registrar of the Eastern Districts Court.

Mr. Benjamin moved for the admission of Marthinus J. Hattingh, as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Tarkastad.

Mr. Benjamin moved for the admission of Stephanus Sebastian Walters as an attorney and notary.

Application granted and oaths administered.

Mr. Gutsche moved for the admission of Pieter Eduard Roux as an attorney and notary.

Application granted and oaths administered.

### PROVISIONAL ROLL.

#### MOLTENO V. HACKENBERG.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £600, with interest from July 1, 1905, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### REID AND NEPHEW V. LEATHERMAN.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £6 10s. 6d., with interest and costs.

Hopley, J., said that provisional sentence would be granted, but only Magistrate's Court costs would be allowed. Both parties lived in Cape Town, and the amount was small.

Defendant admitted the debt, and said that he had not been able to meet it, because he was out of work.

Mr. Jones then applied for a final judgment against defendant in view of his admission.

Final judgment granted.

#### LEIBBRANDT V. TASSIEM.

Mr. Marais moved for provisional sentence for £18 10s., balance of interest due on a mortgage bond, less £2 10s. paid.

Order granted.

#### TRUTER V. BARENDSE.

Mr. Close moved for provisional sentence on a mortgage bond for £40, with interest at 10 per cent., from January 1, 1903, and for the property specially hypothecated to be declared executable; counsel also applied for provisional sentence for overdue interest on a mortgage bond for £25.

Order granted.

HEINAMAN V. BADARDIEN.

Mr. Roux moved for provisional sentence on three mortgage bonds for £600, £150, and £100 respectively, with interest, less £112 8s. 11d., paid on account; counsel also applied for the property specially hypothecated, to be declared executable.

Order granted.

MOWBRAY MUNICIPALITY V. AUSTIN.

Mr. Swift moved for a decree of civil imprisonment upon certain unsatisfied judgments of the Resident Magistrate's Court, Wynberg, for £10 10s. and £11 5s., and costs, amounting to £3 11s. 5d.

Defendant did not appear.

Order granted.

MALING V. MULLER.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MALING V. DOMANOWITZ.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

FLEMING V. CORBETT.

Mr. Roux moved for provisional sentence on a mortgage bond for £225, with interest from the 1st January, 1906, and £1 2s. insurance premiums, bond due by reason of non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable. Defendant was sued by edictal citation, substituted service having been effected.

Order granted.

ENSLIN V. SWANEPOEL.

Mr. Toms moved for provisional sentence on a mortgage bond for £50, with interest from the 1st January, 1906, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Defendant was sued by edictal citation.

On its appearing doubtful whether a copy of the document sued on had been served upon defendant, the matter was ordered to stand over until the 19th inst. for further information.

STEYN V. VICTOR.

Mr. De Waal moved for provisional sentence on a mortgage bond for £275, with interest from the 1st July, 1905, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ESTATE YOUNG V. AUSTIN.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £500, with interest from the 1st July, 1904, and for £3 0s. 6d., insurance premiums, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

FRASER AND SONS V. COHEN.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

GOLDSMITH V. IRWIN AND LEVIN.

Mr. Alexander moved for a decree of civil imprisonment upon an unsatisfied judgment for £36 11s. 7d. (costs). Counsel (in answer to the Court) said that the matter arose out of a case of spoliation of certain horse and wagon.

Levin repudiated any liability.

Hopley, J., said that he could not enter into that question at this date.

Irwin said that he did not understand English, and could only speak Yiddish.

It appeared that an interpreter was not available, and the matter was ordered to stand over for a week, his lordship advising the defendants to try to come to terms with the plaintiff in the meantime.

REVIEW.

REX V. MARTIN.

Act 7 of 1905, Sec. 2—Fine for deterioration of stolen stock.

Hopley, J., said that this case, which was for theft of a mare, came from the Resident Magistrate of Prieska. The accused was clearly found guilty of the theft of the mare, and the Magistrate sentenced him to 12 months' hard labour and to pay a fine of 10s., or in default one day's imprisonment. Now, he must have acted in that matter under the Act 7 of 1905, but that only said that if the property were lost or deteriorated to more than half its value

the Magistrate may enforce a fine and further imprisonment beyond the ordinary jurisdiction of the Stock Thefts Act. However, the mare was recovered, and apparently without any deterioration. While the sentence of 12 months' hard labour must stand, that portion of the sentence which imposed a fine and in default one day's imprisonment, must be struck out.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

SCARBROW V. ADAMS. ( 1907.  
( Mar. 13th.

Mr. Roux moved, as a matter of urgency for an interdict attaching certain money in the hands of defendant or her agents, Fagan and Markotter. Petitioner said he was a medical practitioner, of Somerset West Strand, and that defendant owed him £400 upon a second mortgage bond. On the 26th February last he obtained judgment against her, and a writ of execution was issued against the defendant's movable and immovable property. The movables had been disposed of by defendant to defeat plaintiff's claim, and the proceeds were in the hands of defendant or her agents. There was a piece of land against which a first mortgage bond was registered, and it was expected that there would be a considerable shortfall if the land were sold. Mr. Roux (in answer to the Court) said that petitioner's bond contained the general clause.

Order granted, authorising the Sheriff to attach the said moneys in the hands of the defendant or her agents, Fagan and Markotter, and rule nisi to issue calling upon defendant to show cause why such moneys should not be applied in satisfaction of the plaintiff's claim, rule returnable on the 26th inst.

### ILLIQUID ROLL.

WALKER V. BRUNT, INDIVIDUALLY AND AS TRUSTEE OF INSOLVENT ESTATE WALKER.

Mr. Alexander moved, under Rule 330a, for leave to sign judgment against plaintiff (Brunt) for not proceeding with his action within the time fixed by

Rules of Court, and for removal of a certain interdict.

Dr. Greer appeared for respondent, and said that he opposed the portion of the notice of motion asking for the discharge of the interdict in reference to certain portion of the money, viz., £32 10s.

Mr. Alexander said that respondent had consented to withdraw the summons and pay taxed costs.

Affidavits having been read and counsel heard in argument on the facts,

Hopley, J.: In this case Mr. Brunt was the owner of a house which he sold to one Hazell, who immediately resold it to Mrs. Walker, Mrs. Walker passing a bond directly to Mr. Brunt for the sum of £3,000, and, I suppose, paying some cash. At the time the place was taken over by the Walkers there were some articles which were of a debatable nature, as to whether they were fixtures or not, or as to whether they passed with the house to the buyer, and eventually a compromise was arrived at in respect of these, and a sum of £32 10s. was agreed upon as being the value at which they should be taken over, and it would appear, and the correspondence shows that Mr. Walker had rendered himself liable for the sum of £32 10s. for these alleged fixtures. Subsequently the Walkers lived in that house, there being furniture in the house, and they seem to have got into difficulties, so that at a certain stage they advertised the furniture for sale. Thereupon Mr. Brunt came in his individual capacity and got from the Court a rule interdicting the auctioneer, who was allowed to go on with the sale, from parting with the proceeds of the furniture he was selling, and also at that same time he asked that the estate of Mrs. Walker be provisionally sequestrated. He got his order; Mrs. Walker's estate was sequestrated, and the money was interdicted in the hands of the auctioneer. Now, it is clearly proved that the Court, in giving such order, looked upon this furniture as being, as alleged in the petition, the property presumably of Mrs. Walker, who was then insolvent, and if there were any doubt upon that point that doubt would be resolved by the fact that he obtained an order pending the appointment of a trustee, clearly showing that it would be in the mind of the Court that it was the property of Mrs. Walker that was interdicted. Well, the insolvency proceeded, and Mr. Brunt was elected sole trustee. He, apparently, is also the largest, if not the sole, creditor. He thereupon went to the auctioneer, and, showing the order of the Court, got the auctioneer to hand over to him the proceeds of this sale, £83 or £84. That I do not think he had any right to do. He certainly was the trustee, but the order of the Court did not say that upon the

appointment of the trustee the auctioneer is to forthwith hand over to him this money, more especially as it afterwards became evident there was really another claim to the proceeds of this sale, viz., that of Mr. Walker himself, who is married to insolvent out of community of property. He claimed that certain of this property which the auctioneer was selling was his own, and he produces proof which the respondent apparently is not in a position to controvert. So matters stood for a time. Eventually, on the 30th October, some time after the sale of this furniture had taken place, and the property had been interdicted, Mr. Walker was compelled to come to this Court, and the Court then ordered that the rule be extended for a fortnight, and then be set aside, and the money handed by the auctioneer to the applicant (Mr. Walker), unless the respondent previously bring an action to establish his right to the said money, in which case the rule should stand. It was further ordered that, if the applicant were to give security to the satisfaction of the Registrar, the payment of the money might be made forthwith to him. The Court therefore still thought the money was in the hands of the auctioneer. Well, the respondent allowed the whole of the November term to go past, and at the very end of the fortnight he issued a summons, and since then he has done nothing at all. Another term has elapsed, and it seems Mr. Walker now comes and asks to sign judgment against the respondent. I do not think Mr. Brunt can escape the consequences of such a motion as this at the last moment by withdrawing the summons and offering to pay costs. I do not want to settle this finally, but it seems to me to withdraw the summons at such a stage is a proceeding which the Court will take no notice of. The only thing that complicates it is that to-day it is opposed on the ground that amongst the moneys so interdicted was alleged to be a sum of £32 10s., the proceeds of articles which were looked upon as fixtures. On that there is a dispute. Walker denies that he has sold any of those articles. I think, if the facts as to those articles had been before the Court when the interdict was applied for, no order would have been made interdicting the proceeds of sale of such articles which were in dispute between the parties. Mr. Brunt, if he can establish his right, may bring an action against Mr. Walker. At present I see no reason for restraining any portion of these articles. The order will be that judgment be signed against plaintiff as prayed, and that respondent pay over to applicant the moneys obtained by him from the auctioneer Phillips forthwith, and that respondent pay the costs of this and previous applications.

OUDTSHOORN MUNICIPALITY V.  
MOOICHANG.

Mr. P. S. T. Jones moved for judgment, under Rule 319, in default of plea, for £10 10s. 3d., with interest and costs, being for rates. Defendant was sued by edictal citation. Counsel also applied for certain moneys in the hands of the Master, which had been attached, to be declared executable.

Order granted as prayed, moneys in the hands of the Master declared executable.

LEON V. STEYN.

Mr. W. Porter Buchanan moved for judgment, under Rule 319, in default of plea, for payment of £40, money lent, with interest and costs. Service had been made upon defendant's attorneys. Order granted.

GOURLAY V. JONES.

Mr. Gutsche moved for judgment, under Rule 329d, for £290, upon certain promissory note, with interest, and for £69 19s. 3d., goods sold and delivered. Order granted.

DEMPERS AND VAN RYNEVELD V.  
GROENEWALD.

Mr. Pohl moved for judgment, under Rule 329d, for £9 6s., amount disbursed for defendant. Order granted.

GUTHRIE AND THERON V. TALJAARD.

Mr. Gardiner moved for judgment, under Rule 329d, for £108 17s. 11d., goods sold and delivered, with interest and commission and £32 8s., moneys advanced and disbursed, etc.

Mr. W. Porter Buchanan (for defendant) applied for leave to purge default and enter appearance, or, alternatively, for a postponement of the case until fuller affidavits could be laid before the Court. Plaintiffs had already obtained provisional sentence for £40 on a promissory note.

The matter was ordered to stand over until the 26th inst., defendant to pay wasted costs.

KIMBERLEY WATERWORKS CO. LTD. V.  
STEWART.

Mr. Inchbold moved for judgment, under Rule 329d, for £9,097 19s. 3d., being the amount of certain defalcations by defendant of moneys of the plaintiff company. Counsel put in a confession by defendant and the record of the High Court of Griqualand.



[Hopley, J.: I suppose defendant is in prison.]

Mr. Inchbold: Yes. He was sentenced to two years' hard labour.  
Order granted.

#### REHABILITATIONS. { 1907. { Mar. 13th.

Mr. Toms applied for the rehabilitation of Christian Frederick Zietsman.  
Granted.

Mr. Marais applied for the discharge from insolvency of David Johannes Welgemoed.  
Granted.

Mr. De Waal applied for the rehabilitation of Hendrik C. Rensburg.  
Granted.

#### GENERAL MOTIONS.

##### ESTATE LLOYD V. JACOBS.

Mr. Benjamin moved for judgment in terms of consent paper. The action related to the proceeds of a policy of insurance effected on the life of deceased for £1,000. By the terms of settlement a sum of £700 was to be paid to the plaintiff, and £300 to the defendant, each party to pay his or her own costs.

Judgment entered in terms of consent.

##### *Ex parte* SPIERS.

Mr. Swift moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

##### *In re* PURE MILK SUPPLY CO. (IN LIQUIDATION).

Mr. Roux presented the second report of the liquidator, and applied for the usual order as to lying for inspection and publication.

Usual order granted, publication in the "East London Dispatch."

##### HOBEN V. CAPE TOWN STEVEDORING CO., LTD.

Mr. Swift moved for an order on respondents to return a certain steam launch and for an interdict.

Mr. Gardiner was for respondents.

An action had been heard before the Chief Justice, in which Hoben sued the respondent company for £100, being part purchase price of certain launch. (17 C.T.R., 154.)

Mr. Swift said that respondents had abandoned the yacht at the docks, and, while it was so abandoned, the brass-

work had been removed by thieves. Applicant claimed that he was entitled to the return of the launch by respondents with the brass work intact.

Mr. Gardiner: The applicant failed in his claim in convention, and respondents succeeded in their claim in re-convention to the extent of £28, and were awarded costs. Applicant should restore the brass work and bring an action to recover the cost, if need be, against respondents.

Mr. Swift said that the Chief Justice, in an *obiter dictum*, stated that the launch must be delivered by the company in the condition in which it was handed over at the time of the sale. That, however, did not form part of the written order.

Mr. Gardiner said that he had no recollection of the Chief Justice having made the remark quoted by his learned friend. Respondents had got their judgment, and now wanted to take execution.

The matter was eventually ordered to stand over till to-morrow.

*Postea* (March 14th).

The affidavit of the applicant set out that for the last six or seven months the launch was left by the respondents uncared for in the open, and practically everything movable had been stolen out of her. The engine and machinery were badly rusted, and it would require something like £200 to put her in the same order and condition in which he handed her to the respondent company. The boiler had been removed, and the stay had not been replaced. He declined to accept the launch in such a state, but the respondents declined to hand it back in accordance with the judgment. He was prepared to pay the respondents £38, and the taxed costs, when the launch was handed back in the same condition.

The answering affidavit of Joseph Watson, one of the directors of the respondent company, denied that the respondents were ordered to return the launch in the same order and condition as at the time of the sale. The Court ordered the respondent to replace the boiler in the launch as far as the materials were concerned. He admitted that some brass fittings had been stolen, and that she had been lying in the open, and that there was some water in the hull, but that was the fault of the applicant in not having taken steps to remove the water, as the launch was lying there at his risk.

Mr. Clore said the launch was sold to the company on the 7th March, 1906, with a guarantee that the launch was in good working order and condition. For six months the company had the launch running, and at the end of that time an examination was made by having the boiler taken out. Having paid £38 as one instalment, they were sued in an

action for £100 as being the next instalment of the contract. That was defended on the ground that the goods were not up to warranty, and they were not bound to carry out the contract. They claimed in reconvention to have the contract rescinded and tendered back the launch. His Lordship the Chief Justice gave judgment for the defendant in convention, and consequently for him as plaintiff, in reconvention for the rescission of the contract, and for the return to him of the £38, with costs, on his tendering back the launch. The point in the action was as to the boiler apart from the machinery. His lordship held that this boiler was not in good order and condition in terms of the guarantee otherwise there was no fault to be found with the launch at all. As counsel understood the order of the Court, His lordship said the tender on the 24th August was no tender, because the boiler had to be put in the launch, and judgment was for the defendant in convention, for plaintiff in reconvention for a rescission, and for return of £38, with costs, the defendant to return the launch with the boiler in it, and as received. They admitted that the written order did not contain anything that was directed at the time. Mr. Watson, for instance, in his affidavit said the boiler had since been connected as far as materials would allow, and that did not appear in the order.

Mr. Gardiner said he did not remember the Court ordering the launch to be restored in the state in which it was at the time of the sale. Counsel's note was to the effect that the defendant was ordered to return the launch and boiler with the boiler inside, so far as materials would allow, the defendant to replace the stolen parts, but counsel's attorney did not recollect anything about the stolen parts.

Mr. Close said technically the plaintiff might claim the whole of the profits made during the running, according to Voet (21.1.4), where the various things a purchaser must do were discussed.

[Hopley, J., said it seemed to him a good marine surveyor would have been the man who could have made an equitable allowance. He often wondered why people like these brought such matters before the Court.]

Mr. Gardiner said there had been negotiations, but nothing had resulted. The resident engineer of the Union Castle Co. had said the boiler was dangerous to life, and it was not a boiler that would be passed by the Harbour Board. There was evidence that it was worth nothing but as scrap iron.

Hopley, J., suggested that the parties should come to terms, and after the adjournment

Mr. Close announced an arrangement as follows: That the applicant, Mr. Hobben, accept the launch, boiler, and

machinery in their present state, the applicant to keep the £38, which he was ordered to repay, and each party to pay its own costs in the action and the motion.

An order accordingly was made.

PENHALONGA PROPRIETARY MINES, LTD.  
AND ANOTHER V. STRICKLAND AND  
ANOTHER.

Mr. Benjamin moved for an extension of time within which to prosecute certain appeal from a judgment of the High Court of Southern Rhodesia in the next ensuing term of the Supreme Court. There had been some delay in the printing of the record.

Leave granted to prosecute appeal during the next ensuing term.

*Ex parte* STONE.

Mr. Swift moved to make absolute certain rule nisi authorising amendment of certain transfer deed.

Rule absolute.

*Ex parte* GABRIEL.

Mr. Douglas Buchanan moved for a certain rule to be made absolute authorising petition to sue her husband *in forma pauperis* for divorce.

Rule absolute, Mr. Stent to act as attorney, and Mr. D. Buchanan as counsel to the applicant.

*Ex parte* LEVING.

Dr. Greer moved on behalf of the petitioner for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Petitioner said he came to this country from Australia about six years ago; he carried on business near Port Nolloth, and his wife, although repeatedly requested so to do, refused to join him.

Leave to sue by edictal citation granted, with leave to serve citation interdict and notice of trial together, returnable on the 13th June.

*Ex parte* SNOOKE.

Cricket team—Articled clerk—

Leave of absence.

Mr. P. S. T. Jones moved for leave of absence to petitioner from certain articles of clerkship for a period of six months, in connection with the English tour of the South African cricket team, of which Mr. Snooke is a member. Petitioner is articled to a firm of attorneys in Cape Town, and has his principals' consent.

Leave granted to applicant as prayed, on the understanding that service be given at the end of the articles in lieu of the period of absence allowed.

#### STEENKAMP V. STEENKAMP.

Mr. Roux moved, as a matter of urgency, on behalf of the plaintiff, who lives in the division of Calvinia, for an interdict restraining defendant from parting with any of the assets of the joint estate, and directing an inventory to be made, pending an action to be brought by petitioner for divorce and division of the joint estate.

The Court granted a rule nisi, to operate as an interim interdict, calling upon respondent to show cause why he should not be restrained from parting with any portion of the joint estate of himself and petitioner, pending decision of the action instituted by petitioner, and why Nicolaas S. Louw should not be appointed receiver of the said estate, pending such action, and the said Louw authorised to make immediate inventory of the joint estate, and why respondent should not pay costs, rule returnable on the 2nd April with leave to petitioner to telegraph the order.

#### GRAY V. R.M.'S CLERK, CAPE, AND ANOTHER.

Magistrate's Court—Appeal from—Rule 33, Schedule B. to Act 20 of 1856.

*An appeal from the decision of an R.M. Court must be noted on the next Court day, that is on the Tuesday or the Friday following the day on which the judgment is given.*

This was an application upon notice to (1) the Resident Magistrate's Clerk of the Cape, and (2) the Green and Sea Point Bowling Club for an order compelling the first-named respondent to accept notice of intention to appeal from a judgment delivered on the 16th January by Mr. Lotter, A.R.M., in a suit in which the applicant was plaintiff, and the second named respondents were defendants, which notice was on the 19th January tendered to him, and refused on the ground that it did not comply with Rule 33, Schedule B, of Act 20, 1856, and why the second-named respondents, in case they opposed, should not be ordered to pay costs.

Mr. Gardiner was for applicant; Mr. Howel Jones was for the first-named respondent. The second-named respondents did not appear.

Rule 33, Schedule B, of the Resident Magistrates' Court Act of 1856, says that

an appeal from a judgment of the Magistrate must be noted not later than the next Court day. The Resident Magistrate's Court in the Cape has two proclaimed days in the week, viz., Tuesdays and Fridays. Judgment was given in the present case on a Wednesday, and applicant claimed that by the practice of the Court he was entitled to note an appeal with the Magistrate's Clerk not later than the following Tuesday. Mr. De Smidt, attorney, and Mr. W. B. Shaw, law agent, said that this had been the practice for some years. The Magistrate's Clerk said that the appeal should have been noted on the following Friday, which was the next Court day after that on which judgment had been given. An affidavit to the effect that this had been the practice had been sworn by Mr. Brittain, another practitioner.

Mr. Gardiner (in answer to the Court) said that he did not press for costs against the R.M.'s Clerk. What his client desired was leave to appeal. He submitted that the Court had power to grant leave, on the authority of *Africa v. Rhenish Mission Society* (21 S.C. Reports, 650). The Magistrate's Clerk had *bona fide* erred in refusing to accept notice. Two days had been proclaimed in 1874 as Court days in the district of the Cape, viz., Tuesdays and Fridays. Government Notice No. 546, 1895, said that Resident Magistrates should hold a Court upon such days as had been announced, and should, if occasion required, hold their Courts daily. That notice, counsel submitted, did not affect the question of what were the days proclaimed. The applicant had no wish to secure an interpretation of the rule; what he wanted was leave to appeal.

Mr. Jones said that the authorities contended that the rule must be read as it stood, taking Tuesdays and Fridays as Court days. The appeal should, they said, have been noted on the Friday.

Hopely, J.: In this case there is apparently a desire on the part of the present appellant to appeal against a judgment of the Resident Magistrate's Court, given on the 16th January. As there seems to have been a *bona fide* mistake either on the part of the practitioner, who was acting for the applicant, or on the part of the clerk to the Resident Magistrate, it is right that there should be relief to that extent for the applicant, and that he should not, on account of that *bona fide* mistake, be precluded from the right which every man has if he is dissatisfied with a judgment of the Lower Court. Therefore, especially as the other party does not oppose, leave will be given to note an appeal and to prosecute it in the ordinary course. A further question, however, arises as to whether the Magistrate's clerk was at all in the

wrong in refusing to take the notice which was tendered to him on the 19th January. Now it appears that since 1874 there are two days in the week that have been set aside as regular Court days for the purpose of the construction of Rule 33, Schedule B, of the Magistrate's Court Act, viz., Tuesdays and Fridays, and it is said, and not contradicted that those are the only days for which summonses in the Court in civil matters can be made returnable. The rule says that "any party . . . in any civil case . . . if he intend to appeal therefrom to any superior Court, shall, on the next Court day, make known his intention to the clerk of the said Court, who shall note his appeal, with the date thereof, in the proper column of the record-book." In the present matter, the case in the Court below was first of all called on the 14th January, it was part heard on that day, and it was continued on Wednesday, the 16th January, when judgment was given. Then came Thursday and Friday, the 17th and 18th, and only on Saturday, the 19th, was the noting of an appeal tendered to the Resident Magistrate's clerk. The Magistrate's clerk thereupon says that he must abide by the reading of the rule, and that applicant should have come on the next Court day, which he understood to be the Friday. It is said that there is a practice in the Court, or has been, that all cases decided between Tuesday and Friday should be taken as if they had been decided on the Friday. Two practitioners of considerable experience say that that is their experience, but, on the other hand, a practitioner, who has been practising longer in that Court, and with a very large experience of that Court—Mr. Brittain—comes and says he knows of no such practice. He, therefore, reads the rule in the same way as the Magistrate's clerk does. It seems to me that, there being this dispute, the Court must take the rule as it stands, and read it accordingly. I cannot, therefore, say that the Magistrate's clerk was wrong; I think he was right. While the applicant has leave to appeal, and the Court will direct the Magistrate's clerk to accept notice of appeal, I think the application for costs against the clerk should be refused, and that the applicant should be ordered to pay the clerk's costs in coming here. I would just say that I do not think the practice which Mr. De Smidt and Mr. Shaw contend was in their minds as the correct practice is by any manner of means a bad one or an inconvenient one. I think, on the other hand, it would probably be very convenient to have some such practice established if it were thoroughly understood by everybody, and if the Magistrates were to let it be known to practitioners that that was the reading to

all concerned. But then the grievance is a very small one, because if they deposit £1 17s. 6d., that is all that is required when noting an appeal, and that amount can always be got back if within a fortnight they abandon their appeal. On the present application, the applicant must pay costs of the respondent who has appeared, and the Resident Magistrate's clerk will be authorised to note an appeal, so that the appeal may go on.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### GENERAL MOTIONS.

*Ex parte* ESTATE VAN DER ( 1907.  
BYL. } Mar. 14th.

Mr. Gutsche moved for an order authorising the Sheriff to attach the respondent's undivided portion of certain land, and sell same, to meet the taxed bill of costs, surveyor's expenses, etc., in connection with partition. The amount of the respondent's share of expenses was £294 10s. There were eight respondents in default. The petitioner had been unable to find movables on which to satisfy the claim.

Hopley, J.: In the peculiar circumstances of this case, which has often been before the Court, it was wise, perhaps, to come to the Court. All the same, I think you might have got the writ from the Registrar. The Court will authorise a writ to be issued against the immovable property for the satisfaction of these costs.

*Ex parte* BERNING.

Mr. Roux moved, on the petition of Frederick Simon Berning, attorney, Kokstad, for leave to sue one Tonsi Kuswaye, a blacksmith, by edictal citation on a mortgage bond granted by petitioner on security of quitrent ground at Kokstad. Petitioner said that respondent had paid no interest since June 30, 1905, and that he left the Colony a few years ago, and had lately been residing in Alfred County, Natal. Counsel also applied for the property to be attached *ad fundandum jurisdictionem*.

Leave to sue by edict granted and property attached, personal service, failing which, one publication in the "Kokstad Advertiser," citation returnable on the 2nd May.

#### AMALINDA V.M. BOARD V. COLONIAL GOVERNMENT.

Mr. Gutsche moved for the appointment of the Assistant Resident Magistrate of East London as commissioner, to take the evidence of such witnesses as may be called by the respective parties.

Mr. Howel Jones appeared for the Government to consent.

Ordered that a commission *de bene esse* to examine all necessary witnesses who may be called by the respective parties do issue, and that the A.R.M. of East London be commissioner, costs to be costs in the cause.

#### *Ex parte* PIENAAR.

Mr. De Waal moved for leave to petitioner, managing director of the firm of J. P. J. Pienaar and Co., Ltd., of Loxton, for leave to sue one Mason Murray Rose by edictal citation for debt, and for the attachment of a certain erf in Loxton *ad fundandam jurisdictionem*. Respondent was believed to be in German South-west Africa.

Leave to sue by edict granted, and property attached *ad fundandam jurisdictionem*, personal service, failing which, one publication in the "Windhoek Nachrichten," citation returnable on the 14th May.

#### MAREE V. MAREE.

Mr. Roux moved for the removal of this case for trial at the ensuing Circuit Court at Aliwal North. Notice was given to respondent in the citation that an application would be made for removal of the trial.

Case removed accordingly.

#### *Ex parte* VINK.

Mr. Alexander moved for an order authorising the executors in the estate Vink to pass transfer of certain farm property at Koeberg, in the Cape Division, to the petitioner. Counsel said that the other parties interested under the will had entered into a deed of renunciation. Petitioner was the grandson of the testator. One of the executors consented to the application, but there was no statement by the other executor.

Order granted as prayed.

#### *Ex parte* KOTZE.

Mr. P. S. T. Jones moved, on the petition of David Jacobus du Plessis, as executor in the estate Kotze, for leave to mortgage certain property at Pearston, in order to pay the costs of an action brought by the estate against one Van As. The matter had previously been before the Court, and the Chief Justice had ordered the attorney and client bill of costs to be taxed, an amount of about £11 having been taxed off. The costs and disbursements amounted to £680 3s. 9d. After the action, Van As became insolvent, and a very small sum had been received from his estate. Counsel read a report by the Master, who said that as father of the legatee, petitioner had sufficient ground for the action, but he did not satisfy himself that Van As was in a position to pay costs.

Hopley, J., said that the executor seemed to have acted *bona fide* throughout. The costs seemed to be heavy, and the remit was extremely unsatisfactory, but there appeared to be no alternative but to allow the property to be mortgaged.

Mr. Jones applied for leave to mortgage the property for costs of the action and of the present application.

Leave granted to mortgage the properties mentioned for the amount of the costs in the action against Van As as taxed, and taxed costs of this application.

#### *Ex parte* PUXTY.

Mr. P. S. T. Jones moved for an order for the release of the petitioner from arrest pending payment of £3 a month. Petitioner had formerly been associated with one Jacob Myers in pushing a consumption cure called "Acraum." Myers was out of the country. Petitioner had been touring the country for some months past with a bioscope. A decree of civil imprisonment had been obtained against him by one L. C. Streeter, of Worcester, without his (petitioner's) knowledge. He was arrested on the 11th inst. at Mossel Bay and lodged in gaol.

Hopley, J.: It is impossible for me to vary the order of the Court on an *ex parte* motion where there are other parties interested who might very well wish to oppose such a change in the order. I cannot, therefore, make an order at present. I can only advise you to give the opposition party due notice, so that they may be properly before the Court.

#### *Ex parte* VAN WYK.

Mr. Burton moved for a certain rule to be made absolute authorising the sale



and transfer by the petitioner to his three sons of half-share in a certain farm for £500, authorising the minor children to mortgage the said property, and appointing one Mr. Louw as guardian. Counsel said that there was no opposition by the children of Hendrik C. van Wyk, to whom notice of the rule had been given.

Rule absolute.

*Ex parte* STRAUSS.

Mr. Roux moved, as a matter of urgency, for an order authorising registration of transfer of certain property in the division of Calvinia belonging to the estate of Catherina Wilhelmina A. Strauss, bought at public auction by petitioner (who is executor testamentary) and another.

Order granted as prayed.

JAGGER V. WEINBERG AND ANOTHER.

Mr. Burton moved as a matter of urgency for an order restraining Joe Weinberg and Simon Weinberg, of Prieska, from dealing with certain articles which they had obtained by undue preference from an insolvent estate.

A rule nisi was granted to act as an interim interdict, calling on the respondents to show cause why they should not be restrained from parting with the property pending an action to be brought by the trustee, and why they should not pay the costs, the rule to be set aside on respondents giving sufficient security, rule returnable on April 2.

*Postea* (March 21st).

It appeared that the parties had not arrived at an agreement. The first-named petitioners are creditors to defendant for about £76, and the second-named petitioners have a claim against him for about £60. Defendant some time ago assigned his estate to the Board of Executors in Cape Town, and petitioners were alleged to have been parties to the deed. They alleged, however, since the said assignment, certain other creditors, one of whom was not a party to the deed, had been paid in full, and that writs of execution had been taken out against defendant. The defendant replied that the payments had been made, not by himself, but by third parties.

Laurence, J., informed Mr. Benjamin that he was of the same impression as he was on Tuesday, that this was a case in which final sequestration should be granted.

Mr. Benjamin said that he had been instructed by his attorneys to lay the facts of the case before the Court.

[Laurence, J.: I suppose I am bound to hear you, but I certainly think that the case is one in which the provisional order should be made final.]

Mr. Benjamin submitted that the petitioners had an ulterior object in view in the proceedings, viz., to upset the deed of assignment. If the estate were to be administered under the provisions of the Insolvent Ordinance, as provided in the deed of assignment, all the movables which had been assigned to the assignee would be distributed amongst the creditors in accordance with the provisions of the Ordinance, and there could be no advantage in coming to the Court and asking that the estate should be wound up under the Insolvent Ordinance. Counsel submitted that the petitioners wanted the assignment set aside, because there was a possibility that the immovable property could be realised to their advantage. This immovable property was not included in the assignment, and was bonded to the Board of Executors. In this case a bargain had been made between the debtor on the one hand and the creditors on the other. By that they must abide. There was no express condition that the creditors only signed subject to all the creditors signing. The fact that certain creditors had not signed was no ground for setting aside the deed. Counsel submitted that there could be no *bona fide* reason for the present application.

Without calling upon Mr. Burton,

The Court ordered the final adjudication of the defendant's estate.

## SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE.]

ADMISSIONS. { 1907.  
{ Mar. 19th.

Mr. Benjamin moved for the admission of Michael Muller Brink as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Ladismith.

Mr. Inchbold moved for the admission of Philip Jacobus Fouche as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Barkly East.

Mr. Toms moved for the admission of Gilbert Cronwright Christie as an attorney and notary.

Application granted, and oaths administered.

### PROVISIONAL ROLL.

#### SMUTS AND KOCH AND ANOTHER V. SMITH.

Mr. Burton moved for the final adjudication of the defendant's estate as insolvent.

Mr. Benjamin appeared for defendant, a farmer in the Malmesbury Division. Defendant, in an affidavit, said that it was not for the benefit of his creditors that his estate should be sequestrated. He had assigned his estate to the Board of Executors, Cape Town, with the exception of a fourth share in certain farm, which was mortgaged. The creditors had agreed to the deed of assignment, and had already acted under it, having advertised a sale of his property. Deponent said that there was a debt due to a firm of creditors, who had not signed the deed. This had been paid by his brother, and the indebtedness had been extinguished.

Mr. Burton read a replying affidavit by A. C. Koch, one of the petitioners, who said that since his firm had signed the deed of assignment certain writs of attachment had been issued against the movables of the estate of Smith. He was informed that the debts due to two creditors had been paid in full since the deed of assignment. On learning this, deponent's firm withdrew from the deed.

Mr. Benjamin said that this was not a *bona fide* application. Two debts owing by defendant, it was true, had been paid off, but by a third party. It would be more to the advantage of the creditors that the estate should be administered under the hands of a well-known gentleman like Mr. Roos, who under the deed of assignment was appointed to administer in accordance with the terms of Ordinance 6, 1843.

Laurence, J., threw out a suggestion that it would be in the interests of all concerned that the estate should be sequestrated and a trustee appointed. He ordered the matter to stand over, and urged the parties to try to come to an arrangement in the meantime.

#### HANAU V. BUCHANAN.

Mr. Searle, K.C., moved for the final adjudication of the defendant's estate as insolvent. Counsel read an affidavit by Isidor Hanau, of Wynberg, the holder of a bond for £1,500, money lent and advanced to respondent, who formerly carried on business in Cape Town

as a bookseller and stationer. In 1903 Buchanan became involved financially, and his estate was assigned in November, 1903. About £229 was available for distribution, and this amount was awarded to petitioner as preferent creditor under the bond. A sum of £1,030 was still due to petitioner, in addition to which there were concurrent creditors. The deponent also referred to an interest which respondent had held in a mining venture at Millwood, Knysna.

Mr. Molteno (for defendant) read an affidavit, in which he said that he was at present residing in Johannesburg. He claimed that he was released under the deed of assignment, which had been acted upon by petitioner, and pointed out that an application had previously been made in the Court for the sequestration of his estate, the provisional order being discharged in January, 1904. He also stated that the mining venture at Knysna was being liquidated. Counsel also read an affidavit by B. G. Heydenrych, who said that, after the payment of his interest in the mining venture at Knysna there would be no balance available for other creditors. He was a creditor to the extent of £2,400. It would not facilitate the liquidation if defendant's estate were sequestrated. Messrs. Syfret, Godlonton and Low had called for tenders for the purchase of the property and business at Millwood.

Mr. Searle read an answering affidavit by petitioner, who said that Heydenrych was not a party to the assignment, and he had refused to be a party. It was through Heydenrych's action that cash in hand was being wasted and the liquidation of the property of the Preston Buchanan Gold Mining and Development Syndicate was delayed. It would be to the benefit of the creditors that the defendant's estate should be sequestrated. Counsel added that the object of the present application was to bring the whole matter to a head. Heydenrych and Martin claimed a preference over the mining venture at Knysna, and said that the creditors of Buchanan, the bookseller, had no claim against Buchanan, the miner. Sooner or later there must be an action to determine the rights of parties.

Laurence, J., suggested that the proceedings should be postponed until the tenders had been dealt with.

Mr. Searle said that the tenders received had been so unsatisfactory that it was not likely that anything would be gained by a postponement.

Mr. Molteno submitted that under the assignment the defendant was entirely released. Plaintiff was bound by the assignment. It was not alleged that defendant had not in every possible way carried it out. It would not be to the benefit of the creditors in any shape or form to place defendant's estate under the insolvency law. The respective rights of plaintiff and Heydenrych and

Martin as regards the prospecting and mining venture could very well be determined without incurring the expense of a sequestration. Counsel cited *Hosack v. Lippert* (3 Juta, 272) and *Trustee De Vos v. Bournill and Co.* (1868, Buchanan, 1).

Laurence, J., said that the amount in question was a very small one, and he suggested that the case should stand over for a week with a view of arriving at a *modus vivendi* between plaintiff and Heydenrych.

To this counsel consented, and the matter was accordingly ordered to stand over until the 26th inst., His Lordship observing that, as the assets were so small, it would be a misfortune to have a complicated litigation.

GOLDSMITH V. IRWIN AND LEVIN.

Mr. Alexander moved for a decree of civil imprisonment against defendants upon an unsatisfied judgment for £36 11s. 7d., amount of taxed costs incurred in certain spoliation proceedings. The matter was before the Court last week and was ordered to stand over, as Irwin said that he could not speak English and there was no Yiddish interpreter in Court. Mr. Justice Hopley, before whom the application last week was heard, suggested that in the meantime a settlement should be come to. Defendants, however, had made most inadequate offers.

Defendants both said that they were not in a position to make any substantial offer towards the liquidation of the debt. They were cross-examined at considerable length as to their means.

Mr. Alexander said that Levin had money, and could make a reasonable offer, but his objection was principally as to his liability.

Laurence, J., said he was not satisfied with regard to either of the defendants, that they were not able to do something towards meeting the debt which they owed by the judgment of the Court. He would, however, give both the defendants a chance. The Court would order a decree to issue; to be suspended on payment by Levin of 15s. a month and Irwin 5s. a month, first payment to be made on the 1st May; payment to be made at the office of plaintiff's attorney, with leave to plaintiff to move the Court for an increased order when so advised.

MARAI'S V. TRUSTEES, ST. DAVID'S LODGE.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £1,800, and to have the property declared executable.

Order granted.

LUYT V. YOUNG.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £650, and that the property specially hypothecated be declared executable.

Order granted.

PHILLIPS V. DOMINGO.

Mr. Lewis moved for provisional sentence on a mortgage bond for £750, less £50 paid on account, and that the property specially hypothecated be declared executable. The bond became due through non-payment of interest.

Order granted.

STAHL V. KRUGER.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £250, and that the property specially hypothecated be declared executable.

Order granted.

SWART V. COFFIN.

Mr. De Waal moved for provisional sentence on a mortgage bond for £270, and that the property be declared executable.

Order granted.

COTTERELL V. VORSTER.

Mr. Payne moved for provisional sentence on a mortgage bond for £80, and that the property be declared executable, with costs.

Order granted.

SAVAGE AND SONS V. JACOBSON.

Mr. Inchbold moved to have the provisional order of sequestration discharged. The plaintiff had come to an arrangement with his creditors.

Order discharged.

ESTATE GUDGEON V. JACOBS.

Mr. Pohl moved for the final adjudication of the respondent's estate as insolvent.

Order granted.

HUGO V. JEPPE.

Mr. De Waal moved for provisional sentence on a promissory note for £300.

Order granted.

## FLETCHER V. MATTHES.

Mr. Inchbold moved for provisional sentence on two mortgage bonds for £400 and £100, and that the property be declared executable.

Order granted.

## ILLIQUID ROLL.

BETTINGTON V. SCOTT AND ( 1907.  
ANOTHER. ) Mar. 19th.

Dr. Greer, for the applicant (defendant in the action) moved for leave to sign judgment against the plaintiffs for not proceeding with their action. Mr. Uppington, for respondent (plaintiff in the action) moved to have the bar removed, and for leave to proceed with the action.

Laurence, J., said he had had the papers on the matter. It was the business of the plaintiffs to guard themselves against the negotiations which were going on.

Dr. Greer: It is simply a question as to what order the Court should make as to costs.

Mr. Uppington suggested the respondents should pay the wasted costs, but as far as this application was concerned the costs should be costs in the cause.

Dr. Greer said the application to sign judgment was made first.

It was ordered that the declaration be filed and served within seven days, plaintiff to proceed with the action, bar removed, wasted costs to be paid by plaintiff, and costs of the application to be costs in the cause.

## BARLOW V. LAW.

Mr. Pohl, for applicant (defendant in the action) moved for judgment against the plaintiff for not proceeding with the case.

Order granted.

## ADLER V. STAPLES.

Mr. Lewis moved under Rule 329d for judgment for £55, board and lodging supplied to the defendant, less £15 paid on account.

Judgment as prayed.

## TENNANT V. A.M.E. CHURCH.

Dr. Greer moved for judgment under Rule 329d for £31 7s. 5d. for professional services rendered and moneys disbursed.

Laurence, J., felt some doubt as to whether the service on the wife of a

representative of the Church was sufficient, and ordered the matter to stand over for further information.

## WHITE V. STEVENS.

Mr. Pohl moved for judgment under Rule 329d for £127 14s. 6d., materials supplied, work and labour done, with interest *a tempore morae*, with costs.

Order granted.

## REHABILITATION.

Mr. Swift moved for the release from insolvency of Johannes Jacobus Kruger, under Section 117 of the Insolvent Ordinance. No creditors had proved on the estate, and no trustee had been appointed.

The matter was ordered to stand over for the production of authorities.

At a later stage Mr. Swift cited *In re Burn* (1 Juta, 49), and *Balenski v. Iategan and Wife* (22 Supreme Court, 97).

Laurence, J.: The result is that it seems to reduce insolvency to a farce.

Mr. Swift also quoted Van Zyl's Judicial Practice (p. 680).

Laurence, J.: In view of the decision of the case of *Balenski v. Iategan and Another*, I do not see that it is open to refuse an order in this case.

Application granted.

## GENERAL MOTIONS.

*Ex parte* ESTATE BEUKES. ( 1907.  
Mar. 19th.

Mr. De Waal moved for an order authorising transfer of certain property at Heidelberg in the division of Swellendam, the executor having died.

Order granted as prayed

*Ex parte* ESTATE SMIT.

Mr. Pohl moved for an order authorising the Registrar of Deeds to register a mortgage bond for £150 on the landed property Namakuasfontein so as to meet estate debts.

Order granted as prayed.

## HARCOMBE AND ESTATE HARCOMBE V. COSAY.

Mr. P. S. T. Jones moved for an order upon the Master to report to the Court a certain offer which he had received for certain property bonded to applicants.

Laurence, J., said that he had read the papers in this case. The property

was sold by Harcombe to Cosay for £35,000, and a bond was granted for £25,000. Judgment was taken on the bond, and the property was declared executable, and the only bid was one made by the applicant of £10,000, which the Sheriff declined to report for confirmation.

Mr. Jones said that a deadlock had occurred. The applicant's only remedy was to come to the Court for an order confirming the sale, and authorizing the sale to go through, or for a report from the High Sheriff as to whether he thought it probable that any other offer would be made for the property. The property was at present bringing in an income equivalent to 19 per cent. on the bond.

The Master said that the sworn appraiser's valuation was £20,000. Under the 113th Rule of Court, the Sheriff fixed the reserve price at £18,500, and the only bid received at the sale was £10,000. The Sheriff, of course, was not obliged to report unless the reserve price were reached. The bondholder was not without his remedy. He could take over the property at the reserve price, and he would still have a margin of £5,000 on his bond. He did not think the Registrar of Deeds would accept transfer duty on any sum less than the valuation of £20,000.

Mr. Jones (in answer to the Court) said that the applicant sold the property in 1905. The rents received for the year ending 30th September, 1906, were £1,142 14s., but the administration reduced the income to £483 0s. 3d., after payment of rates, insurance, caretaker's charges, and electric light.

The Master said that he did not oppose the application, but merely wished to bring the facts before the Court.

Laurence, J.: I do not think the Court would be justified in directing the Sheriff to move the Court to confirm the sale when the discrepancy is so very considerable between the valuation, the reserve, and the actual bid. I think the applicant ought to approach the Court further. I will take the reserve price of £18,500 fixed by the High Sheriff, and go so far as to deduct from that 15 per cent., viz., £2,775, leaving £15,725. I think the case is one in which, if you increase your offer to £15,725, or within 15 per cent. of the reserve, the Sheriff might fairly move the Court to confirm on that basis. I do not feel justified in making any order on the £10,000 offer. The Court will suggest that the Sheriff take a bid for the amount of his reserve price, less 15 per cent.

*Ex parte* FRIEDLANDER BROS.

Mr. Douglas Buchanan moved to attach certain property to found jurisdiction, and for leave to sue the respon-

dent by edictal citation on interest due on a kustings brief.

Leave granted to sue the respondent by edictal citation, and to attach the property *ad fundandum jurisdictionem*, with one publication in the "Government Gazette."

*Ex parte* BROOKS.

Mr. Inchbold moved for leave to sue Lewis Levinson by edictal citation for an amount due on a mortgage bond, and to have the property declared executable. The respondent's last address was a P.O. Box address at Springs, Transvaal.

Application granted, service to be effected personally if possible, if not, one publication in the "Government Gazette" and a Johannesburg paper, and by registered letter to the respondent.

*In re* GRAND JUNCTION RAILWAYS.

Mr. Uppington presented the third report of the administration of the estate, Counsel moved that the report should lie for inspection.

Application granted.

*Ex parte* MCOWAN.

Mr. Swift moved for leave to the petitioner to register a supplementary bond for the benefit of the applicant's son.

Application granted.

*Ex parte* DE WET.

Mr. Gardiner moved for the appointment of a curator *ad litem* to the petitioner's mother, who was an alleged lunatic.

Application granted, Mr. De Waal appointed *curator ad litem*.

*Ex parte* ESTATE DU PREEZ.

Mr. J. E. R. de Villiers moved for the appointment of a *curator ad litem* to the minors in respect of the partition of certain property. The name of Louis du Preez was suggested as curator.

The matter was ordered to stand over for further information as to the subdivision of the estate, and as to whether the person proposed to be appointed curator was interested in the estate, and the qualification of the major children to represent the minors.

*In re* GRAND JUNCTION RAILWAYS, LTD.

Mr. Searle, K.C., presented the official liquidators' report, and moved that the report should lie for inspection, with



publication in South African newspapers and in England.

Application granted.

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*Ex parte* ESTATE MAYBERG.

Mr. Lewis moved for leave to the executrix to sell certain property in the estate, in which certain minors were interested.

Order granted in terms of the Master's report.

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*Ex parte* TRUSTEES RHODES RECREATION GROUND, MOWBRAY.

Trust deed—Prohibition: to mortgage.

*Although the Court may dispense from a prohibition to mortgage in the case of a will, it cannot do so in the case of a trust-deed.*

*The trustees' only course is to obtain the sanction of the Legislature.*

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Mr. P. S. T. Jones moved, on the petition of the trustees for leave to raise a mortgage of £3,500 to pay for work already executed, and to erect stands and conveniences, and put the ground in a revenue-producing condition. The petitioners said that they did not anticipate any difficulty in raising the loan. The municipal valuation of the ground was £10,000. There was a clause in the trust deed prohibiting alienation or mortgage of the property. Counsel pointed out that the position had been rendered very difficult by reason of the withdrawal of the inhabitants of Woodstock and the Salt River workmen, who had made no contribution to the recreation ground. Counsel also pointed out that, unless the trustees were allowed to mortgage the ground, the object of the donation could not be served, the money being required in order to make the ground available and suitable for recreation purposes. The parties principally concerned, including debenture holders and the Rhodes Trustees, consented to the application. The petitioners had been authorised by a meeting of the inhabitants of Mowbray, held on the 18th January last, to move the Court for leave to raise this loan.

Laurence, J., raised a question as to whether the Court had power, in face of the prohibition in the trust deed, to authorise the mortgaging of the ground.

Mr. Jones said that the dispensing power had been exercised in the case

of wills, but he was not aware of any such case in trust deeds.

Laurence, J., declined to make an order on the application, and said that, as far as he could see, the only course open to the trustees was to go to the Legislature.

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*Ex parte* LUYT.

Mr. Pohl moved on behalf of the agent of Leopold Luyt, of Uitenhage, for an order authorising transfer of certain property.

Order granted as prayed.

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*In re* EXLEY AND CO.

Mr. Searle, K.C., mentioned this matter, which, he said, ought to have appeared on the provisional roll. An application had been set down on the motion roll. It appeared that there was a firm of Exley and Co., carrying on business at Port Elizabeth, and also a firm of Charles Exley and Co., practically the same firm, carrying on business in Johannesburg. A provisional order was granted last month by the Chief Justice, returnable on the 27th February, and then extended by the Court until this day. This was the return day of the order for the compulsory sequestration of the firm in this Colony, but the parties thought that, as the other matter was on the motion roll, it was not necessary to put this on the provisional roll. Defendants had not been called nor had they been summoned, because a petition came down from Johannesburg asking the aid of this Court to make the same trustees who had been appointed in Johannesburg by a prior order of the High Court, appointed to administer the estate here. There was no landed property in the estate in this colony. The difficulty was that should the rule not be extended or the motion not heard to-day, the estate would not be hung up any longer so far as this Colony was concerned.

Later in the day, Mr. Searle, K.C., moved, on the petition of the trustees of Charles Exley and Co., appointed in Johannesburg and another, for an order confirming their election, and authorising them to administer the estate in this colony.

Laurence, J., granted an order as prayed.

Mr. Searle then formally applied for the provisional order of sequestration made in this Court to be discharged.

Laurence, J., said that the estate would be released from the operation of the provisional order, which would, accordingly, be discharged, usual notice to be given in the "Gazette."

*Ex parte* VAN DER MERWE.

Mr. W. Porter Buchanan moved for leave to register a certain waiver, and the removal of certain conditions as to alienation of property in the estate of the late W. J. van der Merwe, sen. The present application was rendered necessary by the death of Van der Merwe after giving a release under power of attorney. Counsel said that from the Master's report it was not quite clear whether the Master recommended that only a portion of the application should be granted.

Laurence, J.: There is no difficulty as to making an order for registration of the notarial deed. The matter will stand over for a further report by the Master as to whether there is sufficient ground to authorise the executors to execute the powers, etc., as prayed in paragraph (a) of the petition.

## SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE.]

(IN CHAMBERS.)

ERLANK V. TENNANT AND ( 1907.  
ANOTHER. ( Mar. 20th.

Insolvency — Endorsement of letters of administration — Intention to surrender — Irregularity—Act 38 of 1884, Sec. 2.

*The applicant (A. G. E.) had obtained judgment against the estate of the late Mrs. E., and had attached certain sheep in execution. Before these sheep were sold, the first respondent, as executor dative and administrator of the estate, gave notice of his intention to apply for its sequestration as insolvent, and thereupon the deputy sheriff refused to sell the sheep without an order of Court. Application was now made to set aside the notice of surrender, on the ground that the respondent had not been duly appointed administrator, his letters of*

*administration having been signed by the Magistrate of Rouxville and not, as prescribed by the law of the O.R.C., by the Master of the High Court at Bloemfontein. The Master of the Supreme Court now refused to recognize these letters of administration or to issue letters in respect of such part of the estate as is within this Colony.*

*Held, that the deputy sheriff should forthwith proceed with the sale of the sheep attached.*

*Held further, that the notice of intention to surrender the estate was of no force and effect: but that, in view of the fact that it was alleged that the written sanction of the Master of the H.C. of Bloemfontein to the letters of administration granted to the respondent was expected to arrive in a day or two, the proceeds of the sale must remain in the hands of the High Sheriff until the application for sequestration had been disposed of.*

This was an application upon notice to David Tennant, attorney, Cape Town, and the High Sheriff, for an order setting aside a certain notice published in the "Government Gazette" on Tuesday signed by the first-named respondent of intention to surrender the estate of the late Alida Hendrina Margaretha Erlank, and also directing the execution in the matter of *Erlank v. Estate Erlank* to be proceeded with in terms of the writs issued in this matter, and for costs against the first-named respondent.

From the affidavits, it appeared that on February 19 last applicant obtained judgment against the estate in question for £500, with interest and costs, and a writ of execution was issued and 594 sheep were attached. These sheep it was proposed to sell in execution of the judgment at Lady Grey, division of Aliwal North, to-morrow (Thursday). Yesterday (Tuesday) a notice appeared in the "Government Gazette" over the signature of Mr. Tennant of an intention to surrender the estate of the late Alida H. M. Erlank, as insolvent. Mr. Tennant purported to act for the executor, but it appeared that an informality had occurred as the letters of administration had been endorsed by the R.M. of Rouxville, and should have been

endorsed by the Master of the High Court, Bloemfontein, and, as a consequence, the Master of the Supreme Court declined to issue letters of administration.

Pending the arrival of the proper authority, Mr. Tennant, finding, as he said, that the estate was insolvent, had given notice of intention to surrender the estate. The proceedings now taken, he said, were strictly *bona fide*, and in the interests of the creditors in general.

It was also stated that the applicant had served bills of cost upon the first named respondent for £567 6s. 9d. in the action between the applicant and the said estate. These bills had been reduced on taxation to about £300. Mr. Tennant said that he also had a bill of costs against the estate amounting approximately to £200. Mrs. Erlank died while the action was proceeding.

Mr. Upington was for applicant, Andries G. Erlank; Mr. Burton appeared for Mr. Tennant.

[Laurence, J.: It is suggested on behalf of the respondent that there are other creditors in the Orange River Colony who are entitled to share in the assets?]

Mr. Burton: There are creditors in the Orange River Colony, and there are creditors here besides the plaintiff.

[Laurence, J.: I have looked at the papers, and I at once formed a strong impression that it might be a case in all the circumstances for an order under section 3 of the Act of 1884.]

Mr. Upington said that that was not the application. The position was that a notice of intention to surrender had appeared in the "Government Gazette." That notice was not worth the paper it was written on. The applicant asked the Court to declare that the notice was invalid, and that it had no legal effect. The High Sheriff, very properly, upon seeing the notice, gave instructions to his subordinate to stay his hand as regards the sale, and the applicant now applied for an order authorising the Sheriff to direct the sale to proceed.

[Laurence, J.: I think the Sheriff may be at once informed that the Deputy Sheriff may proceed with the sale to-morrow. As to the proceeds, I was going to suggest, subject to anything that counsel may say, that the matter of urgency being thus put out of the way, the simplest course would be to let the proceeds remain in the hands of the Deputy Sheriff, where they would be perfectly safe until this application is disposed of in the ordinary manner.]

Mr. Upington said their position was that the notice could not be recognised. The notice had been inserted in the "Gazette" for the purpose of defeating the judgment claim of the plaintiff. The Court, he submitted, would not interfere with clear rights, such as the plain-

tiff now possessed, to proceed to execution, merely because there were other creditors concerned, and merely because it was alleged that the estate was insolvent. Those other creditors must look after themselves.

[Laurence, J. (to Mr. Burton): Do you admit the irregularity in this notice?]

Mr. Burton: It is irregular to a certain extent. I cannot admit that it is irregular to the extent that it is entirely valueless and that it is not a good notice under the Act. Proceeding, he submitted that the Court would not go out of its way to allow one creditor to have the benefit of a large portion of the assets of an estate like this to the prejudice of the other creditors. He cited *In re McLeod* (1876 Buchanan, 1). Plaintiff had presented a handsome claim against the estate, and the respondent had come to the conclusion that the estate could not meet the claims, and he had taken steps to surrender the estate. There had been a technical hitch in the way, because certain documents had been attested by the Resident Magistrate of Rouxville instead of the Master of the High Court.

Mr. Upington having been heard in reply,

Laurence, J.: This is rather a nice point, and it is not by any means an easy matter for the Court to decide what is really the fairest course to all parties to pursue in the somewhat exceptional aspect that this matter now presents. A notice appeared in the "Gazette" that it was the intention of the executor of the late Mrs. Erlank to apply for the surrender of her estate to one of the Judges of this Court, on the 23rd of this month. Now, a notice of this kind can be made by a party who has an estate to surrender, or the legal representative of that party, as executor testamentary or dative, and it is also competent for it to be signed by the attorney for the party, either, that is to say, for the party or the executor of the party whose estate it is desired to surrender. When this notice appeared, which *prima facie* is a notice in the usual form, the execution sale, which had been advertised to take place at ady Grey to-morrow, was *ipso facto* suspended under the provisions of section 2 of the Act of 1884, except by an order from a competent Court to the contrary, and therefore, very properly, on the publication of that notice the High Sheriff sent directions by telegram to his deputy to suspend the sale. Now, application is made to the Court to allow the sale to proceed on the ground that no valid notice of intention to surrender has ever been given, the point being that, although it is not disputed that there is an executor of this estate duly appointed in the Orange River Colony, no executor has been appointed in the

Cape Colony, and therefore, Mr. Tennant, as attorney, could not be authorised to issue the notice which he did. The reason why he issued that notice has been sufficiently explained in the affidavits. It seems that an application was made for letters of administration here, but as the certificate of the appointment of the executor in the Orange River Colony was signed by the Resident Magistrate of Rouxville, and not by the Master of the High Court at Bloemfontein, the Master could not accept that as a valid attestation of his authority, and the matter stood over until his authority could be proved. Now, the question is, what ought to be done in these circumstances? In the first place, I am quite clear that an intimation should be sent to the Sheriff at once that his deputy is authorised by the Court to proceed with the sale of these assets. The sale has been advertised, and, whoever may be the party entitled to the proceeds, it is clearly in the interests of such person or persons that the expenses incurred should not be wasted, and that there should not be the expense of a postponed sale. Then the question arises as to whether the Court ought to make any special order as to the proceeds. I quite recognise what Mr. Upington says about the Court not being prepared to go out of its way to defeat the rights of a vigilant creditor, but, at the same time, as was pointed out in the case quoted by Mr. Burton, the Court is extremely reluctant to interfere with the distribution of assets in insolvency in the manner provided by law, and the mere fact that one creditor has got an execution before others should not give him a prior right unless there were special circumstances for departing from the ordinary distribution. In this case it is perfectly clear, or, at any rate, there is good ground for the Court to believe, that if there had not been this little hitch in the Orange River Colony as to the authority, there would have been a valid notice in the ordinary course. The notice which has actually been published is unauthorised, and is worth nothing at all. But it is also stated that it is the intention of the respondent to take all necessary steps, as soon as he is authorised, to proceed with the sequestration of the estate. The necessary documents are said to be in transit, and it is expected that they will arrive the day after to-morrow (Friday). I am inclined to think in the circumstances the safest course will be for the proceeds of the sale to remain in the hands of the Sheriff until the application for the surrender of the estate has been disposed of. There must be no delay in the matter, and the respondent will be put to terms. It will be provided in the order that proper notice of intention to surrender be published not later than

Tuesday next for the application to be heard at the earliest practicable date. I think an earlier date than the 23rd April should be appointed, but I will not fix the date. Then, of course, it will be competent to the applicant to present a caveat against the acceptance of the surrender. All the facts can be brought before the Judge, before whom the application is heard, and if he then, having all the information that is not now available, comes to the conclusion that the application for surrender is really not an attempt to benefit the general body of creditors, but to impede and interfere with the prior rights of the judgment creditor then, in accordance with the principles referred to by the Chief Justice in the earlier case of *Van Ellence* (Buch., 1876, p. 3) the surrender would, I take it, be refused. I only add that the case is one in which the Court ought not wholly to ignore the fact that there has not been much time to get the papers in order, and have the information laid before the Court by an executor, who does not live in this colony, but who was, as a matter of fact, made a party to this suit. I think, if only on the ground of comity, the executor having been appointed by the Court of another colony, it would not be desirable to shut the door on any application which he might wish to make simply through what may prove to be an inadvertence on the part of one of the officials in the O.R.C. In all the circumstances, I think the proper course will be to authorise the Sheriff to proceed with the sale of these sheep, and anything else that may be included, but not to distribute the proceeds pending the determination of the contemplated insolvency proceedings, provided that proper notice of application is published not later than Tuesday next for an application to be heard at the earliest practicable date.

Applicant will be at liberty to lodge a caveat to oppose the application for surrender, and to raise any grounds which might have been submitted on the present application.

The costs of this application should, I think, be reserved.

[Applicant's Attorney: P. A. M. Cloete. Respondent's Attorney: D. Tennant.]

## SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE.]

*Ex parte* REED. ( 1907.  
( Mar. 21st.

This was an application to make absolute certain rule nisi under the Derelict Lands Act. Mr. Benjamin was for petitioner; Mr. Gardiner appeared for one Grant to oppose the application.

Laurence, J., raised the question as to whether this was a matter which could be disposed of under the Derelict Lands Act.

Mr. Benjamin said that the affidavits were very voluminous, and he would suggest that, if the matter could not be disposed of on affidavit, it should be dealt with by an action without pleadings, as was done in the case of *King Brothers v. Wasserfall* (15 C.T. Reports, 356). Counsel added that there was no one through whom the present applicant could obtain title. He claimed title from a person who was deceased, and whose executor was now deceased. The applicant claimed to have purchased in 1875, and the respondent claimed that he had acquired the property by prescription. Counsel (in answer to the Court) said that the ground was valued by the local authority at about £75.

Laurence, J., said that, after perusing a large number of the affidavits, he could see no reason for granting any special order for dispensing with pleadings. An order would be granted to try the issues of fact by pleadings, without issue of summons, costs to be costs in the cause.

Ordered that the rule be discharged, applicant to be at liberty to proceed under section 9 of the Act 28, 1881, without summons, but upon pleadings, for determination of the issues in dispute between the parties, if such action is brought, costs to be costs in the cause, if action not brought within a reasonable time costs to be paid by petitioner.

### INDUSTRIAL LIFE ASSURANCE CO., LTD, V. ESTATE FELIX AND THE R.M., CAPE TOWN.

This was an application calling on respondent to show cause why an order should not be granted authorising the Resident Magistrate of Cape Town to complete a certain record. Mr. Alexander said the position taken up by the respondent was that there was no precedent for the application.

Mr. Benjamin was for the applicant, and Mr. Alexander for the respondent Felix.

Laurence, J., said, on the whole, it was much fairer that the plaintiff should have the opportunity of going to Court and repeating her evidence. The best thing would be to have this witness recalled, and for the record to be returned to the Magistrate to be completed for the purpose of appeal, costs to be costs in the cause.

### LAZARUS AND OTHERS V. ESTATE LAZARUS AND OTHERS.

Mr. P. S. T. Jones was for the applicants; Mr. Benjamin (with him Mr. Close) was for respondents (Morris and Drabbe). Dr. Rainsford appeared for the minors, and Mr. Swift was for the executors.

Laurence, J., said he understood that the matter had been before the Chief Justice, and thought it would be more satisfactory if the matter was taken before the Chief Justice. The best course, his lordship thought, would be to leave the matter over until Tuesday next.

The application was for an order, calling on the respondents to show cause why a certain agreement should not be made a Rule of Court.

The matter was ordered to stand over.

The matter was again mentioned later in the day, when

Mr. Jones said that the late Laurence Lazarus made a will in which he directed that his estate should practically remain as a fund for the benefit of his widow and his children, and in the last clause, which was really the contentious clause, he said that, after the death of his children, his estate should go to his grand children, and the question was whether those words created a fidei commissary of the property or direct substitution. Mr. Justice Maasdorp, who heard the matter, found that it was a case of direct substitution which resulted in the estate being in this position, that, during the lifetime of the widow and the children, it should not be sold, and each of the children and the widow after the payment of certain bequests, would be entitled to receive one-ninth of the proceeds of the estate, which should remain under the administration of the Colonial Orphan Chamber, who were appointed joint executors with Mrs. Lazarus. There was some question of her renouncing her rights in this particular action, and his lordship said it was open to the parties to enter into any arrangement by which transfer of the undivided shares of the estate could be given to the heirs, and it was with a view of effecting some arrangement of that description that the deed which was to be placed before the Court had been drawn up, and the only party who really had not signed was his friend's client (Mr. Morris), who married one of the late testator's daughters, which daughter died after the testator's death,



and who left a will making Morris her sole heir. Mr. Jones submitted that under the will there was a prohibition against the sale of the property during the lifetime of the children.

Dr. Rainsford said that he submitted to the Court's order.

Mr. Benjamin said that the position taken up was one to which they could not consent. They had offered certain terms, which the applicants had refused.

Mr. Jones said that Morris's disagreement was that they would not accept Drabbe as a party to the deed. Morris's consent at first appeared to be on the verge of being given, but eventually, when he found himself financially involved, away went all his rights to Drabbe, and he said, "Now deal with Drabbe."

[Laurence, J.: You must produce all the necessary consents before this agreement can be made a Rule of Court. The Court can make no order on the matter.]

Mr. Benjamin applied for costs.

[Laurence, J.: From the somewhat superficial acquaintance that I have with the matter, I should think costs should come out of the estate.]

#### *Ex parte* BRIMACOMBE.

This was an application calling on the respondent to show cause why the applicant should not be declared entitled to the custody of two minor children.

Mr. Alexander was for the applicant, and Mr. P. S. T. Jones was for the respondent.

Laurence, J., said the children were quite young, and it was desirable under all the circumstances that they should remain in the custody of their mother. If the applicant could prove his wife was guilty of misconduct it was open for him now, after judicial separation, to bring an action for divorce. Application refused, with costs

## SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE and the Hon. Mr. Justice HOPLEY.]

### REVIEW

REX V. DE WEI. { 1907.  
Mar. 23rd.

Laurence, J.: A case came before me for review from the Special

Justice of the Peace of Loxton, district of Victoria West, in which one Abram de Wei, described as a coloured shepherd, was charged with contravening section 4, Act 28, 1898, by procuring liquor on behalf of one Speelman, a native of Loxton, against the conditions of the licence. There is evidence that the accused gave another man named Speelman a drink, and there is no evidence that Speelman was a native, or even if he were a native, that the accused bought or received liquor as his agent or on his behalf, or that the purchase involved a breach of the conditions of anybody's licence. All that appears is that Speelman says: "I know the accused; I saw him last Monday; he gave me some brandy. I became intoxicated." The remainder of the record consists of a somewhat detailed narrative of the proceedings of Speelman when in this condition. Accused pleaded guilty. He is described on the charge sheet as a coloured shepherd. When a man of this class, at all events, pleads guilty to a statutory offence, there must be some *prima facie* evidence of a contravention of the Statute. Here there is no such evidence. The accused was convicted and fined 20s. The conviction must be quashed and the fine returned.

## SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE.]

ADMISSIONS. { 1907.  
Mar. 26th.

Mr. Benjamin moved for the admission of Gerhardus van Coppenhagen as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Ernest Daniel Engels as an attorney and notary.

Application granted and oaths administered.

Mr. De Waal moved for the admission of Jacob Meyer de Kock as an attorney and notary.

Application granted and oaths administered.

Mr. Gutsche moved for the admission of Foster Allan Frederick Bone as an attorney and notary.

Application granted and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Hubertus J. A. Pritchard as an attorney.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Johannes T. van der Vyver as a translator.

Application granted, oaths to be taken before the Resident Magistrate of Wodehouse.

### PROVISIONAL ROLL.

#### HANAU V. BUCHANAN.

This was an application for the final adjudication of the defendant's estate as insolvent. The matter was before the Court a week ago, and was then ordered to stand over, a suggestion being thrown out that an arrangement should be come to between the parties.

Mr. Searle, K.C., was for plaintiff; Mr. Molteno was for defendant.

Mr. Searle said that no arrangement had been arrived at between the parties, and he had now to renew the application. Counsel read a further affidavit by the plaintiff, Isidor Hanau, who said that, in consequence of the action of Heydenrych, who was not a party to the assignment of the defendant's estate and the claims made by him, it was impossible to deal with the property at Millwood, Knysna, of the Preston Buchanan Gold Mining Syndicate, which was assigned under the estate. Mr. Searle also read an affidavit by Mr. Simpson, of Syfret, Godlonton and Low, attorneys, who considered that under all the circumstances it would be in the interests of the creditors that the estate should be sequestrated.

Mr. Molteno read a further affidavit by Mr. V. van der Byl, of Van der Byl and De Villiers, attorneys, in which he said that Buchanan's position was that he had carried out the terms of the assignment into which he had entered in 1903. Counsel added that he also had an affidavit by Heydenrych, in which he said that he had agreed with Hanau to raise a special case to determine their respective rights in relation to the Millwood property, but that the negotiations collapsed because they could not agree as to costs.

Mr. Searle: We do not admit that.

Laurence, J., put a question as to any assets defendant might now have in the Transvaal.

Mr. Searle said that the plaintiff was prepared to give an undertaking that he would not attach any asset Buchanan might have in the Transvaal.

Mr. Molteno argued that Hanau was estopped from coming to the Court to override the terms of the assignment and force the sequestration of Buchanan's estate, seeing that there was no

allegation in the summons or affidavits that Buchanan had not carried out the terms of the assignment, which was an out and out release on the part of Hanau. Buchanan had assigned his private estate, and it had been liquidated by Hanau. Counsel cited *Hossack v. Jippett* (3 Juta, 273). He submitted that the position of Buchanan ought not to be prejudiced, and that the dispute between Hanau and Heydenrych could be determined without sequestrating Buchanan's estate.

Mr. Searle submitted that it was clear that Buchanan's estate was insolvent and that it was for the benefit of creditors that it should be sequestrated. The only other question was: Had the creditors debarred themselves by the assignment? Hanau only signed subject to reservation of his rights under the bond, so that all he would have to do now would be, if he wished, to sue upon his bond. Hanau was not now before the Court as assignee, but as a creditor. Counsel cited *Gourlay, Caranagh and Co. v. Gromer* (13, C.T.R., 1090), and he contended that the course of action taken was the only way out of the difficulty as to the mining venture.

Laurence, J.: This is an application for compulsory sequestration of the estate of the respondent Buchanan, who formerly resided in Cape Town, and is now residing in Johannesburg. The petitioning creditor is one Hanau, living here, and he recites that the respondent Buchanan passed a bond for £1,500 and afterwards assigned his estate, he (Hanau) being one of the assignees, and the only amount available on the assignment for distribution was a sum of £230, which was awarded to himself as preferent creditor, and the present indebtedness by the respondent is alleged to be something over £3,000, including £1,000 to Hanau himself, as a balance still due. It is alleged that the only remaining asset in the estate is a mining venture and the proceeds of this mining venture, in which Buchanan was in partnership with one Martin, and in which an interest is claimed by one Heydenrych. Petitioner goes on to allege that the estate is insolvent and that it would be for the benefit of creditors that it should be sequestrated, and that the rights of creditors decided in insolvency. He is opposed by Buchanan, mainly on the ground that he has carried out his obligations under the assignment, and that, as those obligations have been carried out, he is entitled to the release which the creditors who are parties to the assignment then agreed to give him. Buchanan's position is supported by affidavits by Heydenrych, who denies that insolvency is necessary or desirable in the interests of the creditors in the estate. Apart from the deed of assignment, it seems clear that there would be no defence to any application to

sequester the estate on the ground that it would be for the benefit of ment, it seems clear that there would be no obstacle to Hanau first taking judgment on the bond and then obtaining sequestration as a judgment creditor. It is said in argument that he could now obtain judgment for the balance still due on the bond. That is a matter I do not wish to express an opinion about. I do not think it necessary for the present to express an opinion, and it does not appear to me to be quite so clear. It depends upon the effect of the condition on which he became a party to the assignment. The original deed of assignment contained this condition to the signature of Hanau. It was only produced in court this morning. There was nothing to indicate that any such condition had been attached on the copy that is annexed to Buchanan's affidavit, and I do not wish to express any definite opinion in my judgment as to what the present position is as to the effect of that condition. It seems to me if a creditor is a party to an assignment which provides for a release of the debtor on the assignment of all his assets being included—and this assignment included all his assets except some property in Cape Town, which was specially excluded for the operation of the deed—and if the debtor proceeds to carry out his portion of the bargain and his assets are duly assigned, then the release would be a good defence to an action by a creditor who had a bond. The release would operate as a release of any assets which might at any future date be acquired by an insolvent from the operation of any bond which might then be existing. The reservation of rights by a creditor in becoming a party to an assignment, I think, would only be his rights to priority in distribution of the assets which were included in the assignment, and would not, as I think, affect any assets subsequently acquired. At the same time, it is clear that a deed of this kind does not in any way take away the discretion of the Court. It does not preclude the Court from ordering a sequestration if the trend of events subsequent to the assignment has been such as to render sequestration the proper course to take in the interests of the creditors at large. While that is so, one cannot help being impressed on the other hand with the feeling that if a debtor has made a full and fair assignment of his estate the Court is always reluctant to make an order for compulsory sequestration and put him in the position of an insolvent. Whether it is necessary for the Court to exercise that discretion I have referred to, notwithstanding the reluctance to which I have just referred, seems to me to be a question which must necessarily depend upon the view which

the Court takes of all the facts of each case as it is brought before it. How do the facts stand so far as they are material to the present case? It is perfectly clear that the estate is insolvent. It was insolvent then; it is insolvent still. There is a very large balance, said to be about £3,000, due to the petitioner and other creditors, while the assets are reduced to one small asset of apparently diminishing value. Buchanan, as I understand, at the time of this deed, was in partnership with one Martin, Buchanan apparently being a party to three-quarters and Martin being a party to one-quarter. They were concerned with a certain mining venture in the Knyana district, and the rights of Buchanan in this venture were included in the assignment. This property, as I understand, was subsequently let to some syndicate; I think it was called the Buchanan Syndicate. Disputes arose as to the rights of the lessors and lessees, with the result that an action was brought by the assignees of Buchanan, his partner, Martin, and Heydenrych, who was also joined as co-plaintiff against the syndicate. The action did not come to trial, because the question was compromised. The defendant syndicate gave up possession of these claims, or whatever they were, and they paid a sum of £600 in satisfaction of what was claimed against them by the plaintiffs. The £600 which they paid, as I understand, was paid over to Messrs. Syfret, Godlonton and Low, the attorneys for the plaintiffs, and is still, to some extent, in their hands. It has been considerably diminished since then by subsequent outgoings—I suppose by licence money and other incidental expenses necessary to be disbursed for the preservation of these mining rights and the actual cash remaining is said now to be about £400. It is steadily diminishing, and if this litigation is prolonged might ultimately become, so to speak, a vanishing quantity. It is clearly desirable that these mining rights, if they are worth anything, should be sold as promptly as possible, that, if they cannot get a satisfactory offer, they should be abandoned, and the liabilities on them cease, and the net balance, whatever it is, in cash, should be distributed between the creditors according to their legal rights. The great dispute is as to who are entitled to this balance, whatever it may ultimately turn out to be. Hanau, as I understand, claims to be entitled to this balance under the bond to which he refers in the summons. Heydenrych, on the other hand, claims a preference or lien on the property or cash resulting from sale of the property for moneys advanced by him to carry on the business. The question is whether Hanau, as acting as-

signee, ought now to bring an action for a declaration of rights, an action to determine what is Buchanan's share of these assets, and then proceed to distribute the proceeds. As to that, it is impossible to shut one's eyes to the fact that Hanau's interest as a creditor might conflict with his duty as assignee to the creditors at large. There might be conflicting rights which Hanau would not be the most satisfactory person to determine, and the weight of that consideration is rather augmented by the circumstance that Hazell, his co-assignee, who is said to have been acting assignee in this deed, unfortunately, has now been convicted of a criminal offence, and a substantial sentence of imprisonment has been passed upon him, so that he is no longer able to act in the matter. On the other hand, if the estate is sequestrated, a trustee would have to be elected. He could claim Buchanan's share, and after settling that matter by whatever process may be most expeditious and economical, at all events he would have to claim and realise Buchanan's share in this property, then to frame an account, and if he frames a distribution account to which any creditor objects, the creditor could take his legal course, and bring the matter before the Court, and have it finally decided in that way. I have given my best consideration to the matter, with a desire to do justice to the position of both applicant and respondent, and I have come to the conclusion, on the information before the Court, that this really is a case, if I may so describe it, in which the gordian knot should not be unravelled by assignment, but that it should be cut by the knife of the insolvency law. I felt, as I have said, anxious to protect the respondent, who is in no way, as far as I can see, to blame for the application which has resulted, and there is no reason to apprehend, even if he has acquired any assets subsequently in the Transvaal, that any attempt will be made to place such assets under the operation of the Colonial sequestration. The petitioning creditor, at all events, gives a distinct undertaking, as far as he is concerned, to make no such attempt, and if, in the improbable event of any such attempt being made, it does appear to me if the facts were laid before the Supreme Court of the Transvaal, or the High Court of Johannesburg, it is not a sort of case in which the Court would be likely to make such an order as is competent for the Court to make. I do not think Buchanan is likely to be prejudiced. I think the order for the final adjudication must be granted. At the same time, if any application were made to me, I should not be unwilling to make an order directing that it should lie in the office, say for a week, so

that the parties may have some final chance of coming to an arrangement.

Mr. Greer (intervening in the absence of Mr. Molteno) applied for costs of opposition to come out of the estate.

Mr. Searle, K.C. (for applicant) opposed.

Laurence, J.: I do not think the circumstances are of so very exceptional a character as to justify the Court making a special order as to costs.

#### DE WAAL V. RADEMEYER AND RADEMEYER.

##### Promissory note—Special verbal agreement—Novation.

*Defendants being sued on a promissory note, set up the defence that the note had been varied by a verbal agreement to the effect that the plaintiff should pay himself out of the proceeds of a certain sale which he was instructed to hold on behalf of the first defendant. The sale was held, but after the mortgage on the property was paid off, the residue of the proceeds was wholly insufficient to satisfy the other creditors. Thereupon, in order to pay certain creditors, defendant agreed to pass a general covering bond, and this he contended effected a novation of the debt secured by the promissory note.*

*Held, that as there was no satisfactory proof of the alleged verbal agreement, it could not be taken to vary the terms of the promissory note.*

*Held further, that the passing of a general bond in favour of creditors did not constitute a novation.*

Mr. Gardiner moved for provisional sentence on a promissory note for £360, payable at the Standard Bank, Uniondale, and for interest at 10 per cent. per annum, less £10 14s. 5d. remaining in the hands of the plaintiff. Counsel also moved for judgment under Rule 329d for £18, being 5 per cent. commission on account of the sum of £360, for collection thereof, due in terms of the promissory note aforesaid, which the defendant specially agreed to pay in the event of the said promissory note not being paid on the due date.



Mr. Close appeared for defendants, and read an affidavit by J. H. Rademeyer, who pleaded that he was not indebted. His property had been sold by auction by plaintiff, and it had been arranged that the plaintiff should pay the promissory note out of the proceeds, and it was covered by a bond. He denied that either himself or his brother was liable under the promissory note. An affidavit by J. I. Rademeyer was also read, in which he said that he signed the promissory note as surety and co-principal debtor, and he repudiated liability. An affidavit by J. T. Stone, agent and auctioneer, was also read.

Laurence, J., commented on the inordinant length of the affidavits on both sides, and said he hoped that the question of superfluous length of the affidavits would come under the attention of the Taxing Officer in due course. The country attorneys seemed to have been "intoxicated by the exuberance of their own verbosity."

Mr. Close submitted that the defendants had made out a good case that there had been a novation. Once the plaintiff got the proceeds of the sale in his hands, he was bound to deduct Gert Rademeyer's indebtedness from that amount. That was the arrangement made with the surety, and if the plaintiff had not taken out that indebtedness and had paid other creditors the surety could not now be held liable. It was important to note that no demand was made for 20 months after the sale.

[Laurence, J.: If the other debts were paid, the debtor would have the benefit of those payments made by the plaintiff.]

Mr. Close: Admittedly, but the surety has not had the benefit of any such payments. The security was entered into conditionally; the plaintiff has not fulfilled that condition, and he cannot now recover against the surety. Counsel went on to say that it did not appear that other creditors were pressing Gert Rademeyer, and it was therefore difficult to see why he should have ordered other creditors to be paid, while De Waal, who was pressing, remained unpaid. He submitted that defendants had made a sufficiently strong *prima facie* case to entitle them to ask the Court to order plaintiff to go into the principal case, and especially so in relation to the surety.

Mr. Gardiner having been heard in reply,

Laurence, J.: The claim is one for provisional sentence on a promissory note signed by the two defendants—Gert Rademeyer signs as debtor, and his brother signs as surety and co-principal debtor. I do not think sufficient ground has been shown in this case to justify the Court in refusing

to grant provisional sentence. The note is in the possession of the plaintiff, and, therefore, *prima facie* he is entitled to sue upon it. It is not contended on the part of either defendant that the amount of the note has been actually paid. The defence, as far as I can see, is based on two grounds: (1) It is put forward that there was a special agreement at the time of renewal of the former note made by the parties, that the payee, the present plaintiff, should pay himself out of a certain fund which it was anticipated at the time would come into his hands at an early date, the fund being the proceeds of a sale which he was instructed to hold on behalf of the defendant. Well, if there was any condition in a matter of that kind—at all events, as a matter of prudence, it should have been embodied in the contract itself. Here is a liquid document, without any condition or qualification of that nature, and I am not prepared to hold, on the evidence given before me, that any such prior condition has been established which would be legally admissible to vary the contract in writing. At all events, if there was such a condition that he should pay himself out of a certain fund that would imply that a fund should be available, and I am by no means satisfied, on the evidence given by the parties, that that was actually the case. It seems that certain property was sold, realising net, I understand, something probably under £1,500, and this property was specially hypothecated, so that the net amount which the defendant could realise to meet all claims would not be very considerable. The defendant, in order to pay certain creditors who, I presume, were pressing him, agreed to pass a general covering bond for £2,000. The only question which the Court has now to decide is whether it is clear that the intention of the parties at the time when that bond was passed was that it should operate as a novation of the prior obligation created by the promissory note. It is unnecessary to refer to authorities on the law with regard to novation. It is sufficient to refer to the case of *Ewers v. Roberts' Trustee* (Foord's Reports, 32), in which the law is discussed at some length by His Lordship the Chief Justice, and in which it is clearly pointed out that the intention to novate is not to be presumed. I think the intention to release a surety in one instrument by means of a novation is one that should be admitted, or very clearly proved, by all the circumstances of the case. It is strongly denied by the plaintiff in this case, and all I can say is on the facts of the case before me, the balance of the probabilities is in favour of the plaintiff, and, therefore, he is entitled



to provisional sentence. It will, of course, be competent to the defendant to go into the principal case if he gives security, and in that case any question of the balance of account, if he is dissatisfied with the amount which he is charged, could be debated by way of counter-claim, or in other ways. Provisional sentence granted, with costs and judgment, as prayed on the illiquid claim.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants' Attorneys: Herold and Gie.]

#### STAHL V. KRUGER.

Mr. Benjamin moved for provisional sentence on a promissory note. The matter had been before the Court last week, and counsel now said that the promissory note and the notarial certificate of presentation had been filed.

Order granted.

#### HUDSON VREDE AND CO. V. DE BRUYN.

Mr. Pohl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### HIDDINGH V. STETZKOM AND VERSFELD.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,000, with interest from July 1, 1906, bond due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### KENT V. MALGAS.

Mr. Inchbold moved for provisional sentence on certain two judgments of the Resident Magistrate's Court at Woodstock for £16 15s. 9d., and £2 9s. 3d. costs, and £6 16s. and £2 6s. 4d. costs, and for certain lot of property in Richmond to be declared executable.

Defendant said that he had no means. He had ground at Richmond, but there was a bond of £40 upon it. He did not mind if the judgment creditor sold the property and paid the bondholder and satisfied the judgments out of the balance.

Order granted.

#### LITCHFIELD V. THURMER AND TORS- TENSON.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond

for £850, with interest, from July 1, 1906, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and the rents attached. Counsel said that the present whereabouts of the defendants were unknown. The property hypothecated was situate at Lakeside.

Order granted.

#### MACHAAB AND CO. V. SHAMMA.

Mr. P. S. T. Jones moved for confirmation of a certain writ of arrest. Defendant, it was stated, owed plaintiffs £41 10s., balance of account for goods sold and delivered.

Defendant said that he did not owe anything to the plaintiff. He admitted that he had intended to go away to Delagoa Bay, but said that he would leave his property here, and proposed to return. He afterwards said that he owed the plaintiff firm £4 10s. He had no means at present.

Writ of arrest confirmed.

Laurence, J., informed defendant that if he wanted to obtain his release from custody pending the trial of the action he had better engage an attorney, to advise him with regard to providing security and entering into a bail bond.

#### STEEL V. DREYER.

Mr. W. Porter Buchanan moved for provisional sentence upon an unsatisfied judgment of the R.M.'s Court at Woodstock for £76, with interest and costs.

Order granted.

#### ILLIQUID ROLL.

##### ANDREWS V. GOLDSTONE ( 1907. (ALIAS GOLDSTEIN). ( Mar. 26th.

Dr. Greer moved for judgment under Rule 329d for £68 18s. 4d., balance due for professional services rendered and moneys disbursed, with interest a tempore morae and costs.

[Laurence, J.: As this appears to be an application by a solicitor for an amount due for professional services, is it a liquidated demand without any allegation that it has been taxed on the amount claimed?]

Dr. Greer: This is an application for judgment under Rule 329d.

[Laurence, J.: It is for a debt or a liquidated demand without an allegation of taxation. I think there is a decision that a solicitor's bill is not liquidated until there has been taxation.

If counsel desires, I will take time to consider the matter, and authorities may be brought.]

Dr. Greer said that he would be glad if the Court would adopt that course.

*Postea* (27th March).

Judgment, with costs, for plaintiff.

#### SWART V. COFFIN.

Mr. De Waal moved for judgment for transfer of certain properties in the village of Greytown, plaintiff tendering the purchase price.

Order granted.

#### REHABILITATION.

Mr. Pohl applied for the release from insolvency of Daniel Smalberger.

Application granted.

#### GENERAL MOTIONS.

*Ex parte* ESTATE STUCKE. (1907. Mar. 26th.

Mr. Swift moved for an extension of the petitioner's powers as provisional trustee. Counsel stated that the respondent had withdrawn from the case since the last hearing.

Laurence, J., pointed out that the notice of motion called upon respondent to show cause why the petitioner should not be elected sole trustee.

Mr. Swift said they had found that they could not make such an application.

Laurence, J., said that he thought, under the circumstances, it would be encouraging irregularities if the Court allowed the application to go through in its present form.

Rule granted calling upon respondent to show cause why applicant should not be given full powers to administer the estate as trustee, rule to be served promptly, and to be returnable on the 9th April.

#### *In re* INSOLVENT ESTATE LOUBSER.

Mr. Benjamin moved, as a matter of urgency, for the appointment of provisional trustees in the insolvent estate of N. E. Loubser, hotel proprietor, Somerset West Strand.

Order granted appointing Messrs. Fagan and Cluver as provisional trustees with the powers prayed for.

#### *Ex parte* ESTATE ALBRECHT.

Mr. P. S. T. Jones moved for leave to cancel the sale of certain property to a man who had disappeared. A sum of £25 had been paid on account. Counsel cited *Ex parte Henry Stevens* (6 Sheil, 150).

No order, leave reserved to applicant to mention the matter again.

#### *Ex parte* ESTATE BROOK.

Mr. Toms moved on the petition of the trustee and *curator bonis* for leave to sell certain property and rights for the maintenance of the lunatic owner.

Laurence, J., said that the account showed a large expenditure for trips of various kinds, and subscriptions to sundry clubs, but he saw very little expenditure for the actual maintenance of the lunatic. The matter was referred to the Master for report, as to whether the amounts authorised by the Court had been properly applied, and whether a further order should be made.

#### *Ex parte* ESTATE PIET.

Mr. J. E. R. de Villiers moved for leave to sell a certain undivided share in property, in which minors are interested. Order in terms of Master's report.

#### SMITH V. DU PLESSIS.

Mr. W. Porter Buchanan moved for the removal of trial to the ensuing Circuit Court at Aliwal North, in terms of consent paper.

Case removed accordingly, costs to be costs in the cause.

#### *Ex parte* ESTATE BLACK.

Mr. W. Porter Buchanan moved for an order authorising the executors to release a certain water right at Simon's Town upon payment by the Admiralty of £100 and all expenses.

Order in terms of Master's report, amount paid by the Admiralty to be deposited with the Board of Executors for administration.

#### *Ex parte* ESTATE VAN TONDER.

Mr. Close moved on the petition of the executors testamentary for a partition of certain property in the Ladismith district.

The matter was ordered to stand over, his lordship suggesting that petitioners should draft a form of order, and submit

it to the Master. Leave was given to again mention the case on Tuesday next.

*Ex parte PREECE.*

Mr. P. S. T. Jones moved for leave to petitioner to sue her husband *in forma pauperis* for judicial separation, on the ground of cruelty and ill-treatment. Counsel said that he was prepared to certify.

Petitioner, who resides with her parents at Observatory-road, appeared. Her husband, she said, was a man of violent temper, and she was afraid to live with him. She believed that defendant was still in Cape Town. She could not possibly live with defendant. She desired an order for maintenance against him.

Rule nisi granted, calling upon respondent to show cause on the 16th April why leave should not be granted as prayed, personal service.

*Ex parte WOUTERSEN.*

Dr. Greor moved for leave to petitioner to receive her share of the estate Loe-dolff, unencumbered with the burthen of *fidei commissum*. Counsel said he applied for a similar order to that given in the application made by petitioner's brother before Mr. Justice Maasdorp.

Order granted as prayed.

**EXECUTORS ESTATE BAILEY V. AFRICAN BANKING CORPORATION AND ANOTHER.**

Mr. Payne moved for leave to petitioners to intervene, and be joined as co-defendants in the action brought by the first-named respondents against the second-named respondent.

Order granted in terms of consent.

## APPENDIX.

### GEORGE CIRCUIT COURT.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

NOCHAMSON V. VAN DER WESTHUYSEN. (1907. Mar. 27th.)

*Lis pendens*—Refusal of provisional sentence—Magistrate's Court.

*The plaintiff claimed provisional sentence in the Supreme Court on a promissory note, but he was directed to proceed with the principal case. Instead of so doing, he brought an action in a Magistrate's Court on the same note. There was no evidence before the Magistrate that the action in the Supreme Court had been withdrawn.*

*Held, that the Magistrate properly refused, on the ground of lis pendens, to try the case.*

This was an appeal from a decision of the Resident Magistrate of George.

Advocate Louwrens appeared for the appellant. Advocate Sutton for the respondent.

It appeared that in August, 1906, the appellant sued the respondent in the Supreme Court on a promissory note for £187 16s., alleged to have been made by the respondent. Provisional sentence was refused, and the plaintiff was directed to go into the principal case. Costs to abide the result. Thereafter the appellant took out a summons on the same note in the Magistrate's Court at George. At the hearing the summons was excepted to on the ground that it was beyond the jurisdiction of the Magistrate, as provisional sentence had been claimed and refused in the Supreme Court. The Magistrate upheld the exception, and dismissed the case, and from this ruling the appeal was brought.

Mr. Louwrens said he was instructed that the appellant had paid the costs of the provisional action in the Supreme Court and had withdrawn the case.

De Villiers, C.J., said there was nothing on the record to that effect.

Mr. Louwrens, in argument, said he took it the exception raised was that

of *lis pendens* though it was not so worded. The parties had been directed to go into the principal case, and he submitted that it was competent for the appellant to go into the principal case in the Magistrate's Court, as the cause of action was within his jurisdiction. The action in the Supreme Court had been withdrawn, and consequently the appellant could proceed anew in the form he should choose. It was to the benefit of both parties that the case should be heard in the Magistrate's Court rather than in the Supreme Court.

Without calling upon Mr. Sutton,

De Villiers, C.J.: It is common cause that the plaintiff chose the Supreme Court as his forum. That Court refused provisional sentence on the note and directed the plaintiff to proceed with

the principal case, costs to abide the result. It then was competent to file his declaration and to proceed with his action in the Supreme Court, but instead of that he brought his action in the Magistrate's Court. It is suggested that before doing so the plaintiff had withdrawn the action in the Supreme Court and paid the defendant's costs, but there is no evidence of such withdrawal. The payment of the defendant's costs would not prove that the action had been withdrawn. According to the record before the Magistrate, the case was still pending in the Supreme Court. It is true that the declaration had not been filed, but that was not necessary to entitle the defendant to set up the exception of *lis pendens* in the Magistrate's Court (see Voet 44, 2, 7). The appeal must be dismissed with costs.







# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1907.  
                          { Apr. 2nd.

Mr. Douglas Buchanan moved for the admission of Whitmore William Parsons as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Oudtshoorn.

#### PROVISIONAL ROLL.

##### MCGREGOR V. SOPIE.

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £500, with interest from the 1st July, 1906, less £7 5s. 1d. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

##### SCARBROW V. HAMP-ADAMS.

Mr. W. Porter Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

##### ENSLIN V. SWANEPOEL.

Mr. Toms moved for judgment on a mortgage bond for £50, with interest from the 1st January, 1906, and for the property specially hypothecated to be declared executable. Counsel said that the matter had been standing over for proof of service of the bond on the de-

fendant. Service had now been effected upon defendant and her husband.

Order granted.

##### DE VILLIERS V. JACOBS.

Mr. Philipson Stow moved for provisional sentence on a mortgage bond for £100, with interest from the 1st July, 1904, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

##### CROOKS V. SCHOEMAN.

Mr. Marais moved for provisional sentence on two mortgage bonds for £492 and £300 respectively, with interest from the 1st January, 1906, bonds due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

##### SAVAGE AND SONS V. BACHNISCH.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £999 3s. 3d., with interest, from December 31, 1906, and £20 7s. premiums of insurance, bond due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable and rents attached.

Order granted.

##### KATZ AND OLSWANG V. BECKER.

Dr. Greer moved for provisional sentence on a mortgage bond for £62 6s. 8d., with interest from September 13, 1906, bond due by reason of non-payment of interest; counsel also applied

for the property specially hypothecated to be declared executable.

Order granted.

#### WHITE V. ABDOOL BROS.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

#### HOBSON V. MWUNYISWA.

Mr. Benjamin moved for provisional sentence for £37 0s. 2d., balance due upon a judgment of the Resident Magistrate's Court, which had only been satisfied in part, for £2 15s. 9d. taxed costs, and for certain immovable property at Mount Ayliff and Tsolo to be declared executable.

Hopley, J., said that there was a question as to whether sufficient service of the summons had been given.

Mr. Benjamin submitted that due service had been given in view of the fact that the railway now ran to Maclear. According to the Registrar, the service should have been 26 days, whereas only 19 days had been allowed. The allowance, according to the rules of Court, was 200 miles a day by railway, and where the defendant's residence or last-known place of abode should be less than 72 miles from the nearest railway station, 36 miles a day. Defendant resided in the district of Mount Ayliff, which was distant from Maclear as the crow flies 64 miles, while Maclear was distant 883 miles by rail from Cape Town. These facts were set out in an affidavit by applicant's attorneys.

Hopley, J., held that the service was sufficient and granted provisional sentence as prayed.

#### ILLIQUID ROLL.

#### ESTATE THEUNISSEN AND ANOTHER V. VAN WYK. N.O.

Mr. Marais moved for judgment under Rule 329d against the defendant, requiring him to complete and finally close off the third and final liquidation and distribution account in the joint estate of which he is executor by paying into the Guardian's Fund the respective amounts awarded to certain minors.

Judgment as prayed, with costs.

#### STEENKAMP V. STEENKAMP.

This was an application to make absolute a certain rule *nisi*, interdicting respondent's property pending an action to be brought by his wife for divorce.

Mr. P. S. T. Jones was for applicant; Mr. M. Bisset was for respondent.

Mr. Jones applied for a postponement until the first day of term, to enable applicant to file replying affidavits. The parties resided at Calvinia.

Mr. Bisset opposed a postponement, and said that the interdict was quite unnecessary, and prevented respondent from carrying on his business. He had no intention of making away with his property.

Mr. Jones said that this was a disputed point, and he urged that a postponement was desirable, so that the whole of the facts should be laid before the Court.

Ordered that the matter be postponed until the first day of term, and the rule be modified so as to allow the respondent to carry on his ordinary farming operations, and to dispose of movable property not exceeding £200 in all to meet the liabilities set forth by him, in other respects the rule to remain of full force and effect, respondent to keep an accurate account of all such sales, and obviate application of the said money so made by him, costs to stand over.

#### ESTATE STEPHAN V. OTTERSTROM.

This was an application to set aside a certain order granted by Mr. Justice Maasdorp, sitting as a Divisional Court, authorising respondent to sue the applicant estate *in forma pauperis*, on the ground that he was no longer a pauper.

Mr. Upington was for the applicants; Dr. Greer was for respondent.

Hopley, J., said that he was not sitting there as a Court of Appeal from the decision of another Judge.

The matter was ordered to stand over, pending the return of Mr. Justice Maasdorp from Circuit.

#### *Ex parte* DIESEL AND ANOTHER.

Mr. Toms moved for an order authorising the Registrar of Deeds to register a certain notarial grosse embodied in an ante-nuptial contract executed in the Orange River Colony and registered there on the 9th January, 1907.

Order granted authorising the Registrar of Deeds to register the grosse, saving any intermediate rights of creditors in the Cape Colony which may have arisen in the interim.

#### *Ex parte* REID AND ANOTHER.

Mr. Douglas Buchanan moved, on the petition of J. S. Inglesby Garlake, attorney, Cradock, as agent of George S. Reid and estate John Hamilton McLauchlin, for cancellation of a mortgage bond for £220, granted by petitioner's principals in favour of the

Cape of Good Hope Bank, on the 31st May, 1884, specially hypothecating certain ground in Frere and Cawood streets. Cradock. Petitioner believed that the capital amount had been repaid, but was unable to state exactly when, and with a view of ascertaining the date caused inquiries to be made from one of the liquidators of the said bank, but was unable to obtain any information in the matter owing to the bank books having been destroyed by order of the Court. The bond was not in possession of petitioner's principals, but he could not ascertain that it had been cancelled or a cession registered. Every possible effort had been made to find it, but without success. Counsel applied for an order similar to that granted in *re Krul's estate* (4 C.T. Reports, 239), in which a rule was ordered to issue and to be made absolute without further application if within six weeks no objection be raised.

Rule nisi granted in similar terms to rule in *Krul's estate*, publication of rule to be made in "Midland News" forthwith.

#### BRADY V. ROBERTSON.

Mr. Upington moved, on the petition of Christopher Brady, for an order for the attachment of certain inheritance due to respondent, George Frederick Robertson, late of Cape Town, and for leave to sue him by edictal citation for provisional sentence for £30 under and by virtue of a certain promissory note. Respondent was stated to be serving as a trooper in the B.S.A. Police, stationed at Salisbury, Rhodesia.

Order granted authorising the attachment *ad fundandam jurisdictionem* of any moneys in the estate of R. and M. J. Robertson, of Colesberg, in the hands of the executor or his attorneys, and giving leave to sue by edictal citation, returnable on the 14th May, citation and notices to be served personally.

#### GAUSS V. HARVEY.

Mr. M. Bisset moved for leave to sue the respondent by edictal citation for £97 6s. 4d. for medical attendance, and to attach a mortgage bond to found jurisdiction. The last address of the respondent was a hospital in Dublin.

Hopley, J., thought there would be no difficulty in serving the respondent personally. She might wish to dispute the bill. It was ordered that the bond or any funds in the hands of the S.A. Association at Port Elizabeth be attached *ad fundandam jurisdictionem*. Leave to sue by edictal citation, interdict and notices to be served together, returnable 3rd July, personal service if possible.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

REX V. ABRAHAMS AND ( 1907.  
ROBERTSON. ( Apr. 3rd.

Cheque form unsigned—Forgery  
—Crime.

*The presentation of an unsigned request written on a cheque form to pay A. B. a certain sum of money, the writer and the presenter being in collusion to obtain the money does not constitute a crime.*

Hopley, J., said that Mr. Justice Laurence had asked him to mention the case of Christian Abrahams and John William Robertson, which came before him from the Assistant Resident Magistrate, Cape Town, and in which the accused were charged with attempted theft by false pretences. They were both found guilty, and sentenced to three months' imprisonment. The charge alleged that they falsely and fraudulently gave out and pretended to a teller of the Bank of Africa that a certain document, to wit a cheque, for payment of £10 sterling, drawn in favour of Messrs. Crooks upon the National Bank, was a genuine cheque, whereas it was not, and had thus committed the crime of attempted theft by attempting to obtain £10. The evidence showed that one of these men wrote upon a cheque form of the Federal Supply and Cold Storage Company, and in their illiterate way, "Pay Messrs. Crooks £10." The whole thing was unsigned, and this unsigned piece of paper, which, of course, was not a cheque, there was no order by anybody at all, was presented by the other man to a teller of the bank, who, of course, at once saw that it was no cheque, nor anything else but a piece of paper. He asked the man what he wanted, and he said, "Ten pounds." Thereupon the man was given in charge. It was perfectly clear that there was no forgery in this case. If it had been signed, it might possibly have been a forgery in one case and uttering in the other, but as presented it was a mere worthless piece of paper, and the way in which it was presented and the sort of document that it was made it just as worthless as any other piece of paper, and it could not be taken to have been a pretence. It might very well be that these men did intend to commit some sort of crime, and possibly had the intention of getting hold of some money, but, as a matter of

fact, the accused had done nothing which amounted to a crime, and the conviction must be quashed.

### REHABILITATION.

Mr. Sutton moved for the rehabilitation of Johannes Daniel Rensburg, under the Act 38, 1884.

Granted.

### GENERAL MOTIONS.

*Ex parte* HEMMING AND { 1907.  
PATTLE. { Apr. 3rd.

Mr. Douglas Buchanan moved, on the petition of Douglas Hemming and Cecil J. Pattle, who are articled to Mr. H. W. Gush, attorney and notary, Umtata, for an order condoning a certain break in their articles. From the petition, it appeared that applicants are members of the Tembuland Light Horse, and that when Volunteers were called upon to assist the colony of Natal last year in suppressing the native rebellion, they were selected for service by their commanding officer. On the 15th June last they proceeded to Natal with the Volunteer force, and were absent on military service until the 15th August, when they returned to Umtata and resumed their articles. The Incorporated Law Society had intimated that they would not raise any objection to the admission of applicants by reason of the above break of service.

Hopley, J., said he supposed applicants did not expect to be let off two months' service of articles out of the three years. He took it they would serve two months extra.

Mr. Buchanan said that in *Ex parte Will* (7 Juta, 67) and *Ex parte Katzenstein* (7 Juta, 93), it had been laid down that an articled clerk was entitled to reasonable holidays during his articles, and a period exceeding two months had been allowed.

Hopley, J., said that there was nothing to show that applicants had not already had a holiday. The ground of the petition was not that they were entitled to a holiday. One wished that every young man would become a Volunteer, if possible, and he did not want to discourage Volunteering in the least, but absence on service of that kind was quite alien to the study of the law, and they desired that articled clerks training for the profession should be as efficient as possible. He did not mind acceding to the application, provided petitioners had had no holiday during the articles into which they had entered, the one in March, 1904, and the other in July.

If they had had a holiday, then they must serve the two months in addition.

Mr. Buchanan said he was prepared to take an order in these terms.

Order granted accordingly.

### *In re* ECLIPSE MINERAL WATER CO.

Mr. Douglas Buchanan presented the first report of the official receiver, and applied for the usual order as to lying for inspection and publication. Counsel said that the company, which was really a partnership, was in liquidation. In answer to the Court, he said that he believed the procedure in the Grand Junction Railways, also a partnership, was the same as it was proposed to follow in this matter.

The report was ordered to lie for inspection at the Master's Office for 14 days, publication once in the "Cape Times" and once in the "South African News."

### JAGGER AND CO. V. WEINBERG AND OTHERS.

Mr. P. S. T. Jones moved to make absolute certain rules nisi, attaching 14 donkeys and certain loads of merchandise, and certain two promissory notes for £140 and £200, pending an action by the trustee in insolvency. Counsel said that the property actually attached consisted of six donkeys and some merchandise, the promissory notes, and £40 in cash. Service had been effected on certain of the parties concerned.

Rules absolute, pending action to be taken by the trustee in the insolvent estate of Nathan Weinberg, costs to abide result.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### GENERAL MOTIONS.

*Ex parte* VAN DER MERWE. { 1907.  
{ Apr. 4th.

Mr. W. Porter Buchanan moved for leave to petitioner to register a certain waiver. He said that this was an application for authority to an executor of a deceased person's estate to execute

a power of attorney in the same way as the deceased person had done just prior to his death, which power of attorney had lapsed by his death. The matter had been before Mr. Justice Laurence last week, and he was inclined to grant an order, at any rate, he said there would be no difficulty about an order with regard to a certain notarial agreement as to which the Master had reported. In his report, however, the Master had not specifically addressed himself to prayer (a) of the petition, and his lordship sent the matter back to the Master for a more specific reference to prayer (a). He (counsel) had now a further report from the Master, who said that the question to consider was whether the power of attorney which lapsed at the death of the deceased was sufficient authority for the cancellation of the condition in the deed of transfer restricting the alienation of the property sold by Van der Merwe, sen., to his son, the petitioner. Indicating, as the power clearly did, the intention of the deceased to cancel this condition, the Master thought there was sufficient ground to authorise the executor to execute the powers asked for under paragraph (a) of the petition.

Order granted as prayed.

#### GUTHRIE AND THERON V. TALJAARD.

Mr. Upington moved for judgment, under Rule 329d, in terms of the second section of a certain summons, for (1) £108 17s. 11d., amount of account, with interest at the rate of 8 per cent. from the 1st February, 1907, and 5 per cent. for collection in terms of conditions of sale; (2) interest on the sum of £89 7s., being the capital amount of the before-mentioned account at the rate of 8 per cent. from the 1st February, 1907; (3) £32 13s. 5d., balance of account for sums advanced, moneys disbursed, and interest thereon at 8 per cent. to 1st February; and (4) interest on the sum of £26 19s. 8d., being capital amount of the afore-mentioned account at 8 per cent. from February 1. Counsel added that, so far as the liquid claim mentioned in the summons was concerned, the Court had already granted provisional sentence (17 C.T.R., 241).

Mr. W. Porter Buchanan appeared for defendant, Hans J. Taljaard, farmer, Stanford, division of Caledon, and moved for leave to purgo default and enter appearance. In his affidavit, defendant said that plaintiffs were a firm of attorneys at Caledon. He had a good and *bona fide* defence to the second count in the summons, and had tendered to plaintiffs the sum owing to them. Plaintiffs, however, had always insisted upon his signing a promissory note, which would include

certain sums amounting to about £59 odd, which they alleged were due to them for purchases at auction sales. These sums, deponent said, he did not owe, and were only charged against him, because plaintiffs found that they could not recover from one Jan Swart. He claimed that on the 4th April, 1904, a complete and final settlement was arrived at between plaintiffs and himself as regarded these items. Further affidavits and correspondence were read, from which it appeared that defendant had tendered £146 4s. 8d., in full discharge of his indebtedness to the plaintiffs.

Mr. Upington read an affidavit by C. J. F. Theron, attorney, who said that defendant was given due notice of action which plaintiffs were bringing against him. He denied that the debts incurred by the defendant were incurred as between attorney and client. He also denied that his firm had always insisted upon defendant signing a promissory note, and said that on several occasions defendant had admitted the correctness of the account. He further denied that the firm had guaranteed payment of a promissory note of £47 due by one Swart to defendant. From further paragraphs in the affidavit, it appeared that the firm's bookkeeper had erroneously settled the promissory note for £47, and that communications were addressed to the defendant, but without receiving any acknowledgment. Plaintiffs had been repeatedly promised payment of the account. As to the alleged settlement of the 4th April, 1904, Mr. Theron said that the so-called settlement was obtained by defendant by a deliberate falsehood, and that when the error came to his notice he immediately wrote to the defendant on the 13th July, 1904, pointing out to him that they had not received from J. Swart any portion of the sum due on the promissory note. The present application, Mr. Theron said, was being made by defendant solely on the advice of his solicitor to force the plaintiffs into accepting his tender or losing everything. Counsel also read an affidavit by Mr. Guthrie, who said that Taljaard represented to him that Mr. Theron had said that they had received the money from Swart and thus obtained the so-called settlement of April, 1904. Affidavits by certain bookkeepers and clerks in plaintiffs' employ were also read.

Mr. Buchanan having been heard in argument on the facts,

Hopley, J., said he did not like to shut out a defendant, who seemed to have a genuine defence, from entering appearance. He was generally in favour of giving the defendant every opportunity of having his case heard and of bringing all the facts before the Court. But there were occasions, and this seemed to be one of



them, where the Court should be very slow to admit a defence which was brought in at the last moment after a long term of correspondence, the effect of which would be to inevitably increase the costs over a paltry matter, and with the possible result, if the plaintiff were successful, he would not get his judgment or the costs involved in obtaining it. As to the facts in the case, it seemed to him on the affidavits that the probabilities lay strongly with the plaintiff. If he thought there was a reasonable ground of defence he certainly would not shut the door against the defendant, but as things stood, he thought there must be judgment for the plaintiff as prayed, and that the application to purge default be refused, both with costs. With regard to the voluminous nature of the affidavits, if there was anything in them which was too lengthy, the Taxing Master might have his attention drawn to them, and if he thought anything in them was unnecessary then he could strike out such unnecessary matter.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLAY.]

INCORPORATED LAW SOCIETY ( 1907.  
V. COULTON. ( Apr. 5th

Attorney—Law Society—Indefinite charge.

*Where the Law Society calls upon an attorney to show cause why his name should not be removed from the roll; the charges against him should be stated with the same precision as is required in a criminal indictment.*

*Law Society v. Tottenham and another (1904, T.R., 304) followed.*

This was an application upon notice directed to William Gordon Coulton, attorney, Cape Town, calling upon him to show cause why he should not be removed from the roll of attorneys of the Supreme Court.

The affidavit of A. B. Linscott stated that he was the plaintiff in an action instituted against his wife and one Marsh for divorce, heard in this Court on the 24th August last, on which judgment was given for his wife without any evidence being led on her behalf. Mr. C. H. Maasdorp acted as deponent's attorney, and the respondent represented the defendants. Deponent drew attention to the bill of costs lodged against him by respondent. In this bill were charges in respect of two witnesses named Mackay and Maguire. The Taxing Officer disallowed the charges in respect of the witness Mackay, and allowed the charges in respect of the witness Maguire. Some time afterwards his wife instituted an action against him for divorce, and he then ascertained that Mr. Maguire had had nothing whatever to do with the previous case, and that Mr. Mackay attended the Court, but did not give evidence. John Maguire, in an affidavit, stated that he was never spoken to by any person as to giving evidence in the case of *Linscott v. Linscott and Marsh*; he was not subpoenaed, and he did not attend the Court.

Mr. C. H. Maasdorp, attorney, stated that included in the bill of costs as taxed was the minuting of Maguire's evidence and witness's expenses and conduct money. Respondent informed the Taxing Officer that all the witnesses in question were in court. Maguire was adjudged to be a necessary and material witness.

Robert B. Saunderson, secretary of the Incorporated Law Society, deposed that early in October last Mr. Linscott wrote to the society calling attention to the respondent's conduct. The Council of the Society decided to ask the respondent for an explanation of his conduct, but the explanation furnished was not considered satisfactory, and the society's attorneys were instructed to take the present proceedings. Mr. Saunderson also called the Court's attention to certain evidence given by respondent in the case of *Rea v. Hilyard Home Drummond*, heard at the Criminal Sessions.

The answering affidavit of respondent stated that he was admitted as an attorney of this Court in July, 1902, and had since been practising as an attorney in Cape Town. He was fifty years of age, and formerly practised in England, having been admitted there in the year 1881. As this was the first application of the kind that had been brought against him, he felt the same most acutely, especially as he was entirely dependent upon his profession for a living, and he was convinced that there was no ground for the same, after the explanation he had given to the Law Society. He emphatically denied that

he had been guilty of any misconduct or unprofessional dealings or actions so as to justify a motion for his removal from the rolls. He had handed over the case of *Linscott v. Linscott and Marsh* to his managing clerk, Edward Collins who conducted the case as his managing clerk throughout the whole of the proceedings. Having full reliance in the said Collins, he only occasionally intervened in the case when consulted by Collins, and when personally required to sign any document. The draft brief, minutes of evidence, etc., were made by Collins. In the fair copy brief appeared the minutes of evidence of the two witnesses Maguire and Mackay, and he entirely relied upon the said Collins for this. After the conclusion of the case, Collins handed to him minutes of the costs. The whole of these minutes were in the handwriting of the said Collins. If an error or unproved charge appeared in the minutes, it was unknown to him, and he would and did copy in the same in ignorance thereof. In the bill the names of Maguire and Mackay had been inadvertently transposed by Collins, and expenses had been allowed to one which should have been allowed to the other. The bill of costs so taxed amounted to £47 16s. 3d. After complaining that he had been placed at a disadvantage by the delay of the Incorporated Law Society, deponent went on to refer to his connection with the case of *Rex v. H. H. Drummond*, and said he was not informed that this case would be brought up until he received notice on the 15th March. It seemed to him that this case was simply brought up to prejudice him in the eyes of the Supreme Court, and to lengthen the proceedings. Drummond was never in his service, but he (deponent) voluntarily allowed him to temporarily use his office prior to the Webster transactions. He admitted that his bill of costs and disbursements in connection with the matter of Webster amounted to £22 3s. 4d., and that he refunded £17 14s., but said that he did so in order not to be embroiled in the disputes between Webster and the Assets Realisation Association.

The affidavit of Edward Collins, of Kimberley, and formerly a clerk in the employ of respondent, stated that in the course of the action he made minutes of the various charges due to his principal. He said that the respondent made a fair copy of the rough bill of costs, which he put before him. He emphatically denied the statement by Mr. Maasdorp as to what took place before the Taxing Officer. Respondent was not present at the taxation. Deponent said that he should have stated that Mackay, and not Maguire, attended the court, and that the expenses of Mackay should have been allowed, and not disallowed, while

the expenses of Maguire should have been disallowed.

The replying affidavit of Mr. Saunderson explained that the delay was due to Mr. Linscott being away in Johannesburg.

Mr. Close for applicant; Mr. Upington for respondent.

Mr. Close submitted that, as to the first branch of the case, the respondent's present explanation was inconsistent with his former explanation on November 24. He urged that the statement given by Mr. Maasdorp as to what took place before the Taxing Officer, the late Mr. Gately, was entitled to credence. The respondent should have taken measures to check the rough bill of costs submitted by his clerk. If he chose to take the risk, and leave the matter entirely in the hands of his clerk, he could not afterwards shelter himself behind that clerk from the consequences of an error, if such it were. He could not now be heard to place the responsibility upon his clerk. As to the other branch of the case, counsel submitted that it was an improper and unprofessional act on respondent's part to enter into an agreement to share profits with a person not connected with the profession, viz., Home Drummond, upon any business introduced by the latter. There was also the question of an item in his account of "paid 15s. stamp." Respondent admitted in his evidence that he had not paid that 15s. His bill amounted to £22 odd, and he returned a cheque for £11 15s., and made further refunds, leaving nothing of the original bill, except practically the amount that he was to share with the manager of the association as profits.

Mr. Upington said he wished to draw attention to the form which the notice of motion had taken. In these matters, where it was sought to remove a man from the roll, the charges should be set out in a definite form, so that he would know what he had to meet. In this instance all that was done was to cite his client into Court, and to tell him that the Law Society intended to apply to have him removed from the roll. The only charge upon which he had been asked to make any explanation was the charge that he included in a bill of costs the expenses of a certain witness who, in fact, was not called or subpoenaed. It appeared that long prior to this explanation being demanded, evidence had been given by Mr. Coulton in a criminal case, and attention was now directed to that. No charge whatever was made, and no explanation demanded. Certain evidence had been brought before the Court to show the respondent's association with one Home Drummond, of notorious memory, and that was done in order to prejudice the respondent. He did not think a more flimsy charge

had ever been brought by the Law Society against a professional man. He could have understood their position if with all the facts now before the Court they wrote to Mr. Coulton and censured him for allowing such a thing to happen in his office. He should like to see the faces of the leading attorneys of this city if they were to be held practically criminally responsible for every mistake, error, or omission which occurred through the fault of their articulated clerks. If every attorney was to be dragged before the Court under such circumstances, appearances would be very frequent. With regard to attorneys entering into partnership with persons outside their profession, counsel pointed out that the Law Society did not attempt to take any proceedings against Mr. Markotter after the hearing of the Fagan case (17 C.T.R., 196). It was a common practice for attorneys and auctioneers to enter into partnership throughout the country. The explanation of the respondent, counsel submitted, was a satisfactory one.

Mr. Close, in his reply, quoted sections 21 and 22 of Act 27, 1883, and cited *Pienaar v. Incorporated Law Society* (1902 T.S., 14). He repudiated the suggestion that the respondent had been picked out by the Law Society for special treatment. As to the point made by his learned friend in regard to partnerships with unqualified persons, he might say that the society were taking proceedings in respect of certain persons who were in a similar position.

Mr. Upington cited *Incorporated Law Society v. Tottenham and Longinotto* (1904 T.S., 304).

Hopley, J.: In this matter the respondent has been called into court on notice which reads as follows: "Please take notice that application will be made to this honourable Court on the 26th March, at which time you will be required to show cause, if any, why your name shall not be removed from the roll of attorneys of this honourable Court, and why such other order should not be granted against you as to their lordships shall seem meet, and why you shall not be ordered to pay the costs of this application." It is a notice, it will be observed, in very general terms, not specifying any particular charges against the respondent, but simply calling upon him to defend himself against any charges which might be raised out of the accompanying affidavits. The affidavits set forth two sets of circumstances which had been relied upon by the applicant's counsel as showing such professional misconduct as would justify the Court in disqualifying the respondent from practising in his profession for a limited or unlimited period. I think a very sound rule was laid down in the Transvaal Courts in the case referred to by Mr.

Upington, in that of the *Law Society against Tottenham and Another*, reported in the Transvaal reports, 1904, at page 304. There the Court considered this very question of a sort of vague notice, bringing an attorney or professional man into court without formulating properly the charge against him. On page 309 it says: "When a charge of unprofessional conduct is brought by the society against any practitioner, such charge should be distinctly formulated, and the inquiry ought to be restricted to the charge. This rule should have been adhered to in the present case, and it should be kept in view in all cases of a similar character. It is right, not only that the charge should be stated with distinctness, but the practitioner who is accused should not be asked to meet any point not fairly raised upon the papers. It would be wise for the applicants to bear that decision in mind, and, as far as I am concerned, I am prepared to adopt these words, and say that is the desirable course to be pursued in such a case. The man comes into court to defend himself against what perhaps is not a crime, but what to him is a charge as important as if he were standing charged on some criminal charge. Our own law as to that is that in criminal indictments the charge must be distinctly set forth, and the accused person know the charge he has to meet. Similarly with professional men, they should know the exact acts complained of, and the exact charges should be formulated. Now, in the present instance, the general notice of motion to which I have referred is supported by an affidavit, which sets forth the cause of complaint against the respondent of having made certain charges in a bill of costs in a divorce action in which he had been concerned for the defendant, and in which his client came off successfully. There was included in such bill of costs a charge which ought never to have been included in the bill of costs, a claim for moneys that had never been disbursed. That would be a serious piece of misconduct on the part of an attorney, and I shall deal at once with that portion of the case. His Lordship, after dealing with the facts of the Linscott case, said it was not until the affidavits were filed that this explanation was given of the confusion between the two names, Mackay and Maguire. In view of the lateness of this explanation, it not unjustifiably raised the suspicion of the applicants. Although I think they should formulate all the charges against any respondent, when they bring him to Court. I do not think they should hold private inquiries as suggested by Mr. Upington, and I think if censure is to be meted out to any member of the profession it would be much better it should be done openly in Court.

On the whole, I am satisfied that no actual dishonesty or malpractice was intended. I do think it was a mistake on the part of Collins in the first instance, that Collins did not maliciously go about putting these charges in, but that he intended to do the work at the time. I do not think Collins intended to get any advantage by this mistake, but the explanation was not made to the Law Society, and I think they were right in coming to the Court to have this matter thrashed out, and while I absolve the respondent of anything like intentional professional misconduct, I cannot entirely hold him irresponsible for the mistakes and carelessness of his managing clerk. I do not think the explanation was made in such time that the Law Society was bound to accept it without coming to Court. With regard to the other charge, which I may call the Home Drummond charge, no explanation was asked of the respondent in the correspondence which passed on the matter, and there was some force in Mr. Upington's contention that it is simply tacked on to the affidavit as an extract from the records of the Criminal Sessions, embodying some evidence given by Mr. Coulton which showed he had been mixed up with Home Drummond, having him in his office and sharing certain charges. I do not think it followed at all that he must have known they were going to bring any charge arising out of that. I think it is a sound rule that was laid down by the Transvaal Court that that charge should have been properly formulated so that the respondent might know what to meet. That has not been done. Such a state of affairs as that alleged is highly undesirable. I am not going to express my opinion as to how far it might disqualify a practitioner from being a practitioner where he shared the proceeds with an unqualified person. I am aware a good deal of this thing goes on, and I am aware in the country districts attorneys have a sort of mixed or heterogeneous class of business. A good deal of money-lending goes on in their offices, and auctioneering business is carried on there, which is not always managed by an attorney or qualified officer of this Court. Whether that is a desirable state of affairs I am not going to say. I do not altogether like it, but I am not going to say generally or broadly that anybody who shares charges with an unprofessional man is necessarily disqualified. I can only say I hope such practice will extend as little as possible, and I think these people who have the honour of their profession at heart and are guided by its traditions and its etiquette, should avoid getting mixed up with that class of business. But I do not think I would consider these matters, because I do not think they have been properly brought

before me. The result of it all is that I make no order such as prayed for by the applicant in the present case, because it is not properly brought before me, and, on the second case, I think a satisfactory explanation of how the mistake occurred has been now laid before me. At the same time, the conduct of the respondent was open to enquiry, and his explanations were not given at once and in such a way that the society should be altogether satisfied with the matter. They were right in coming to this court, and I think the respondent should pay the costs of this application.

[Applicants' Attorneys: Van Zyl and Buissinne. Respondent's Attorney: C. Brady.]

UNION-CASTLE STEAMSHIP CO., LTD. V. HEINRICH KNORR, AS REPRESENTING THE HAMBURGER ASSEKURADEWIEN, OF HAMBURG, AND THE NEPTUN INSURANCE CO., OF ARENDAL, NORWAY.

Mr. Benjamin moved for an order directing the Registrar to pay out certain moneys, in terms of a consent paper

Counsel read an affidavit by Mr. S. S. Jacobsohn, attorney, Cape Town, who said that the Union-Castle Steamship Company sued defendant for £2,000 for salvage services rendered in connection with the salvage of the barque Cingalese and the cargo thereof. At an early stage in the proceedings, and with the view of avoiding expense, the barque and her cargo was publicly sold by the Sheriff, and by consent the net proceeds totalling £1,721 9s. 8d., were paid into Court pending a final order in the suit. The suit, however, had now been settled by defendants agreeing to pay plaintiffs for salvage services £688 11s. 10d., for certain disbursements £75, and taxed costs £57 13s., making a total of £821 4s. 10d. On the 3rd inst., a consent paper, signed by the attorneys of plaintiffs and defendant, was filed with the Registrar, consenting to the said sum being paid out to plaintiffs, and the balance, viz., £900 4s. 10d. being paid to defendant. By formal consent of parties, Mr. Heinrich Knorr, of East London, represented all concerned as far as defendants were concerned. Deponent's firm express instructions were to consent to payment out of the £1,721 9s. 8d. of the sum of £821 4s. 10d., and to uplift the balance and remit it to Heinrich Knorr less the defendant's costs of suit. Application had been made to the Registrar, who, however, required an order of the Court.

Order granted in terms of consent paper.



## PUNTY V. STREETER.

This was an application upon notice calling upon respondent to show cause why he (applicant) should not be released from civil arrest pending payment of £3 a month.

From the affidavits it appeared that applicant had been arrested at Mossel Bay and lodged in gaol under a decree of civil imprisonment, obtained by respondent. Applicant offered to pay £3 a month if released from gaol, but respondent was not prepared to accept anything less than a guarantee of £10 a month. Applicant had been touring the colonies with a bioscope, and one of the men who had travelled with him said that Puxty had exhibited pictures of the Springbok football matches before crowded houses. In the replying affidavits it was stated that the bioscope tour had not been a great financial success, having only left £20 for applicant's personal expenses during five months.

Mr. P. S. T. Jones was for applicant; Mr. Benjamin was for respondent.

Mr. Jones said that the applicant was arrested at a time when he did not know a summons was out against him. If he had known that, and he had appeared and offered £3 a month, it was possible that the Court would have suspended the decree on payment of instalments of £3 per mensem. Considering the smallness of the debt, he was now making a reasonable offer. The original debt was £20 odd, and at the most the indebtedness was now £60 odd.

Mr. Benjamin submitted that the onus rested upon applicant to show that he had no property or means. He was not entitled to release, unless he paid the debt in full or made a reasonable offer. The applicant had failed to make a reasonable offer, considering the evidence before the Court, as to his means. It was clear that Puxty had property, and until he consented to hand up that property, respondent was entitled to keep him in gaol.

Eventually the Court suggested that the parties should come to a compromise to enable applicant to come to Cape Town and point out the property which he said he had.

Mr. Jones said that the property Puxty said he had at his office in Fletcher's Chambers had already been attached. He urged that the Court should grant relief on payment of from £3 to £5.

Hopley, J.: One cannot help feeling how unsatisfactory is the nature of this application, inasmuch as the Court is almost entirely in the dark as to what are the real facts of the case. I can now only make an order by guesswork—I cannot call it anything more—and leave it open to the creditor to apply again for something more sub-

stantial if he finds circumstances warrant it. The order of the Court is that the writ of civil imprisonment be suspended and the applicant released upon payment of £6 to the Deputy-Sheriff of Mossel Bay, and thereafter on the same date of each month at the office of Messrs. Walker and Jacobsohn, attorneys, Cape Town, respondent to have leave to apply for payment of a larger monthly amount if the circumstances warrant such application, applicant to pay costs of this application.

*In re* INSOLVENT ESTATE BUCHANAN.

Mr. Benjamin moved, on the petition of Isidor Hanau, for the appointment of J. M. P. Muirhead as provisional trustee in the insolvent estate of William Preston Buchanan, with power to make certain disbursements, in connection with certain mining venture at Millwood, Knysna.

Order granted accordingly.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.

1907.  
Apr. 9th.

Mr. Gutsche moved for the admission of Johannes Daniel Louw as an attorney and notary.

Application granted and oaths administered.

*In re* INSOLVENT ESTATE MALAN.

Mr. Roux moved as a matter of urgency for the appointment of David Isaac de Villiers, secretary of the Paarl Board of Executors, and Alfred N. Foot, of E. R. Syfret and Co., as provisional trustees in the insolvent estate of David Johannes Malan, general dealer, of Wellington, with powers to carry on the business and collect outstandings.

Order granted as prayed.

## PROVISIONAL ROLL.

VAN RYN WINE AND SPIRIT CO. V. JARRETT.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.



AIR AND CO. V. WILLIAMS.

Mr. Benjamin was for plaintiffs; Dr. Greer was for defendant.

Dr. Greer applied for a postponement to enable defendant to file further affidavits.

Buchanan, J., however, said that he would hear the case.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

From the affidavits it appeared that the respondent had been connected with Wood, Williams and Co., in liquidation. The plaintiffs had made considerable advances to the company, and they said that defendant was jointly liable to them on a guarantee for £12,000, and that he was liable upon a second bond for £2,500 registered against his house at Sea Point. Defendant said that the liquidation of Wood, Williams and Co. had not been completed, and that the plaintiffs had not ascertained to what extent he was liable under the guarantee. As to the second bond, the property had not been put up for sale, and it was not shown that it would not realise the amount of the bonds.

Dr. Greer said that there were certain allegations in the petition on which the provisional order was granted, but there was no clear allegation that any debt amounting to more than £100 was owing by the respondent to the petitioners. There was a statement that respondent was a guarantor for £12,000 on behalf of Wood, Williams and Co., Ltd., in liquidation. That liquidation had not yet been completed. It was not at all clear that there would be any deficiency in the estate of Wood and Williams, Ltd. Mr. Rubinstein, the petitioner's agent in Cape Town, throughout the whole of his affidavit talked only of the probabilities. The whole thing was *in futuro*. Until it was shown that there was a deficiency in the estate of Wood and Williams, Ltd., which had not yet become clear, because the assets had not been realised, and until there were some statement before the Court that the co-guarantor could not meet the liability, there was no such clear allegation of the liability on the part of the respondent as would justify the Court in granting the application under Act 38, 1884. The only other ground on which the petition was based was that there was a second bond of £2,500 in favour of petitioners on the defendant's house, Saxmundham, Sea Point. That property had not been realised; no judgment had been taken on the bond, and until it appeared that there would be a liability if the property were realised, he submitted that no such clear proof of the debt had been given as would be required under the Act of 1884. Defendant was sued on what was, after all, a contingent liability.

Mr. Benjamin submitted that it was perfectly clear that the defendant was insolvent. His learned friend said that this was a contingent liability. That was not so. Defendant had made himself liable as principal debtor in the estate of Wood and Williams, and he had bound himself as principal debtor on both bonds. The only asset that defendant had was the house at Sea Point. If that property were sold by the execution creditor the result would be to considerably prejudice the second bondholder, who was the petitioner in this case. The first bondholder only consented to stay his hand in the proceedings against Williams in consideration of the present petition for sequestration being presented. Defendant had not assets to meet even the second bond of £2,500. That bond had been offered to him for £1,000, but he would not take it up. Then there was the liability under the bond for £12,000.

Dr. Greer having been heard in reply,

Buchanan, J.: This is an application for compulsory sequestration of the defendant's estate. The defendant has not committed an act of insolvency, and consequently the creditor is not entitled to apply under the Insolvent Ordinance, but he has proceeded under the Act 38 of 1884, which enables a creditor where no act of insolvency has been committed to petition for the sequestration of his debtor's estate, but which requires that in the petition the creditor should state certain three requisites: (1) That he is a creditor for £100 at least; (2) that he should show that the debtor's estate is insolvent; (3) that he should show that the sequestration will be for the benefit of creditors. He is also required to set forth in his petition the grounds upon which these statements are based. Two classes of objection are taken to the sequestration of this estate, the first founded upon an allegation that the petition does not comply with the Act, and the second founded upon the merits. Now, the petition is certainly very bald, and had there been any conflict upon the allegations in the petition, it is quite possible that this petition might have been held insufficient. As to the first requisite, that is met in the petition by stating that there is a sum of over £1,500 due, wholly unsecured, and in addition other liabilities under a certain deed of suretyship. The second requisite is that assets of the defendant are wholly insufficient to meet his liabilities. A bare allegation is made, but, without carefully scrutinising the affidavit and picking out the allegations, it might have been difficult to show that the estate was really insolvent. However, the defendant has not denied this allegation in form, and consequently the

paragraph in the petition must be held to be sufficient. Coming to the merits, it is alleged that the defendant's estate should not be sequestrated, because the claim of the creditors is only upon a guarantee. The original debtors are Messrs. Wood and Williams, the "Williams" being the defendant in this case, the company being formed as a limited liability company. Had the facts remained there, in the absence of any excussion of the principal debtors, it might have been a good answer to say that they cannot now sequester the debtor's estate until excussion has taken place. When, however, I come to look at the documents upon which the guarantee is framed, I see that there is an express renunciation of the necessity of excussing the principal debtor, and the creditor might have gone into court without any excussion whatever, and obtained judgment on his bond against the defendant in this case. Hence, therefore, the question of considering the necessity for excussion vanishes in the present instance. The principal point made is that until Wood and Williams are liquidated, it is impossible to ascertain the exact amount of the debt due by the defendant in the present case, but as, on the documents, there is at present a debt due, and the defendant would be liable upon it without excussion, this defence cannot be sustained in this case. Looking to the question as to whether it would be in the interests of creditors that sequestration should go through, we find that there is a first bond on the property due to somebody else, the interest upon this bond is over six months in arrear, the defendant has been threatened with proceedings on this first bond, and he has failed to meet his liability. The second bond is also due, and can be called up, and under the circumstances I think that the utmost that would be saved to defendant by refusing sequestration would be a little delay, and then perhaps proceedings for provisional sentence and a return of *nulla bona*. As nothing would be gained in this case by postponing the order, it is better for all parties that the provisional order for sequestration should be confirmed and final sequestration adjudicated as prayed.

[Plaintiffs' Attorneys: Van Zyl and Buisinne. Defendant's Attorneys: Not on record.]

#### ESTATE LOUW V. LOFTUS.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

Mr. Buchanan also moved for the appointment of G. W. Steytler as pro-

visional trustee of the estate, with power to sell perishable articles.

Order granted accordingly.

#### RUNCIMAN AND ANOTHER V. JENKS.

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

Mr. Toms, later in the day, moved for the appointment of Wm. Runciman as provisional trustee, with power to collect rents and look after the property of defendant at Simon's Town.

Order granted accordingly.

#### GENERAL ESTATE AND ORPHAN CHAMBER V. SAFIERDIEN (AS CURATOR NOMINATE TO TALIEP ABAS SAFIERDIEN).

Mr. Toms moved for provisional sentence on a mortgage bond for £215, with interest from the 1st April, 1905, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### MACLEOD V. CAMERON.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £500, with interest from the 1st April, 1906, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### S.A. PRODUCE CO. V. GOLDSTEIN AND HURWITZ.

Mr. Roux moved for provisional sentence for interest on a promissory note for £100 and for costs, the capital having been paid.

Order granted for interest and costs.

#### ADLER V. STAPLES.

Dr. Greer moved for provisional sentence on an unsatisfied judgment of this Court for £40, together with £8 2s. 7d. taxed costs.

Defendant said he left security with the plaintiff for £50 odd. The value of the security, which consisted of plate, curios, vases, etc., was about £73.

Cross-examined: Witness paid £73 to the merchants from whom he bought the goods. He had on three occasions offered plaintiff £1 a month. He had

no means whatever. He had lately returned from German South-West Africa.

Buchanan, J., said there appeared to be no proof of means, and no order would be made.

### ILLIQUID ROLL.

HUDSON, VREEDE AND CO. ( 1907.  
V. WASSUNG. ( Apr. 9th.

Mr. Gutsche moved for judgment under Rule 329d for £2,125 11s. 8d., less £82 5s. paid on account, moneys due by defendant under an acknowledgment of debt.

Order granted.

### LIEBENBERG V. BAILEY.

Mr. Pohl moved for judgment under Rule 329d for £20 16s., balance of purchase price of certain sheep.

Order granted.

### ROODEBLOEM ESTATES V. GAUL.

Mr. De Waal moved for judgment, under Rule 329d, for £690, balance of purchase price of certain lots at Roodebloem, with interest and costs.

Judgment as prayed, subject to plaintiffs tendering transfer against payment.

### REHABILITATION.

Mr. Howes applied, under Act 38, 1884, for the rehabilitation of Henry Edward Richold.

Granted.

### GENERAL MOTIONS.

*Ex parte* INSOLVENT ESTATE ( 1907.  
STOCKE. ( Apr. 9th.

Mr. Swift moved to make absolute certain rule nisi calling upon respondent to show cause why applicant's powers as provisional trustee should not be enlarged to enable him to administer the estate. Respondent did not appear.

Rule absolute, costs out of insolvent estate.

### *Ex parte* ESTATE VAN TONDER.

This was an application for the partition of certain property in the Ladismith district in which minors were interested.

Mr. Close (for petitioners) said that the matter had previously been before Mr. Justice Laurence, who asked whether the petitioners would be prepared

to take an order as proposed by the Master in lieu of the order which they asked for. (17. C.T.R., 251.) There was some difficulty in the form in which the order was proposed by the Master, and the Court allowed the matter to stand over to see whether a mutually acceptable order could be framed, and, as a matter of fact, such an order had now been obtained, and he had to ask the Court to sanction the order as signed by the Master.

Order granted in terms of the Master's recommendation.

### *Ex parte* BAILEY.

Mr. Howes asked leave to mention this matter as one of urgency. Counsel said that Mr. Bailey petitioned to have his name removed from the roll of advocates, as he was anxious to enter into articles.

Buchanan, J., said he failed to see how the matter was urgent. He thought the case should be set down in the ordinary way.

### *In re* RECREATION SYNDICATE, LTD. (IN LIQUIDATION).

Mr. Gutsche presented the third and final report of the official liquidator, and moved for the usual order.

Order granted.

### *Ex parte* GELDENHUYS.

Mr. M. Bisset moved for leave to the petitioner to enter into a certain agreement by which a syndicate could test one of the farms in the Ceres district for copper deposits. The granting of the application would be to the advantage of the petitioner, and the heirs. The Master's report was favourable.

Order granted in terms of Master's report.

### *Ex parte* SNELL.

Mr. De Waal moved for an order authorising the Registrar of Deeds to substitute a certain diagram.

The matter was referred to the Registrar of Deeds for report.

### *Ex parte* MORGAN.

Mr. P. S. T. Jones moved for an order authorising the issue of a certified copy of a mortgage bond for £500, which had been lost.

Order granted.

*Ex parte* POWELSE.

**Mortgage—Beneficiaries interest  
—Possibility of future heirs.**

Mr. Benjamin moved for leave to the petitioners, husband and wife, aged respectively 87 and 65, and residing at Port Elizabeth, to mortgage certain property for £750 to pay off certain debts. All the persons interested had agreed to the passing of the bond.

Buchanan, J., said the Court would not go out of its way to sanction a private arrangement such as this unless the mortgage was authorised by the will and was necessary to preserve the property for the beneficiaries. An order would be granted authorising the Registrar of Deeds to pass transfer to the children, subject to the applicants' life interest, on the assumption that no more children would be born to the applicants, and their children could pass the bond without coming to court.

*Ex parte* FRIEDLANDER BROTHERS.

**Sale—Cancellation—Rule nisi.**

*The Court has power to issue a rule nisi, calling upon a respondent, who has purchased land, but has not taken transfer, to show cause why the sale should not be cancelled and to direct substituted service of the rule.*

Mr. Close, for the petitioners, moved for an order cancelling the sale of certain erven at De Aar. Purchasers of about 85 lots had not taken transfer of the lots purchased by them, and they could not now be found.

Buchanan, J., asked how could the Court cancel sales of land without notice to the purchasers.

Mr. Close then asked for a rule nisi.

Buchanan, J., said it would be quite a new procedure to obtain cancellation of sales by rule nisi. There would be no order.

Mr. Close again mentioned the matter later in the day, and quoted authorities in support of the application. He cited *ex parte Henry Stevens* (6 C.T.R., 150), *Scott v. Isaacs and Another* (12 C.T. Reports, 791), and *Estate Owen* (16 C.T. Reports, 79, 290, and 439).

Buchanan, J.: Counsel has certainly shown precedents for this application now, although I think they are bad precedents. My first impression would have been against it. I would advise counsel when they come into court with an extraordinary thing like this to come armed with authorities. On first impression I certainly would not have granted an order. The practice,

however, seems to have sprung up. You may take an order. In the other cases I see that there has been personal service.

Mr. Close pointed out that there was not personal service in *Stevens's* case.

Rule nisi was granted as prayed, calling upon all interested to show cause why on the 4th June the sales should not be declared cancelled and why the moneys paid under the contracts should not be declared forfeited, personal service as far as possible, failing which publication in the "Government Gazette," the "Richmond Era," and in the native cases in "Imvo" as well, costs to come out of the purchase moneys already paid.

*Ex parte* INSOLVENT ESTATE SPIRO.

Mr. Douglas Buchanan moved for the appointment of a provisional trustee in the estate.

Mr. A. T. Hennessey was appointed as provisional trustee, with power to sell the furniture in the estate.

*Ex parte* INSOLVENT ESTATE VORSTER.

Mr. De Waal moved for the confirmation of a certain sale to the petitioner, who was trustee in the estate.

Order granted, subject to meeting of creditors.

*In re* PURE MILK SUPPLY CO., LTD. (IN LIQUIDATION).

Mr. Roux presented the official liquidator's final report for confirmation. The report had lain for inspection in the usual way.

The report was confirmed, with remuneration to the liquidator as brought up in the account. Liquidator authorised to apply the assets in satisfaction of the liabilities in terms of the report and on the filing of the receipts the company declared dissolved. Liquidator authorised to destroy books and documents after payment of awards.

*In re* GRAND JUNCTION RAILWAYS, LTD. (IN LIQUIDATION).

Mr. Searle, K.C., moved for the confirmation of the official liquidator's third report. There were certain creditors in England, and counsel asked that the English creditors should have an opportunity of objecting. With regard to certain disputed claims, counsel suggested that a copy of the report and the Court's order be served upon the different banks, and one, Mr. Palmer, and that they be ordered within six months to establish their claims.

It was ordered that a copy of the report be served on the banks, and the creditor, Mr. Palmer, and that a rule nisi be granted calling upon them to establish their claims within six months, failing which to be struck off the list of creditors. It was further ordered that the liquidator have power to ask for particulars from creditors on affidavit as to how and when the debentures come into their possession within three months of posting the registered letter, and authority granted to pay 4s. 6d. in the £ on undisputed claims, sufficient being held in reserve to pay other creditors if necessary. The liquidator, who was appointed some five years ago, to be allowed 2½ per cent. on the amounts which he recovered.

AFRICAN REAL ESTATE CO., LTD. V. ATTAWAY.

This was an application for the ejectment of respondent from certain schools and premises.

Mr. Roux (for applicants) said that respondent had left the premises, and he had now to apply for costs only.

Order granted for costs.

COMMERCIAL UNION ASSURANCE CO., LTD. V. BRAAPT.

Mr. McGregor moved for the appointment of a commission *de bene esse* to take the evidence of Mr. Battersby, of Cape Town. Action had not yet been commenced, but was threatened, and the application was made under Rule 35. Mr. Battersby intended to leave the Colony on the 17th April.

Application granted, Mr. De Waal to be commissioner, costs reserved for further order of Court.

*Ex parte* ESTATE SMITH.

Mr. De Waal moved for leave to the executor testamentary to raise a loan upon certain landed property to pay estate debts and transfer charges.

Leave granted to mortgage the property for such amount as shall be approved by the Master.

*Ex parte* OLIVER.

Mr. Pohl moved for leave to petitioner to sue her husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce. The petition stated that the respondent was at present in gaol at Potchefstroom, Transvaal.

Leave to sue by edict granted, citation returnable on the 4th June, personal service.

*Ex parte* BESTER.

Mr. De Waal moved for leave to petitioner, who is surviving spouse of the late Andries J. Bester, to sell certain landed property in the division of Riversdale, minors being interested.

Order in terms of the Master's report.

SCHOOMBEE V. SCHOOMBEE.

Mr. M. Bisset moved upon notice to respondent to show cause why a certain erf in the village of Steynsburg, owned by Elizabeth MacAllister, a minor, with a life interest in favour of the respondent (grandfather of the minor), should not be sold for £125, and the proceeds appropriated to the cost of maintenance and education of the said child, payment of arrear rates and taxes, and the balance to be paid into the Guardian's Fund for the benefit of the minor. Counsel read an affidavit of service upon the respondent, who lives in the district of Jamestown, and who stated that he did not intend to oppose the application. It was stated that Mrs. Schoombée was the widow of the executor dative of Mrs. MacAllister's estate. Mrs. MacAllister's husband was believed to be still alive, but his whereabouts were unknown. Petitioner was looking after the little girl.

Order granted, authorising the Master to transfer the property, to receive the proceeds, and therefrom to pay arrear rates and taxes, balance to be paid by him at his discretion for the past and future benefit of the minor, costs of this application to come out of the proceeds.

*Ex parte* EXECUTORS OF ESTATE EATON.

Mr. Gardiner moved for leave to attach the rents as against one Viesser, who held a mortgage bond until such time as the immovable property was sold.

Order granted.

*Ex parte* ESTATE LATE ALBRECHT.

Mr. P. S. T. Jones moved for leave to the executor (Mr. Steytler), to cancel a certain sale, and to have it declared that certain amounts paid on account were forfeited.

A rule nisi was granted, returnable 4th June, calling on all interested to show cause why the sale should not be cancelled, with costs, personal service if possible, failing which, one publication in the "Gazette" and the "Cape Times."



# SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ESTATE FOURIE V. FOURIE. { 1907.  
(Apr. 10th.

This was an application upon notice calling upon respondent to show cause why she should not pay costs of an application which she made in October last for leave to sue the estate of the late Ockert Johannes Fourie, sen., *in forma pauperis*.

From the affidavits it appeared that the late Ockert Johannes Fourie's first wife predeceased him. He then entered into marriage with the present respondent under an ante-nuptial contract, which provided that, should he not make a will, she was to be sole heiress, and also provided that a donation of £50 was to be paid to her. She brought an application in October last for leave to sue the estate of her late husband *in forma pauperis*, claiming that she was sole heiress (16 C.T.R., 896). The executor dative contested her right to receive anything from the estate as sole heiress, and said that there was no property acquired by the deceased after the death of his first wife. He said he was willing to pay over £50, which had been tendered before the application was made. When the application for leave to sue as a pauper came before the Chief Justice he made an order that Mrs. Fourie be paid £50, so that there would be no good to sue *in forma pauperis*, and directed costs to be costs in the cause. A sum of £50 was paid over by the attorney in the estate at Jansenville, but the present respondent had taken no further steps with regard to an action. The executor had filed an account with the Master, to which, however, an objection had been taken by the respondent. She submitted that she was unable to bring an action until the executor had filed an account of the separate estate of her late husband. The executor said that there were no assets in the separate estate to account for.

Mr. Gardiner was for applicant; Mr. Swift was for respondent.

Mr. Gardiner said that the executor wanted to wind up the estate. He said that there was no property acquired after the death of the first wife, and that there was nothing for the second wife (the present respondent) to get from the estate. If the applicant were wrong, then it was the duty of the respondent to impeach the account. The respondent ought to be put to terms.

Mr. Swift said that his client was on the horns of a dilemma. She was disinclined to rush into litigation, because she did not know how much there was

in the estate of her late husband that she was likely to get, and, in any case, the costs would have to be borne by her. The respondent wanted to see an account of her late husband's estate. It was desirable in the interests of all parties that a compromise should be come to, and she was prepared to accept £50 in satisfaction of any claim she might have, provided the applicant's estate would pay all her expenses. The respondent was very loth to go into an action at law against her stepson. Counsel submitted that the present application was premature.

Mr. Gardiner said that he did not see why the executor should pay the costs of the respondent. He had filed an account already, which showed what property there was in the estate. Mr. Fourie said that there was no asset to be brought up in the separate estate of the late Ockert Fourie, and that, in fact, the estate had deteriorated since the death of the first wife.

Buchanan, J.: The respondent, Mrs. Fourie, a widow in indigent circumstances, applied to the Court for leave to sue *in forma pauperis*. In consequence of that application the Court made an order directing the then respondent, who, it was shown, I presume, had money in his hands belonging to the estate Fourie, to pay over £50 at once. He did so, and consequently she, being put in funds, could not longer sue *in forma pauperis*. She took no further steps with regard to an action. The question as to why she has not taken these steps is a matter now in dispute. She says it is because the executor has not brought up proper accounts? he says he has brought up proper accounts. As the matter stands, it seems that the Master has not accepted the accounts. I would like to hear from the Master why he did not accept the accounts. It is a great pity that there should be further litigation, because the costs of whatever further steps are taken will have to come out of the estate of this poor woman. I want to save the woman any further expenses, and before making any final order I would like to be informed by the Master what is the exact state of the account. It is quite true that the executor is bound to wind up the estate, and Mrs. Fourie, if she have any cause of action, must proceed, or she must drop it entirely. Before making an order I will communicate with the Master with a view of ascertaining the exact state of the account.

## HEDLEY BROS. V. COLONIAL GOVERNMENT.

### Discovery—Colonial Defence Department.

This was an application calling upon respondents to show cause why (a) they

should not be required to make further and fuller disclosure of the communications which have passed between the officers of the Cape Mounted Police at Prieska during the months of October and November, 1906, with their superior officers or the Defence Department, relative to the acquisition of horses or other animals in connection with the resistance or stoppage of the Ferreira raiders, or otherwise relating to the issues raised in the suit now pending in this Court, and (b) why an order should not be granted requiring Sub-Inspectors Strickland, Bosanquet, and Grant and Inspector Spencer to make discovery on oath of all papers, documents, and writings which are or have been in the power, possession, or control of each or any of them relating to matters at issue in the above suit.

Mr. Gardiner was for applicants; Mr. Howel Jones was for the Government.

Mr. Gardiner said that the application arose out of an action in which applicants sued respondents for the purchase price of certain horses and mules bought, the plaintiffs alleged, by the Government in connection with the recent Ferreira trouble. The plaintiffs alleged that the Government, through their agent, Lieutenant Bosanquet, bought the animals from them. The Government disputed the sale; they denied that any person entered into an agreement of sale, and said that, if he did, he was in no way authorised to act on their behalf. In answer to the Court, Mr. Gardiner said he recognised that he could not press the second part of the application.

From the affidavits, it appeared that on the 21st February last the applicants obtained a discovery order against the respondents, and that, in reply Mr. Janisch, the Under Colonial Secretary, stated on affidavit that they had no further documents to disclose relating to matters in the suit. However, as Mr. Jones said, "to make assurance doubly sure," the Government attorneys telegraphed as follows to the Commandant-General, Cape Colonial Forces, King William's Town: "*Re Hedley Bros. v. Government.* Did any communications by letter or telegraph pass between Strickland, Bosanquet, Grant, or Spencer and headquarters on the 12th or 13th November, relative to purchase of horses from Hedley Bros.? Did anyone at Prieska ever have instructions by letter or telegraph from superior officers or Defence Department as to purchase of horses. Please wire reply; urgent." The reply was as follows: "Your wire received. Your first question, no, until morning of 14th November, before breakfast, when Hedley interviewed the Commandant-General at Prieska police camp about the horses which were then in police

stable yard, existence of Hedley Bros. unknown at headquarters. Your second question, only instructions in any way connected with horses were wired to Captain Grant on 12th idem, that he should be prepared to engage twenty Bastards mounted, details of pay to be notified to him on arrival Commandant-General at Prieska. No orders to purchase horses sent to Prieska."

[Buchanan, J.: I presume, Mr. Jones, that the Government has no objection to show the plaintiffs that wire?]

Mr. Jones: Not the slightest, but I submit that it is not relevant, and that we were not bound to disclose it.

Mr. Gardiner said the wire stated that the Bastards were to be mounted. That, he argued, might mean that the Bastards must be mounted. The communication to the headquarters was in very restrictive terms. He submitted that the affidavit of Mr. Janisch had not been made with sufficient care, because he said that there were no further documents to disclose, and now this telegram had been disclosed. He contended that the respondents should discover any documents relating to the purchase of horses at Prieska, not for Hedley Bros. merely. Counsel cited *Wright v. Pitt* (3 Chancery Appeals, 809), *Lyell v. Kennedy* (21, Chancery Division, 1), and *Bilsbrough v. Mutual Life Insurance Co. of New York* (1906, Transvaal High Court, 53).

Mr. Jones said that they were perfectly willing that plaintiffs should see the telegram. The telegram could not be read as an authority to anybody to purchase horses. All that it said was, "be prepared to enrol twenty Bastards mounted." The Government denied that Bosanquet had any authority to buy horses.

Buchanan, J.: The applicant in this case is plaintiff in an action against the Colonial Government for the recovery of the purchase price of certain horses supplied to one of the officers of the Government. The Government deny the authority of this officer to purchase the horses or to enter into the contract alleged in the declaration. That is a question at issue which can be decided at the trial. In the meantime, by the Rules of Court the plaintiff has applied for an order of discovery upon the defendant of all documents in his possession. The defendant has made an affidavit disclosing what documents he has relating to the matter, and he says he has no further documents in his possession which bear upon the matter at issue. In consequence of the plaintiff alleging that they had got further documents, the Colonial Secretary or the Defence Department in Cape Town telegraphed to the officers on the frontier to ask whether they had any further documents in their possession, and the reply is to the effect that there is only one document, the terms of which

are set forth in the telegram which has been received. That telegram I cannot now say is a document which is inadmissible or is not relevant to the issues at the trial; on the contrary, I think it is relevant, and would be admissible at the trial, as far as the facts are before me now. I think, therefore, that the telegram is a document which ought to have been disclosed on discovery. I do not say there was any default on the part of the Defence Department in not disclosing it before, because they were totally ignorant of the existence of such a document until they communicated by telegraph with the headquarters. Seeing that one document is in existence which should have been discovered, I think as a matter of form they ought to amend their affidavit of discovery by including this telegram. It is possible, on further inquiries, they might find other telegrams and documents. If so, they ought to disclose them. I do not impute the slightest wish on the part of the Government to conceal any of these documents. An order will be made on the Government to make a further discovery affidavit, and the costs of this application, I think, may fairly be costs in the cause.

*Ex parte* SELLAR BROS. AND ANOTHER.

Mr. Gardiner moved as a matter of urgency for the appointment of a *curator bonis* in the insolvent estates of Israel Isaac Kerbel and Hyman David Sher and I. I. Kerbel, trading as H. D. Sher and Co., of Calvinia. The petitioners were Sellar Bros. and Wm. Spilhaus and Co., of Cape Town. Petitioners suggested that Mr. A. N. Foot should be appointed *curator bonis* pending the election of trustees, with power to carry on the hotel, canteen, and general dealer's business. It was stated that the Master would in no case appoint a *curator bonis* unless authorised by order of Court.

Buchanan, J., said he thought the Master was the best person to appoint a curator. An order would be granted authorising such curator as the Master may appoint to sell the perishables and carry on the business at the risk, should sequestration be superseded, of the petitioning creditors.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ESTATE FOURIE V. FOURIE. { 1907.  
Apr. 15th.

This matter had been standing over for judgment, his lordship having intimated a desire to see the Master with regard to the state of the account in the estate Fourie, with a view of saving further expense to the respondent.

It was now stated that the parties had come to a settlement, and had filed a consent paper.

Buchanan, J.: The order of Court will be in terms of consent paper filed.

### DUNDAS V. BEUKES.

Mr. M. Bisset moved to make absolute a certain rule nisi calling upon respondent to show cause why an order should not be granted directing the Sheriff to effect transfer of certain landed property in British Bechuana-land. Counsel said that due publication had now been made of the rule, in the absence of personal service, and that respondent had not appeared to show cause.

Rule absolute.

Later, Buchanan, J., said that the order he had just made would be recalled, as he found from the original papers that the rule was made returnable, not for the first day of term, but for the 16th April. The matter must be mentioned again to-morrow.

Mr. Bisset subsequently explained that he had been under a misapprehension as to the return day.

### BLACK V. SCHROEDER.

Sunday trading—Ordinance 1 of 1838, Sec. 2.

*The sale of live-stock on Sunday, even by private bargain, is illegal, and therefore null and void.*

This was an appeal from a judgment of the Assistant Resident Magistrate of King William's Town in an action brought by Samuel Black against F. W. Schroeder, a hotelkeeper, to recover £13 10s., purchase price of a certain horse bought by plaintiff from defendant.

From the record, it appeared that plaintiff's claim was based on an allegation that the horse contained a latent defect, to wit, glanders, at the time of the purchase from defendant on the

27th October last. Plaintiff re-sold the animal on the 2nd December to another party, and whilst it was in the latter's possession, the horse was destroyed under Act No. 27, 1893, as suffering from glanders and farcy.

At the hearing, exception was taken by defendant on the ground that the sale took place on Sunday, October 28, and that it was void and illegal under section 2, Ordinance 1 of 1838. The Magistrate, in sustaining the exception with costs, said that he found the sale took place on a Sunday, and both parties had placed themselves beyond the pale of the law. The contract was one that could not be recognised in any way whatever.

Mr. Gardiner was for appellant; respondent did not appear.

Mr. Gardiner said that two questions arose in this case: (1) Whether this was a sale prohibited by the Ordinance, and (2) whether, even if it were prohibited by the Ordinance, the contract could not now be enforced. Tracing the purposes of the Statute, he pointed out that the sale of landed property and of shares on a Sunday was not prohibited. In *Queen v. Marks* (5 H.C. 363) it had been held that a barber may carry on his avocation on a Sunday. One may catch a fish on a Sunday, but apparently, according to the Ordinance, one may not discharge a gun on a Sunday.

[Buchanan, J.: Discharging a gun may annoy the neighbours.]

Mr. Gardiner argued from this that the Ordinance was intended to prohibit public sales, the idea being that religious sentiments should not be hurt by any business carried on in public which was likely to offend.

[Buchanan, J.: Playing games in public is prohibited, but there is nothing said in the Ordinance about playing games in private.]

Mr. Gardiner submitted that the Act was not intended to deal with isolated sales, such as the one under consideration. Plaintiff wanted to go into the country, he tried to buy the horse, but failed; he then tried to borrow the horse, and failed; he could not steal the horse, but eventually a sale was concluded. The Act, counsel urged, would not have applied to a case where a horse broke down on circuit and it was absolutely necessary to buy a fresh horse on a Sunday. Surely such a purchase would not be prohibited.

[Buchanan, J.: The spirit of the Act is that you should not be travelling on a Sunday.]

Mr. Gardiner: That is so, but I am afraid it is one that is very often honoured in the breach. He cited *Drury v. Defontaine* (1 Taunton, 129), and *Smith v. Sparrow* (4 Bingham's Cases, 84). On the question as to whether, even if the sale were illegal, it could be declared actually void, counsel quoted Voet (2, 12, 2). He

also cited *Queen v. Hermann* (1 Appeal Court Cases, 316) and Addison's "Law of Contracts" (9th ed., p. 83).

Buchanan, J.: The defendant in this case sold a horse on Sunday. The plaintiff paid the purchase price for the horse, and afterwards resold the animal, and some time afterwards this horse was found to be suffering from glanders and farcy, and had to be destroyed, whereupon the plaintiff sues the defendant to recover the purchase price which he paid for the horse. From early times there have been statutory provisions against Sunday transactions, and I see it mentioned in the first volume of our Ordinances that the first Roman Statute that can be traced was to the following effect: "On the venerable day of the sun let the Magistrate and people residing in cities rest, and let all workshops be closed. In the country, however, persons engaged in agriculture may freely and lawfully continue their pursuits, because it often happens that another day is not so suitable for grain-growing or for vine planting; lest by neglecting the proper moment for such operations the bounty of heaven be lost." From time to time our Statute Book contains various enactments prohibiting dealing on the Lord's Day, and this Ordinance, No. 1 of 1838, entitled "An Ordinance for the better Observance of the Lord's Day," makes this statutory provision: "That from and after the passing of this Ordinance it shall not be lawful for any person to sell or offer for sale any goods, merchandise, cattle, or other live-stock." There are other provisions in the section which I need not now refer to. In this case live-stock, viz., a horse, was actually sold on the Sunday. It is contended that this Ordinance was only intended to deal with public transactions and not transactions in private. The language of the Ordinance is, in my opinion, much wider than that, and it is impossible for the Court to restrict this section to public transactions only. In other sections of the Ordinance certain things are provided for, viz., playing games, and it is expressly enacted that no games shall be played in a public place, but it does not say a word about prohibiting games played in private. Hence, one would say that the distinction between public transactions and private transactions was in the minds of the Legislature at the time this ordinance was passed. They did not restrict the sale of live-stock to public transactions, but prohibited it altogether on the Lord's Day. Then it is said that if the contract comes under the ordinance it is still a contract which can be enforced. The authority of Voet has been cited to show that a contract entered into on a Sunday is not necessarily void or voidable. Voet does say that if a transaction is entered into on



a Sunday, though it is prohibited, if it is carried out, it cannot be annulled. That is, in short, the opinion expressed by Voot, of the law, as it stood in the time when he wrote, but by express Statute the Legislature has placed our law on a different footing. This is a transaction entered into on a Sunday; it is a prohibited transaction, and I think the Magistrate was quite right in holding that neither of the parties who had entered into a prohibited transaction can come to the Court for redress. The Magistrate's decision on this point seems to be sound, and the appeal must, consequently, be dismissed. There is no appearance on the other side and there is no need to enter into the question of costs. It is not suggested that every contract entered into on a Sunday is necessarily void, but only such transactions as are specially prohibited, and the High Court of Griqualand has held that exercising the occupation of a barber is not included in the words "to trade, or deal, or keep open any shop, etc." That expression of opinion by another Court shows that it is not every transaction that is prohibited. But when there is a transaction which is clearly prohibited shown to have been entered into, the Court cannot assist the parties to revert to the position in which they were before the transaction took place. As to the policy of the law, I have nothing to say.

#### WARNER V. BOTHA.

This was an appeal from a judgment of the Assistant Resident Magistrate of Ngamakwe (Transkei), in an action brought by William D. Warner against Christopher R. Botha to recover £50 damages for alleged breach of contract in connection with the purchase of 200 young ewes.

Plaintiff alleged that defendant agreed to sell him the sheep on the 10th September last, and in accordance with the agreement he (plaintiff) sent a messenger to pick out the sheep. Defendant, however, refused to allow him to pick the same and to carry out the contract.

The Magistrate found that plaintiff had not proved that a sale was concluded on the 10th September, and granted absolution from the instance with costs.

Mr. Close was for appellant; Mr. Benjamin was for respondent.

Mr. Close said that the defence and the finding of the Magistrate were contradictory in that at one time it was suggested that there was no sale, and at another time it was suggested that there was a sale but a repudiation. He submitted, on the facts, that there was a concluded contract, that plaintiff never

withdrew from that contract, and, even if he had wanted to do so, there was no concurrence on the part of defendant, which would have left the contract open.

Mr. Benjamin said that on the passage in the defendant's evidence on which his learned friend put so much stress in regard to the repudiation of the contract, it was clear from the Magistrate's reasons what was meant by the evidence. There was really no definite contract entered into in the correspondence. Taking the correspondence, on what number of sheep could there be said to be a definite agreement? It was perfectly clear that the intention of the parties was that the plaintiff should inspect the sheep and see if satisfactory, and then make his selection. It was only if there was approval there would be a purchase. A definite time had been fixed for the plaintiff to communicate and failing to communicate the defendant was entitled to treat the negotiations as off, and there was clear authority for him doing so in Anson on Law of Contracts (page 20). Counsel submitted there was no contract entered into between the parties because the original contract entered into on the 10th September had been put an end to by the letter of the 17th September.

Mr. Close contended, in reply, that in order to make the contract of the 10th September lapse there ought to be something more definite than there was, and there was nothing to show any acquiescence on Botha's part that he intended to allow the matter to drop.

Buchanan, J., said the issue in the case was whether a concluded contract was entered into between the plaintiff and the defendant. The defendant had certain sheep for sale, and advertised in the newspapers. There upon correspondence took place between him and the plaintiff as to the price. The defendant offered the sheep for 16s. 6d., and the plaintiff offered 16s., but his lordship presumed the plaintiff must have offered something less. His lordship, after reviewing the correspondence, thought under the circumstances the Magistrate was justified in saying there was no definite and concluded contract between the parties. The appeal would be dismissed, with costs.



# SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP,]

DE VILLIERS V. NICHOLLAS AND CO. 1907.  
Apr. 16th.  
" 17th.  
" 19th.

Sale and purchase—Estimate and expectation—Quantity.

*Defendants had agreed to purchase plaintiff's entire crop of oranges and naartjes, "about 200,000," at 4s. a hundred. The portion of the crop accepted by the defendants as merchantable numbered only 95,425.*

*The Court found on the evidence that the plaintiff had not warranted the number of oranges, but had merely in good faith given a rough estimate of the probable number.*

*Held, that the plaintiff was not responsible for the shortage and that the defendant was liable for the number actually delivered.*

This was an action brought by Abraham Conraad de Villiers, a farmer of the Groot Drakenstein district of the Paarl, to recover from the defendants—fruit merchants of Cape Town—sums of £5 8s., £30, and £56 9s. 9d., under a certain agreement for the sale of fruit.

The declaration set out that on the 2nd June, 1906, the defendant entered into an agreement whereby the defendant purchased and took over all the crop of the oranges and naartjes on the plaintiff's farm at 4s. per 100, and undertook to furnish the labour for the picking of the fruit, the plaintiff to convey the fruit to the railway and delivery to extend from the 1st August to the 31st October, 1906. In July it was agreed that the delivery should commence on the 20th July instead of the 1st August. On the 20th July the defendant commenced to take delivery of the fruit, and furnished a picker, and continued to take delivery until 18th September. Thereafter the defendant was unable to furnish a picker, and requested the plaintiff to undertake the picking of the fruit. Plaintiff, until the end of October, furnished the

labour, which he estimated cost £5 8s. During the delivery of the fruit the defendant refused to accept the delivery of any fruit which had fallen from the trees, amounting to 20,000, and the plaintiff said he was entitled to claim 4s. per 100 for these, which was £40. In order to minimise the loss, plaintiff subsequently sold the fruit for £10. There was, further, due to the plaintiff £56 9s. 9d. for fruit actually delivered to the defendant under the agreement during September and October, and he claimed judgment for a total sum of £91 17s. 9d., with interest and costs.

The defendant, in his plea, denied that he took over all the crop of oranges and naartjes of the plaintiff. He admitted entering into a contract with the plaintiff, the terms of which were contained in a letter, by which the plaintiff undertook to deliver all his crop of oranges and naartjes to the defendant, amounting to about 200,000, at 4s. per 100, between August 1 and October 31. Defendant denied any special agreement to furnish the labour. The picking of the fruit was to be done by the plaintiff and his servants. The defendant admitted that he supplied an experienced picker, but denied any liability in respect of the picking. The defendant stated that the delivery of the fruit continued up to the 24th October, 1906, at which date 96,245 oranges and naartjes had been delivered to him. He never refused to take delivery of any fruit fallen from the trees. He had no knowledge of the alleged sale of 10,000 oranges by the plaintiff. Defendant admitted there was due and owing to the plaintiff the sum of £53 9s. 10d. in respect of the fruit delivered, and tendered that sum and £5 8s. 9d., subject to a claim in reconvention. Between July 1, 1906, and October 31, 1906, 96,245 oranges and naartjes in all were delivered, but by reason of the plaintiff's failure in terms of the contract to deliver to the defendant the stipulated number, namely, 200,000 between the dates mentioned, the defendant was compelled to purchase other oranges at prices varying from 8s. to 11s., and suffered loss in the sum of £275 10s., and claimed that amount for breach of contract, less £53 9s. 10d. and £5 8s. 9d., which he tendered.

The plaintiff, in his replication, denied he undertook to deliver 200,000.

Mr. Molteno (with him Mr. J. E. R. de Villiers) was for the plaintiff, and Mr. Burton (with him Dr. Greor) was for the defendants.

A. C. de Villiers, the plaintiff, stated that on the 26th May one Purcell offered to find a purchaser for the oranges and naartjes. A couple of days later Purcell offered 4s. per 100, the oranges and naartjes to be picked between the 1st August and the end of October. Purcell took witness to Nichollas and Co.

Nichollas agreed to take fruit at 4s. per 100, and asked him how many there were on the trees. Witness said he could not tell, but the defendant suggested there might be 200,000. Nichollas said the number did not matter much, but they should put down some number to make the contract binding. After the picker came to the farm the defendant refused to take fallen fruit. A great deal of the fruit fell on account of the late picking and the strength of the wind. Witness had not been paid for any of the fallen fruit. It was impossible to estimate the amount of fruit on the trees when the oranges were green. He told the defendant that the crop was about 200,000. Purcell was now acting for Nichollas and Co. He had never sold fruit in that way before.

D. de Villiers, uncle of the plaintiff, said the crop of fruit in question was a good one. He would not undertake the task of estimating the number of oranges on the trees. It seemed a full crop. The coloured man who bought the fallen fruit from the plaintiff said that he took away 10,000 oranges, and left more on the ground. He sold the fruit at a profit, and paid 2s. a 100 for the oranges.

Petrus van der Merwe, an overseer on the plaintiff's farm, remembered the plaintiff selling his crop to the defendants and the arrival of the picker. Witness saw the fruit which fell from the trees. The defendant refused to accept the fruit, and portion of it was disposed of to the coloured man.

Mr. Molteno closed his case.

Nichollas Contels, a partner in the defendant firm, said his firm dealt largely in fruit, and that within a month of the transaction with the plaintiff he bought several crops at prices ranging from 2s. to 2s. 9d. Witness asked an approximate number of the oranges and naartjes, and the plaintiff said about 200,000, and witness said it did not matter whether there were 10,000 more or less. Witness asked for the number so that he would know to some extent how many thousands he would have. Witness offered 4s. because plaintiff was to keep the fruit until the end of October, when the market would be higher. Witness took everything the plaintiff sent him, and gave credit for the fruit received. Witness never told the plaintiff not to send fallen oranges, but what he objected to was rotten oranges. In the middle of August witness estimated there were 175,000 oranges left, and offered £250 for the lot. Witness had to buy 30,000 oranges in October to keep his business going, at an average of about 9s. 6d. per 100.

Hyman Purcell, hotel proprietor, of the Paarl, stated that after he had offered the oranges to the defendant, the latter said that he was well supplied,

but if witness could find a farmer who would undertake to keep delivery going to the end of October he would give 3s. 6d. to 4s. per 100. That was 1s. 6d. to 2s. over the market rate, and it was made clear to the plaintiff that the increased price was given to keep the delivery running over the rising market. The defendant asked the plaintiff how much crop there might be, and the latter said about 200,000.

He was present in September last when the defendant offered £250 for the remainder of the crop. The bulk of the crop was on the trees, as only 26,000 had been taken away. Nichollas complained of receiving fruit in bad condition, and did not object to the fallen fruit. When witness was at the orchard in August and September he saw a few bad oranges lying about, but nothing like the number mentioned by Mr. De Villiers.

Mr. Burton closed his case.

Mr. Molteno said he would deal first with the nature of the contract entered into between De Villiers and Nichollas and Co. He would leave the picking out of the question, and as to the fallen fruit he could deal with that afterwards. It was certain that the price of the oranges had been fixed, but the number of the oranges was not fixed. He thought the authorities upon contracts of this nature showed the contention on behalf of the plaintiff was right—that he had to get paid for the number of oranges delivered, and that the words "about 200,000" were merely words of estimate and expectation. Counsel cited the case of *Maclay v. Perry and Co.* (44 L.T., 152). It was held there that the words "about 150 tons" were words of estimate and expectation, and that there was no warranty as to the quantity the defendants were bound to deliver. It was an almost identical case with the one in question. The sale was fixed before the plaintiff had seen Nichollas. There was another case in favour of the plaintiff, that of *McConnell v. Murphy and Co.* (Law Reports, 5 P.C. Appeal Cases, 203). Counsel also cited Benjamin on sales (p. 701). The plaintiff to get paid for the number of oranges and naartjes, and when he concurred that there might be 200,000, he was acting in good faith, without any intent to deceive. These words were not of the nature of a warranty, and the plaintiff did not bind himself to the amount. Counsel referred the Court to Moyle on contract of sale in the Civil Law (p. 72), and *Gargullim v. Daniel* (C.M. and R., vol. 2, p. 61). If there was no fraud or wrongdoing on the part of the plaintiff, the defendant could not recover damages, but must pay for the amount handed over. In conclusion, counsel quoted Voet (18-1-7), and pointed out that the crop was visited by all the parties, and the plaintiff carried

out his contract in a *bona fide* manner. It was clear there was a dispute in regard to the fallen fruit, and counsel submitted that the claim in reconvention must fail, and the plaintiff was entitled to succeed on the amount actually due for goods delivered, and also for the picking expenses, which were tendered.

Mr. Burton referred generally at the outset to what was said in the *Encyclopædia of the laws of England* on the meaning of the word "about." There it was stated that where the words were not to be taken as words of strict contract and warranty, the vendor would be allowed a reasonable latitude in performance. Counsel cited the cases of *Morris v. Lerison* (Law Reports, 1876, the Common Pleas Division, page 158), *Müller and Co. v. Born and Co.* (Law Reports, Queen's Bench Division, 1900, p. 691). Stroud's Judicial Dictionary (p. 487) set out where goods were sold "say about" these words were intended to provide only for a small difference. The case of *Maclay v. Perry and Co.* was undoubtedly his learned friend's sheet-anchor, but it would be seen there that the surrounding circumstances were all in favour of the defendants, who were builders, and not iron merchants. The agent of the plaintiff estimated the amount. In the present case the plaintiff was a dealer in the thing of which he was going to estimate, and surely if anyone was to give an estimate it would be the man whose business it was to grow oranges. There was no agreement here on the part of the agent as to the number. The defendant, in buying 50,000 oranges from Mr. Minaar and 350,000 from Sir Henry de Villiers, must know approximately what the supply was going to be. It was significant in the case of the other farmers the difference ranged from 2 to 5 per cent., whereas with Mr. De Villiers' case the difference was 40 per cent. It was also important to note that the plaintiff was getting a much better price than his neighbours, and he must have understood that it was the intention of the dealer to maintain portion of the larger crop on the trees right through up to the end of October, when he would obtain a better price. With 10,000 more or less, the defendant would not have complained, but he had a right to protest when he was faced with such a difference as in this case. There was a representation made as to the number of the fruit in the orchard, and by that representation within a reasonable margin the plaintiff must be bound.

*Cur. Adu. Vult.*

*Postea* (April 19th).

Maasdorp, J.: The plaintiff states, in his declaration, that on June 2, 1906, he sold to the defendant his crop of oranges and naartjes at a price of 4s. per 100, and that he

delivered to the defendants in all 96,425 oranges and naartjes, on account of which he has received payments, leaving a balance due of £56 9s. 9d., which balance he now claims. The defendants allege that the contract between the parties was for the sale of the whole of the plaintiff's crop of oranges and naartjes, amounting to about 200,000 at the price of 4s. per 100, and they admit that there is a balance due in respect of oranges already delivered of £53 9s. 10d., but they set up a claim in reconvention for £275 10s. for damage suffered by them by reason of breach of contract on the part of the plaintiff. They say that the plaintiff sold to them the whole of his crop, amounting to about 200,000, and by reason of his failure in terms of the said contract to deliver to the defendants the stipulated number of oranges and naartjes they have been compelled to buy other oranges and naartjes at a loss of £275 10s., which they claim in reconvention. It appears that at the interview at which the instruments of sale and purchase were signed by the parties on June 2, 1906, the defendant Contellis wished to ascertain approximately what he could calculate upon as the number of oranges and naartjes he would receive, in order to regulate his subsequent dealings in the market. There is some conflict in the evidence as to what exactly was said upon this point, but the conclusion I come to upon the whole is that the plaintiff and Purcell both took part in an attempt to arrive at some sort of estimate. Purcell who, in the first instance, had negotiated the sale for the defendants, had seen the orchard, and I am satisfied that he considered himself competent to express an opinion on the subject. After some discussion, the two of them arrived at the estimate of 200,000. But I am also satisfied that De Villiers made Contellis understand that, in giving his opinion, he did not speak with any confidence, and did not bind himself as a matter of contract to the quantity estimated. After the conversation Contellis signed on behalf of the defendant the following document: "I, the undersigned, agree to take all the crop of oranges and naartjes, about 200,000, at 4s. a hundred. The start of the delivery will be from the 1st August to the 31st October, 1906." Upon the construction of this document in the light of the surrounding circumstances the decision of this case will depend. The plaintiff contends that he is bound to deliver to the defendants his whole crop of oranges and naartjes, and no more, the number specified being merely a guess or estimate of the probable quantity, and not a binding condition of the agreement, and the defendants maintain, on the other hand, that the specified number

forms a material part of the contract, the term "about" leaving the plaintiff a reasonable and moderate margin, more or less than 200,000, in performing the contract. It appears from the authorities cited at the Bar that the principles involved in the case have been fully discussed and considered in cases decided in America and England, and it seems to me that the grounds given for the decisions are such as are fully applicable under our law. The general result of the decided cases may be conveniently given in the words of the rules laid down by the Supreme Court of the United States, appearing in Benjamin on Sale, page 701: "Where the goods are identified by reference to independent circumstance, e.g., all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor, in a certain establishment, or to be shipped in certain vessels, and the quantity is named with the qualification 'about' or 'more or less,' or words of like import, the contract applies to the specific goods, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. Where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of qualifying words in such cases only provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Having given this quotation in full, I do not think it necessary to enter into a discussion of the cases cited at the bar, which seem to exhaust the whole subject, and I need only say that the English cases establish, it seems to me, the same rules. The same principle seems to underlie the passage in Grotius 3, 14, 33: "Land is frequently sold by the lump without measure, or in other words to the same effect, in which case even if some measure is mentioned, and the true measure is afterwards found to differ from the estimate measure by a morgen more or less, no account is taken thereof; if, however, the difference is greater, the sale nevertheless holds good, but in the case of an overmeasure the purchaser has the option whether he will keep the excess and pay for it in proportion to what he promised for the whole, or let it go to the seller; and again, if there be undermeasure, the seller has the option whether he will make good the deficiency or return a proportionate part of the purchase price." The last clause contains the principle applicable to the present case, where the estimate of a number of things is too high, the seller has the option of supplying the deficiency or

abating the price. There is no question in Grotius of a breach of contract, for which the seller is liable in an action for damages, the quantity specified is regarded as an honest estimate which may turn out ultimately to be a mistake, but the contract holds good in so far as the parties can carry it out. No difficulty exists in allowing for or returning a proportionate part of the purchase price whereas in the present case a quantity of things are sold in the lump, but the price per parcel or per bushel is fixed. The principle found in Grotius and in the passage quoted from Benjamin on Sales, are contained also in Voet 18, 1, 7. It seems to me that this case falls within the first rule given in the quotation from Benjamin on Sales. The plaintiff in good faith made an estimate of the probable crop, without making it a condition of the contract, and the defendants were satisfied that they had obtained, in the estimate so made and supported by the opinion of Purcell, their agent, information upon which they might act with tolerable safety in the subsequent transactions in the market. As it was, the crop did exceed by some 30,000 what was actually delivered, but was reduced by that amount by the operations of nature, without any fault on the part of the plaintiff. There is no evidence to support the suggestion made in argument, that the crop did actually amount to about 200,000, and that it was owing to the default or negligence of the plaintiff that something approaching that number was not delivered. Nor was that question raised in the pleadings. I come to the conclusion that the plaintiff fulfilled his contract in delivering the quantity of oranges and naartjes, for which he claims in this case, and that he is entitled to payment of the balance alleged to be due. The defendants are prepared to pay for the expenses of the picker, claimed in the declaration, and as to the plaintiffs claim for the price of fruit that fell from the trees, it seems to me that if the plaintiff had tendered to deliver such fruit the defendants would have been liable for the price. But in my opinion, it was proved that upon the defendants expostulating, and assuring the plaintiff that it was not worth their while receiving the fallen fruit, the plaintiff refrained from pressing it upon them, and made no further tender of delivery of such fruit. However, it is unnecessary to say more upon this point, seeing that the plaintiff expressed his willingness at the trial to drop this part of his claim. Judgment will be given for plaintiff for £5 8s. and £56 9s. 9d., with costs. In the claim in reconvention, judgment for defendant in reconvention, with costs.

[Plaintiff's Attorneys: Michau and De Villiers. Defendants' Attorneys: C. and A. Friedlander.]



### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. ( 1907.  
Apr. 16th.

Mr. Benjamin moved for the admission of Adriaan P. J. Fourie as an attorney and notary.

Application granted and oaths administered.

### PROVISIONAL ROLL.

LOWRY BROS. V. WHITE.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £225, with interest from 15th July, 1898, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Defendant was sued by edictal citation, substituted service having been effected.

Order granted.

VENTER V. GRAHAM.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £350, and £1 18s. 6d. insurance, with interest at 7 per cent. from 1st January, 1907, bond due by reason of non-payment of capital sum after six months' notice; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ESTATE MANSON V. VON HOLDT.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £1,000, with interest from 21st July, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and rents accruing to be attached.

Order granted.

ESTATE HIDDINGH V. SHILLING.

Mr. Philipson Stow moved for provisional sentence on a mortgage bond for £4,000, with interest from 13th March, 1905, less £75 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ESTATE BADENHORST V. POTGIETER.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £100, with interest from November 21, 1906, bond due by reason of three months' notice having been given; counsel also applied for the property hypothecated to be declared executable and rents accruing from the property to be attached.

Order granted.

ESTATE BADENHORST V. PIETERSEN.

Mr. Payne moved for provisional sentence on a mortgage bond for £60, with interest from the 6th December, 1905, bond due by reason of notice having been given; counsel also applied for the property hypothecated to be declared executable and rents accruing to be attached.

Order granted.

ESTATE BADENHORST V. GORDON.

Mr. Struben moved for provisional sentence on a mortgage bond for £36, with interest from the 13th June, 1906, bond due by reason of notice having been given; counsel also applied for the property hypothecated to be declared executable, and rents accruing to be attached.

Order granted.

### DIVORCE CASES.

ENGEL V. ENGEL.

This was an action brought by Lisabeth Engel, of Cape Town, against her husband, Wilhelm Adolph Max Engel, presently of Dresden, Germany, for restitution of conjugal rights, failing which a decree of divorce.

It was stated that defendant was sued by edictal citation, and that personal service had been effected.

Plaintiff, in her declaration, alleged that defendant unlawfully and maliciously deserted her in May, 1906. She prayed for a decree of restitution, or, in the alternative, for a decree of divorce.

Mr. Lewis was for plaintiff; defendant did not appear.

The only witness called was the plaintiff, who said that she was married to defendant at the Registry Office, Holborn, England, on the 12th December, 1901. Subsequently they went to the Argentine Republic, and remained there about eight months. They then proceeded to Germany, and remained there about a year. In the latter part of 1903 witness and her husband came to



Cape Town. Witness was a dentist, and she came here under a six years' engagement. Both witness and her husband were employed by doctors. In February, 1906, witness went to Johannesburg for a holiday. In May, in consequence of what she heard, she came back to Cape Town, and found that her husband had gone away. She had since received a letter (produced) from him, written in Dresden, Germany.

Ordered that defendant restore conjugal rights on or before the 16th August, failing which to show cause on the 12th September why a decree of divorce should not be granted as prayed, with costs, failing personal service of this order, publication thereof to be made in the "Dresdener Nachrichten."

#### JACOBS V. JACOBS.

This was an action brought by Barend Marthinus Jacobs, of Hope Town, against his wife, Rentie Jacoba Jacobs, for a decree of divorce on the ground of her adultery with one Albert Myburgh.

Plaintiff, in his declaration, said that he was married to defendant at Hope Town in community of property on the 8th June, 1896. There was one child of the marriage, a girl, aged six years. In July, 1904, at a certain farm in the division of Hope Town, defendant committed adultery with one Albert Myburgh. Plaintiff prayed for a divorce, and an order declaring defendant to have forfeited all benefits of the marriage in community, plaintiff to have custody of the child, and costs.

Mr. Watermeyer was for plaintiff; defendant did not appear.

Wm. Thomas Birch, of the Colonial Secretary's Office, gave formal evidence as to the registration of the marriage.

Barend Marthinus Jacobs (the plaintiff) said that shortly after the girl was born in 1900 he and his wife had a difference, and they parted, whereupon his wife went to live with another man. About July, 1904, he heard that she was mixed up with this man. He had then returned from the Orange River Colony. On the 1st May, 1905, she gave birth to a child, of which witness was not the father.

Mr. Watermeyer said that the claim for forfeiture of the benefits was not pressed, since there was no property in the estate.

Plaintiff said that he desired to have custody of the child. The child was badly treated by his wife. He was, however, willing that the little girl should remain in the care of his wife's mother.

Johanna A. Jacobs said that about a month after the child was born, defendant's wife told her that Myburgh was the father. The baby was baptised in the name of Albert Myburgh.

This concluded the evidence.

Hopley, J., questioned whether the evidence was strong enough to support an allegation of adultery with Myburgh.

Mr. Watermeyer applied for an amendment of the declaration alleging that defendant committed adultery "with one Albert Myburgh, or some person unknown."

The amendment was allowed.

Hopley, J.: It is clear that defendant has committed adultery with somebody or other, but it is not in any way proved that it was with this man Albert Myburgh. The declaration has now been amended by the addition of the words "or with some person unknown," and the Court finds that defendant did commit adultery with some person unknown. There must, therefore, be a decree of divorce as prayed, and it is ordered that the plaintiff have the custody of the child of the marriage. Costs are not pressed against the defendant, and there will be no order on that part of the prayer.

#### REHABILITATIONS.

Mr. Rowson applied under section 117 of the Insolvent Ordinance for the rehabilitation of Jan Jurie van Zyl.

Granted.

#### GENERAL MOTIONS.

DE KLERK V. DE KLERK. } 1907.  
 } Apr. 16th.

Dr. Greer moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights. It was stated that substituted service had been given, and nothing had been heard from defendant.

Decree absolute with costs.

#### MUZOYI V. MUZOYI.

Mr. Howes moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights, with forfeiture of any benefits of the marriage. Service was made of the rule on the keeper of the boarding-house where defendant resided.

Decree of divorce granted, with costs and forfeiture of benefits from the marriage.

*Ex parte* THE COMMITTEE OF THE CAR  
NARVON OUTER COMMONAGE.

Mr. Payne moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* PREECE.

Mr. P. S. T. Jones said that in this matter a rule had been ordered to issue calling upon respondent to show cause why petitioner should not sue him *in forma pauperis*. Counsel informed the Court that all efforts to trace respondent had failed, and he had to apply for an extension of the return day.

Return day extended to the 9th May.

*Ex parte* STREETER

Mr. Benjamin moved for a certain rule nisi to be made absolute calling upon Myers and Puxty to show cause why a sum of £60 alleged to be in the hands of Reuter's Telegram Company, or as soon as it may come into their hands, should not be attached to satisfy applicant's claim, and the exigencies of his writ.

Puxty appeared, and said that no such sum was lying at Reuter's, or was likely to come into their hands. He also objected to having to pay costs.

Mr. Benjamin said that respondent should put these facts on affidavit.

The matter was postponed until the 25th April.

*Ex parte* BYDELL.

Mr. Roux moved for a certain rule nisi to be made absolute calling upon petitioner's husband to show cause why she should not be allowed to sell a certain erf at Kokstad.

Rule absolute as prayed.

DUNDAS V. BEUKES.

Mr. M. Bisset moved for a certain rule nisi to be made absolute authorising the Sheriff to transfer certain landed property in British Bechuanaland.

Rule absolute.

*In re* THE EQUITABLE FIRE ASSOCIATION AND TRUST CO.

Mr. Douglas Buchanan moved for an order authorising the liquidator to destroy or dispose of the books, and finally dissolving the company. A final dividend of 14s. 2d. in the £ had, counsel stated, now been paid to the shareholders.

Ordered that the company be dissolved and the books destroyed.

COLLIE V. KALK BAY MUNICIPALITY.

Mr. Searle, K.C. (with him Mr. Douglas Buchanan), moved, on behalf of the Kalk Bay Municipality, for judgment in terms of referees' award.

The respondent, plaintiff in the action, appeared in person.

Mr. Searle said that the action between the parties was tried before a jury in November last (16 C.T.R., 1022). The jury made certain findings, and the Court later on appointed Messrs. Close and Jones as referees to report to the Court upon certain matters. The referees had made their report, and the defendant Municipality now moved, under section 33 of Act 23 of 1891, for judgment for £2,120 3s. 8d., which amount, it was contended, was due according to the report of the referees. The respondent Collie had given notice to apply for "judgment in his favour in terms of the findings of the judge, jury, and referees' report." He referred specifically to certain items in the account filed by the Municipality, to which he took objection. Counsel detailed the items in respect of which the Municipality claimed and read the report of the referees in relation thereto. The respondent Collie claimed first of all a sum of £556 instead of £158 7s. 8d., as allowed by the referees, on the vleimouth work. This was simply an appeal from the referees' finding. Then he claimed that the sums of £514 16s. 11d. and £337 19s. on stormwater work should be eliminated from the Municipality's account. The Municipality's position with regard to this was that the plaintiff had already had credit for £1,514, and that the plaintiff really wanted to be credited twice over. Then he further claimed £1,000 retention money, but, since the certificates had been swept aside, and the matter dealt with by the referees on the basis of the value of the work done, the Municipality took up the position that the matter of the retention money could not possibly come in. The plaintiff also claimed £900 on plant in terms of what he referred to as "the ruling of the presiding judge."

Hopley, J., remarked that he did not give any ruling on the matter.

Mr. Searle said that apparently the question of the plant had been left in abeyance by the referees by consent of the parties. The Municipality, on dismissing Collie, took over the plant, and they claimed under a section of the contract that, the jury having found that Collie was rightfully dismissed, they were entitled to the use of the plant until the completion of the work. Counsel submitted that the objections could not be sustained in view of the report of the referees, and that judgment should be for the Municipality for £2,120 3s. 8d., as prayed.

Mr. Collie said that the referees' awards in certain respects were subject to Mr. Westhofen's account being accurate. He pointed out that the referees stated that they were quite unable to assist the Court as to whether Mr. West-

hofen's figures should be accepted or not.

Hopley, J., said it was his impression at the trial that the jury took Mr. Westhofen's figures as correct in substance.

Mr. Collie went on to urge that he was entitled to some allowance in respect of the plant, which the Council had had the use of since he was turned off the works. Owing to the dilatoriness of the Council, it seemed very likely that when he got the plant back again it would be practically useless, and thus the capital he had expended would be wasted. He added that in consequence of this contract and litigation he had been rendered penniless. Mr. Collie also addressed the Court in reference to the sum of £556 claimed by himself, and submitted that the referees had misunderstood their instructions on this point, and that he was entitled to receive the sum of £556, which was allowed by the Engineer. He also addressed the Court on other branches of the case.

Mr. Searle having been heard in reply.

Hopley, J.: This is an application for judgment by the defendants in a jury case which was heard last November, for the sum of £2,120 3s. 8d. The case arose from a contract for drainage works at Kalk Bay. Mr. Collie, the present respondent, was the contractor selected by the Kalk Bay Municipality to carry out these expensive drainage works. After a certain time, disagreement arose, and on an application to the Court, Mr. Collie was put out of the works, and the Municipality took over the works themselves. In so doing they retained the material and plant which he had brought upon the ground. Matters went on, and there were recriminations between the parties, and cross-accounts, and eventually the matter went so far that Mr. Collie brought an action in the Supreme Court, and chose the tribunal of a jury for the consideration of the exceedingly complicated questions of law and of fact, of figures and of engineering, that arose in the matter. The jury arrived at certain findings, and the Court referred numbers of questions depending upon figures and accounts and upon engineering and technical matters to two competent referees. On the finding of the jury and the report of the referees, an account has been framed by the present applicants—the Kalk Bay Municipality—from which they make out that there is due to them by the respondent, against whom they had brought a counter-claim when he brought his action, a sum of £2,120 3s. 8d. Now, it is not suggested that the figures have been unfairly taken from the report or that the account does not fairly summarise the report of the referees. The jury having found in the first instance

that there was a sum of £3,250 overpaid to Mr. Collie, which was all that was claimed by the then defendants—the Municipality—the referees went into the whole matter, as far as it was referred to them, and they have reduced this amount to £2,120 by allowing certain amounts to Mr. Collie. It is impossible for the Court to re-open all this matter and to go into it again piece-meal, bit by bit, and item by item. In the absence of anything showing that the referees have acted wrongly, the Court cannot go behind their finding on the figures. To do so would be to render the system of reference, which is designed to facilitate and shorten the work in courts, absolutely futile and entirely mischievous. The case was of such a nature that had every item been inquired into the Court would certainly have had to sit for something like a month longer than it did, and the expense to the parties would have been enormous, and the strain on the jury and upon everybody would have been intolerable. The only possible course to pursue, which was done eventually by consent of all parties, was to refer these complicated matters to competent referees. One of the most competent accountants in Cape Town was selected—Mr. Close—and a highly-qualified gentleman in the engineering line, Mr. Cecil Jones, was also selected, and to these two, by consent of the parties, was confided the task of inquiry into the complicated matters which arose. They have sent in a careful and exhaustive report, and the final result of their investigation of every item is that, after allowing for the £3,250 and the matters found in Collie's favour, and the deductions made and so on, they and the jury between them have found that £2,120 3s. 8d. is due by Mr. Collie to the Municipality. To go behind their finding and to enter into all these matters again would be simply to constitute myself a court of appeal on intricate matters of fact, which it is impossible for me to follow as well as the referees. There are, however, two matters raised outside of the figures by Mr. Collie. The first is the matter of the retention money amounting to £1,000. Now, as a matter of fact, that £1,000 was never retained by the Municipality, and after giving due consideration to that question the referees still find there is due a sum £2,120. The matter of the £1,000, therefore, cannot come into the case. There remains the question of the plant. As to that, it is said by Mr. Collie that £900 should be set-off, because the plant was his, and the Municipality have dispossessed him of it and are using it. The terms of the contract in respect of this are embodied in the 31st clause, which says that if the works are not proceeded with, for want of sufficient proper workmen and materials, with all

necessary assiduity and despatch, then the Council, after giving three days' notice to the contractor, shall have the power to take the whole of the works out of his hands. Now, that was done by them, but it was not done simply on their own initiative. One of the parties—I am not sure who it was—came to the Court, the matter was thrashed out, and the Chief Justice gave an order allowing the Municipality to dispossess him of the works. And the jury have since found that he was rightfully dispossessed. Then the contract goes on to say that in such a case it is expressly provided that the contractor shall not remove any of his materials or plant and that the Council or their agents shall be entitled to use same without charge. As a matter of law, I can only read that portion of the agreement in the way contended for by the Municipality. It seems to me that at the present stage of the case, I cannot make an order saying that the £900 is to come off the £2,120. I have suggested that an equitable sort of arrangement might be come to on this matter, that whereas the Council took over the plant and have had the use of it for a considerable time, during which time it must have deteriorated, it would perhaps be a fair and equitable thing that the Council should make some sort of allowance for deterioration and wear and tear of the plant while being used by them. Of course, I am not laying down that they must do so; it is a matter they must consider. At present I cannot make any order as to the plant, and if Mr. Collie has been unfairly treated, he will have a remedy when the plant is handed back to him. Judgment must be for the Municipality for the sum of £2,120, as prayed, with costs.

*Postea* (April 17th).

Hopley, J.: There was one matter that escaped my notice in giving judgment in this case yesterday. As to the reference, there is no dispute in regard to the amount which should be allowed to the referees. The Court feels that they should be protected in the matter of getting their fees. The work has been long and arduous, and they have sent in a considerable claim, but by no means too much for the work they had to do. These fees must be costs in the cause, but, in order that there should be no doubt that the referees should get their fees, it seems to me a fair thing that the party who used the report and moved on it for judgment in the first instance should pay the fees and recover them as part of the costs in the cause from the unsuccessful party.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### MAGISTRATES' COURT APPEALS.

WARNER V. GONIWE. { 1007.  
Apr. 17th.

This was an appeal from a judgment of the Resident Magistrate of Mqanduli.

The action in the Magistrate's Court was brought in respect of a promissory note made in favour of W. Warner, an attorney. Exception was taken to the summons on the grounds that it was not in proper form, and that whereas the note was signed severally and jointly by two parties, only one had been sued. The Court upheld the exceptions, and plaintiff now appealed against the Magistrate's decision.

Mr. McGregor was for the appellant; there was no appearance for the respondent.

Mr. McGregor having been heard in argument,

Buchanan, J., said that the plaintiff in the case was an attorney of the Court, and he apparently employed another attorney to sue the defendant for the balance due on the promissory note. The summons did not describe the promissory note in the form necessary, according to the rules of the Magistrate's Court. The amount sued for was different entirely from that set forth in the note. Exception was also taken on a point of law that whereas the note had been jointly and severally signed, only one of the parties had been sued. There was no doubt that the form of the summons was altogether wrong, and the Magistrate was right in upholding the exception to that, and the attorney might then have applied for leave to amend the summons. On the other point, the decision of the Magistrate was incorrect. The case would be sent back to the Magistrate to be tried on its merits, leave being given to amend the summons in the respect in which it was not in proper form. Costs in the Magistrate's Court would be adjudicated upon by the Magistrate. As to the costs of appeal, there would be no order. Attorneys ought really, added His Lordship, to be more careful in these things.

GRAY V. GREEN AND SEA POINT  
BOWLING CLUB.

This was an appeal from a decision of an A.R.M. of Cape Town in a case



in which the present appellant sued the Green and Sea Point Bowling Club for the sum of £11 for work and labour done and material supplied.

The matter arose out of a contract entered into between the parties for the construction by plaintiff of a bowling green at Three Anchor Bay. The plaintiff's account was £536 15s., whereof £525 15s. had been paid by the defendants. The only matter in the account on which the dispute turned was an item of £36, "extra labour and material in rolling and consolidating stone, ashes, soil, and sand over the whole site." Of this sum, £25 had been paid. The defendants pleaded general issue, and in regard to the item in question, said that they agreed to pay a reasonable sum for this work, and that the defendant agreed in the first instance that £10 was a reasonable sum. When the dispute arose, they, however, paid a further sum of £15, with a view to avoiding litigation. Plaintiff admitted offering to take £25 in settlement, but said that the offer was withdrawn. Defendants, on the other hand, stated that the offer was accepted, and this was the view taken by the Magistrate, who gave judgment for the defendants, with costs.

Mr. Gardiner was for the appellant; Mr. Benjamin was for the respondents.

Mr. Gardiner, in argument, said that the issue was whether the offer of plaintiff to take £25 was withdrawn before the defendants intimated their preparedness to accept it. The Magistrate had found there was such acceptance, and though the Magistrate had said he was not satisfied with the plaintiff's evidence on the merits, the merits of the case had really not been gone into fully, since the plaintiff had experts to call if the special plea had been decided upon in his favour by the Magistrate. On the question of the acceptance or withdrawal of the offer, counsel contended there was clear evidence of a withdrawal of the plaintiff's offer in consequence of the club's delay in considering it.

Mr. Benjamin submitted that there was no withdrawal of the plaintiff's offer to take £25 in settlement of the claim and that the tender of this sum by the club concluded any difference there might be between the parties. On what date could it be said that the alleged withdrawal took place? Plaintiff himself was not definite upon the point. On the merits of the case also, counsel contended that there was ample warrant for the Magistrate's decision.

Buchanan, J.: The plaintiff Gray was employed by the Green Point Bowling Club to do certain work in connection with establishing a bowling green. Tenders were called for, and certain items were definitely provided for in the tender. These items were done, but as usual in

all contracts, there were a number of extras performed. These extras are all admitted by the defendants, and they have been paid for, with the exception of an item of £36 for extra labour and material in rolling and consolidating the bowling green. With reference to this £36, the defendants paid afterwards a sum of £25. Though they did not acknowledge liability for more than £10, they paid a further sum of £15 for the purpose of keeping the matter out of Court, and in acceptance of an offer made by the plaintiff to take £25 in settlement. Plaintiff now says this payment did not cover the whole of his claim, and he claimed another £11 for which he issued summons against the defendants. The defendants gave a general denial of liability, and they also pleaded that they agreed to pay a reasonable sum in respect of this extra work, that they offered £10 as a fair and reasonable amount, and that they paid this £10 and also paid an additional £15 to prevent any further legal proceedings. The issue the Court therefore had to try was whether or not the sum of £11 was due by the Bowling Club, and after hearing a considerable amount of evidence and at apparently the close of hearing the plaintiff's witnesses, the plaintiff's agent or attorney said he had expert witnesses to call, but that he was quite willing to argue the question of whether the payment made by the Bowling Club was a final payment in accordance with the tender made, or whether the offer to accept £15 had not been withdrawn before payment of the amount. This point was argued before the Magistrate, and he decided in favour of the defendant club; that the offer was not withdrawn, but was accepted by the club. Upon this decision of the Magistrate, nothing further was done by the plaintiff's agent; he did not tender the evidence of experts nor did he argue upon the merits. An appeal was noted, and the Magistrate, in his reasons, has gone beyond the question of the acceptance of the offer and has also discussed the merits. Now, on the first question of whether the offer was withdrawn or not, the Magistrate has given very good reasons for saying that the evidence did not satisfy him that the offer was ever withdrawn, and the written documents certainly do not support the contention that it was withdrawn. I do not therefore think the Magistrate was wrong in finding there was no withdrawal of the offer. On the merits, the Magistrate has gone over the evidence, and I may say that the evidence led is not only that of the plaintiff, but several of the witnesses called were members of the committee of the defendant club, and the facts were brought out in cross-examination, so that, in a way, the matter was fully before the Magistrate. The merits were never argued before the Magistrate, and I do not like to decide on appeal ques-



tions which have not been fully dealt with by the Magistrate. I must say I would have very great difficulty in saying that the Magistrate's view of the merits are wrong and that the case should go on that ground. If I thought there would be any good done by sending the case back to the Magistrate to have the merits argued before him, and to let him find again on the merits after hearing argument, I might do so; but the feeling in my mind is that the plaintiff would not be likely to succeed. The Magistrate gave absolute judgment against the plaintiff, and had the case been argued before him on its merits, this judgment would not be interfered with, but as the case has not been decided on the merits, if the plaintiff thinks he can convince the Magistrate on the merits, he will have an opportunity to do so. The judgment will therefore be altered to one of absolution from the instance. Otherwise, the appeal must be dismissed, with costs.

#### KRIGE V. WILLEMSSE AND ANOTHER.

This was an appeal from a decision of the Resident Magistrate of Ceres in a case in which the present appellant sued Johannes Petrus Willemse, Jacoba Willemse, his wife, and one Saul Gerber for £50, with interest, due on a certain overdue promissory note alleged to have been signed by the two Willemsses and payable to S. Gerber and by him endorsed. Gerber admitted liability and that he received the money from the plaintiff, but the other defendants denied their signatures to the promissory note, and also raised the defence that the note was obtained by fraud and false pretences, and that there was no consideration. The Magistrate gave judgment against Gerber, and in the case of the other two defendants, gave absolution from the instance. Against this decision, as affecting the cases of the Willemsses, the plaintiff appealed.

From the record it appeared that according to the evidence of the plaintiff, J. P. Willemse, the husband, signed the note and his daughter signed the note for her mother, which it was alleged, she was authorised to do. It was stated that the money was advanced to the three defendants to go together to Cape Town. Gerber gave evidence for the plaintiff to this effect. For the defence, the defendant, J. P. Willemse, said that when his daughter signed the document, Gerber told him it was a receipt. Gerber owed Willemse money. Gerber acknowledged the debt and discharged part of the debt by paying the expenses to Cape Town. The two Willemsses said that both names were signed by the daughter, and the latter confirmed this. A handwriting expert

gave it as his opinion that the two signatures were written by different persons. The Magistrate, in his reasons, said that he believed the evidence of the defendants Willemse in preference to some of the other witnesses. He believed that the daughter signed the names of her parents, and that Gerber induced her to do so by the representation that it was a receipt.

Mr. J. E. R. de Villiers was for the appellant; Mr. Benjamin for the respondents.

Mr. De Villiers, in argument, referred to section 27 of Act 19 of 1893 in support of the contention that even if the daughter signed both names, providing she was authorised to do so, the fact of there being fraud, or of there being want of consideration was of no avail as a defence against a claim by the holder in due course. Counsel also referred to section 36 of the same Act, and quoted the case of *the Standard Bank v. Du Ploy* (16 Juta, p. 161).

[Buchanan, J.: Is it possible to have the case removed to trial in this Court? I should like it fully investigated.]

Mr. De Villiers: That would seem to be the more satisfactory course.

[Buchanan, J.: There are many suspicious circumstances connected with the whole matter that ought to be cleared up.]

Mr. De Villiers said that there was not a shadow of suggestion that Mr. Krige did not act *bona fide*. He submitted that the Magistrate's reasons were entirely unsatisfactory, and that the facts which he cited in support of his judgment were, in reality, dead against him, as, for instance, in regard to the expert's evidence, which the Magistrate referred to as verifying the plaintiffs' story.

Mr. Benjamin submitted that the Magistrate was amply justified in accepting the evidence of the Willemsses as against the evidence of the other witnesses. It was purely a question of fact. The Magistrate had accepted the evidence of the Willemsses. On the question of law as to the obligation of the maker of the note, whose signature was obtained by fraud, to the *bona fide* holder in due course, counsel said that a case like this was entirely outside the provisions of the Act. The question turned on this: that the parties did not at the time purport to sign a note; they intended to sign a receipt. Not having intended to sign a note, and having put their signatures to a paper, under the impression that it was a receipt, they were not liable. Counsel quoted the cases of *Foster v. McKinnon* (20, Law Times, p. 887), and *Lewis v. Clay* (77, Law Times, p. 653), and referred to Chalmers on Bills of Exchange (1896 edition, p. 277). In the present case, proceeded counsel, it was shown that

Willemse was a man of weak sight, and that he was somewhat illiterate. He clearly believed the document was a receipt, and it could not be said in the circumstances that there was negligence on his part.

Mr. De Villiers having been heard in reply,

Buchanan, J.: The plaintiff sued upon a promissory note purporting to bear the signatures of C. J. Willemse and J. P. Willemse, and in favour of one S. Gerber, and endorsed by the latter. Gerber, the endorsee, acknowledged his liability, and judgment was correctly given against him for the amount of the promissory note. The two Willemses, who are husband and wife, and who are stated to be married in community of property, deny their liability and deny their signatures to the note. The Magistrate, after hearing the evidence, gave a solution from the instance as regards the Willemses. The Magistrate has found that the Willemses did not sign the note, and he has also found that their names, as appearing on the notes, were signed by their daughter, who was asked by Gerber, in the presence of her parents, to sign a receipt for £50. Gerber, in his evidence, states that he had owed Willemse £50 and had paid it all off. The first question one has to consider is whether the finding of the Magistrate on the facts is sustained by the evidence. Now, I must say that the record is not so full or complete as one would have liked in a case like this, and there are several matters not so clearly elucidated as they might have been at the trial. However, on the finding of the Magistrate, I must say that the record does disclose evidence which justifies that finding. A more important question is whether on these facts as found by the Magistrate, the plaintiff has a right to recover. Great reliance has been placed upon the provisions of our Bills of Exchange Act as to the rights of a holder in due course, and the 27th section of our Act defines who a holder in due course is. His Lordship read the section, and proceeding, said: The person who negotiated the note with the plaintiff in this case was Gerber, and if the promissory note was a note at all properly signed, any want of consideration, which is alleged between Gerber and the defendants, the Willemses, would not avail the Willemses in an action brought by the *bona fide* holder. This is one of the points which one would have liked to have seen made out more clearly in the evidence. I will assume, however, for the purposes of this case, that there was consideration given to Gerber. Now, I take it as clear that a contract is a matter entered into by parties who understand what they are doing, and who intend to contract. In this case the Magistrate says that there was no intention to contract

in the way stated; that there was no intention to give a promissory note; and that it was only the intention to give a receipt. Willemse seems to be an old man whose eyesight is very bad, and who was about to go to Cape Town to see a specialist about his eyes. Gerber states that Willemse signed his name, but this is contradicted by evidence, which the Magistrate found to be correct. If the note had been signed by Willemse there might have been other considerations, but if there is no contract at all between Gerber and Willemse, the provisions of the 27th section of our Act cannot, I think, apply to the case. The question of the title of a person who possesses a promissory note cannot arise if there is no contract between the parties. Supposing that a person had written his name to a piece of paper simply to show his signature, and that thereafter some one had written a promissory note above the signature and had given it to another person for value, there would be no title in that person, and there would be no obligation on the part of the person who wrote his signature for quite a different purpose. Therefore, if I accept the Magistrate's finding, I am bound to say there is no contract, no promissory note made. This being the case, I cannot see how the 27th section of our Act helps the plaintiff at all in this case. The case has been referred to of the *Standard Bank v. Du Ploy*, in which the Bank had received certain guarantees signed by the defendants; and it was alleged that these guarantees had been obtained by the fraud of the person for whose benefit they had been taken. In that case the evidence was very strong, and the Court unanimously found there was no fraud proved to have been perpetrated; and the decision went more on this point: that if a person negligently signs a document and one of two innocent persons have to suffer, the one who was guilty of negligence should be the person to suffer rather than the other one. In the present case, I think there is no negligence shown on the part of Willemse, and according to the Magistrate's finding there was no contract between them. On the facts set up, I do not think Willemse can be held liable, even if the third person holds the document *bona fide* for value. The appeal must be dismissed, with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

OTTERSTROM V. ESTATE ( 1907.  
STEPHAN. ( Apr. 17th.

Leave to sue *in forma pauperis*—  
Affidavits as to means—  
Wages—Executors

*Respondent (O.) had obtained leave to sue applicants in forma pauperis. The householders who had certified as to his means are resident within the Cape District. In the interval between these householders swearing their respective affidavits and the time respondent applied to the Court he had temporarily removed into another Division, but had returned to his domicile before the application was made. It was now sought to set aside the order for leave to sue in forma pauperis on the ground, inter alia, that the householders were not resident within the neighbourhood of respondent.*

*Held, that as both he and they were resident within the Cape Division, they were in the same neighbourhood.*

*It was further alleged that applicant being in receipt of wages was able to prosecute his action in the ordinary way.*

*Held, that his wages were insufficient to enable him to do so. But:*

*Semble, if at any time it is proved that a person having obtained leave to sue in forma pauperis has become possessed of means, the Court will revoke its order.*

*In this matter only one of the two executors applied on behalf of the estate.*

*Held, that only the executors jointly had a locus standi.*

Mr. Russell was for the applicant, and Dr. Greer was for the respondent (Otterstrom).

This was an application made on behalf of James Cecil Bateman, assumed

executor in the estate, for an order rescinding an order of Court, which allowed the plaintiff to proceed *in forma pauperis*. The affidavit of the applicant set out that he was permitted by the Court to intervene as co-defendant in the action, having been appointed as assumed executor in the estate.

[Maasdorp, J.: What is Stephan doing in the matter?]

Mr. Russell: I do not know.

[Maasdorp, J.: How can you appear for part of the defence. Stephan is really the responsible person in the matter. You do not know what position he occupies?]

Mr. Russell: I do not know. Counsel proceeded with the affidavit, which further set out that from the evidence given on commission at Port Nolloth, it would appear that the plaintiff had been at Port Nolloth for a period of about three years, and was there when the accident took place. The Rule of Court provided that a motion for leave to sue *in forma pauperis* should be supported by the affidavit of the party so applying, and by two householders living in the neighbourhood. Neither of the householders who supported his application resided in his district. He was also in receipt of about £90 a year, and he could not be said to be not possessed of property to the value of £10. The friends of the plaintiff it would appear were willing to assist him to obtain a trial by jury. The affidavit of J. F. Oliff set out that on 15th March he went to the alleged domicile of the plaintiff, and found the premises occupied by one Andersen. He was informed by Andersen's wife that her husband and the plaintiff were both Swedes, and that the plaintiff was away at Port Nolloth.

Dr. Greer read a replying affidavit by Andersen, which set out that when he made the affidavit the plaintiff had no means within his knowledge. Otterstrom returned to Port Nolloth for the purpose of settling his affairs. Counsel also read an affidavit by James Ernest Barber, a lieutenant of the Royal Navy, which set out that the plaintiff was at present employed as a labourer in the Cape Copper Company at a salary of 6s. a day, but owing to his state of health he was not likely to be retained. He earned barely sufficient to maintain him with the necessaries of life. Affidavits were put in by Godfrey Baines and J. H. Pearce, resident householders, of Port Nolloth, which set out that the plaintiff in August, 1906, was not possessed of property to the value of £10.

Further affidavits having been read,

Maasdorp, J.: In this matter, when the application was originally made, all the requirements of Rule 125 were apparently complied with. It was then proved to the satisfaction of the Court that the

plaintiff did not possess sufficient means to prosecute his action in the ordinary way, that he was not possessed of property to the amount of £10, which he advanced as a ground for the Court allowing him to sue *in forma pauperis*. The merits of the application were fully inquired into in the first instance, the *rule nisi* was granted, and when application was made to have that rule made absolute, it was found necessary to obtain further information, and the matter was further postponed. During that inquiry the Court was quite satisfied upon the certificate put in by the advocate who was engaged in the case that the plaintiff had good cause of action, and upon the information then given the Court was satisfied that the plaintiff was not possessed of property to the amount of £10. It is now sought to re-open the matter and that is done apparently upon the bare ground that the two householders, who had made the necessary affidavits with respect to his means, were not householders living in his neighbourhood. That seems to be the most serious question raised in the present application. It appears from the affidavits that the domicile of the plaintiff was in the Cape district, that he removed to Port Nolloth for the purpose of performing certain work there, with the full intention of returning, and it is also established by the evidence not only of the plaintiff himself but by other witnesses that at the time the application was actually made, he was again resident for the time being in Cape Town. The householders living in his neighbourhood at the time were therefore householders living in the Cape district, and they made the necessary affidavits, and nothing has been shown to the Court now to establish that they were not the proper persons to make such affidavits. Then the further question arises whether in spite of their affidavits the plaintiff is not actually possessed of sufficient means to prosecute his action in the ordinary way. There is no doubt that if at any time it is discovered that the person who receives the indulgence of the Court has become possessed of means that the Court will deprive him from that time of further proceeding *in forma pauperis* when he has means to carry on his action. In this case nothing new has transpired. Apparently the applicant, at the time when he made the application, was earning wages at the rate of 6s. a day, and that is now raised as a ground for withdrawing the leave granted by the Court. The only evidence required from the householders is to the effect that he is not possessed of property to the amount of £10. That has been satisfactorily established. It is quite true if the Court should find that a man is not possessed of property amounting to

£10, but, at the same time, he is earning such very excellent wages that out of his wages he could pay costs of suit, then the Court will withhold from him the indulgence of suing *in forma pauperis*. I am not satisfied that he is able out of the 6s. he earns with the necessity of supporting his family to accumulate sufficient means to prosecute this action. This application must, therefore, be refused. I wish to point out one feature in this case which would affect the estate against which the action is brought. When the matter was before the Court on a former occasion, the executor appeared, and was satisfied that he had not sufficient ground for resisting the application. Subsequently he assumed another executor, which, apparently, he had the right to do under the terms of the will. The assumed executor now appears in this case to take up this matter. No single executor can manage the affairs of the estate, the affairs must be managed by the executors jointly, and the question might arise as between the estate and this particular executor as to whether he had the authority of thus representing the estate to proceed in this matter, but that is a matter which I say I leave to those responsible for the funds of the estate. I merely refuse the order, leaving it to any parties who wish to protect themselves, and have any ground for such protection, to take such steps as they think fit, the question of costs to stand over.

[Applicant's Attorney: E. J. Sidney.  
Respondent's Attorneys: Van Zyl and Buissinné.]

REX V. BEWSHER.

1907.  
Apr. 17th.  
" 26th.

Liquor licence—Holder of licence  
—Manager—Act 28 of 1883,  
Sec. 75, Sub-sec. 1—Act 44  
of 1885, Sec. 2.

*The appellant, a hotel manager, was convicted by a Magistrate of permitting, upon the premises, violent, riotous and quarrelsome conduct. The conviction was under Act 28 of 1883, which does not provide for offences committed by managers. Such provision is, however, made by Act 44 of 1885, Sec. 2.*

*Held, that as no exception had been taken in the Court below as to the Act under which appellant had been convicted, as*



*real and substantial justice had been done, and as the Court was not disposed to encourage the practice of taking purely technical exceptions, the appeal must be dismissed.*

This was an appeal against a conviction by the A.R.M. of Wynberg, on the 26th January last, in which the appellant, Edward Bewsher, was charged with contravening section 73 of Act 28 of 1883, by permitting violent and riotous conduct on his premises, the Royal Hotel, Hout Bay. The accused was fined in £1, and against that conviction the appeal was lodged.

The appeal was based on the grounds that the accused was not the holder of the licence of the premises in question, and the conviction was not in accordance with the evidence. The evidence showed that the appellant was manager for J. D. Logan and Co. The section under which he was charged was as follows: "The holder of any licence who shall be guilty of any of the following acts or offences, shall, upon conviction, be liable in respect of each act or offence to a penalty not exceeding £10, that is to say, permitting drunkenness, or any violent, riotous, or quarrelsome conduct to take place upon his premises."

Mr. Close was for the appellant, and Mr. Howel Jones was for the Crown.

Counsel submitted the onus was strongly on the Crown to prove that the person charged with the contravention of the section was the person who was the holder of a licence. In this case the only evidence given on the point was to the effect that the accused was manager for J. D. Logan and Co. Then the question arose whether the manager, even if he could be made liable, was as a fact the man who permitted riotous conduct on the premises. The question of permitting drunkenness on licensed premises had been discussed in the cases of the *Queen v. Robertson* (9 Juta, p. 303), *Queen v. Otto* (13 Juta, p. 250), *Rex v. Norman* (19 Supreme Court Reports, p. 200). Counsel contended that merely being present in a place where a disturbance happened to take place was not in law a contravention of the section, unless there was acquiescence on the part of the manager. Here the evidence was contradictory, even on the part of the Crown.

Mr. Jones admitted that the evidence showed that the appellant was the manager for Logan and Co., but that position was covered by section 11 of Act 44 of 1885, which clearly provided that a manager was liable. The section read: "Any person who shall at any time be lawfully managing, superintending, or conducting the business of the holder of any licence

under the said Act or this Act shall be subject and liable to the same duties, obligations, and penalties as such holder." It was perfectly clear he was as responsible as the holder. Counsel submitted section 11 did not create any new offence, and it did not really amend the former Act. It was unnecessary to refer to that section, and the point raised for the appellant was a purely technical one.

Maasdorp, J., said he wished to have authority as to whether there was any decided case which touched upon the matter at all, whether the charge ought to have been under section 11. Counsel might find if there was authority in similar matters which, although apparently very technical, come to be regarded as serious, and then the case could be sent in.

*Postea* (April 26th).

Maasdorp, J., said: In this case the defendant was charged with contravening section 73 (sub-section 1) of Act 28, 1883, in permitting upon certain licensed premises violent, riotous, and quarrelsome conduct. He pleaded not guilty, but was found guilty by the Magistrate, and fined £1. An appeal was noted on the following grounds: (1) That the accused is not the holder of a retail licence for the licensed premises in question; and (2) that the conviction is not in accordance with the evidence. It appears that the accused is described as a European hotel manager, and he is charged with having contravened the section as manager and holder of a retail licence for the sale of liquor. The first ground of appeal, therefore, does not cover the whole of the charge made against the accused. He is not only described as the holder of a retail licence, but he is also described as a manager for the holder of such licence. There is no proof that he is the holder of the retail licence, and in that respect the charge has not been proved, but there is evidence that he is the manager of this business. Under section 73 it is provided that the holder of any retail licence who shall be guilty of permitting drunkenness or riotous or quarrelsome conduct shall be liable to a penalty not exceeding £10. No reference is here made to the manager for such holder. Provision is made in that respect in section 2 of Act 44, 1885, where any person who shall at any time be lawfully managing the business for the holder of the licence shall be subject to the same penalties as the holder of the licence himself. There is, therefore, satisfactory proof that the defendant is liable under the latter section, and there is proof that he actually was the manager for the holder. Then a further ground of appeal was raised during the argument on appeal to the effect that the defendant should have been charged, not under section 73 of Act 28, 1883, but under section 2 of the



latter Act. That in itself was merely a technical exception, which was not raised in the Court below, and was not made a ground of appeal. But it was thought at the time when the argument took place that there might be some authority in a decided case holding that it was more than a technical exception and that it might be a ground for quashing the conviction. The presence of no such authority has been discovered, and I, therefore, come to the conclusion that it might be treated as a technical ground of exception of very trivial importance, and, as this has not been raised in the Court below or made a ground of appeal, the judgment cannot now depend upon it in appeal. A further ground for appeal is that the conviction is not in accordance with the evidence. It was contended that there was not evidence given of riotous or disorderly conduct, and that it was not proved that the defendant had not done his best to prevent such conduct, if any had taken place. There is some evidence given for the defence that what took place was merely some horseplay between a couple of men, or some skylarking, but, when we look at the evidence of the defendant himself, he says these two men were disputing with each other, and he twice told them if they did not make less noise they must leave, as soon as he saw them begin the fight. Well, that seems to me quite sufficient proof that there was some disorderly and riotous conduct. He himself says he had not time to stop this fighting before the police came in, but there is sufficient evidence to show that this riotous conduct was revived for some little while, and he must have had full opportunity for interfering before the police came on the scene. On this ground of exception, the appellant must also fail. The appeal is dismissed.

#### COLONIAL GOVERNMENT V. MILLS AND SONS.

Railway Department — Tariff Book—Regulation 154—Act 19 of 1867.

*The Court held regulation No. 154 of the tariff book of the Railway Department to be binding on a consignor who had signed the usual consignment note, though this regulation had not been published in the "Government Gazette" in terms of Act 19 of 1867.*

This was an appeal from a decision of the Resident Magistrate of Cape

Town, in an action in which the respondents were plaintiffs, and claimed for the return of thirty bags of bran, or the value thereof, from the Railway Department. The bran was delivered to the Railway Department in April, 1904, and consigned by the respondents to Calder and Co., of Wynberg. The Railway Department pleaded clause 154 of the Railway Regulations, and that the plaintiff had signed a consignment note agreeing to be bound by these regulations, and acknowledged they were well acquainted with them. The clause was as follows: "That all damage to, defect or deficiency in a consignment must be pointed out in writing at the time of its delivery, and the department will not entertain any claim when this has not been done; all claims giving full particulars of the loss or damage must be sent in to the Traffic Managers. No such claim for any damage, defect, or deficiency will be allowed unless made within three days after the delivery of the goods, etc., to the consignee, nor for total loss unless the claim be made within fourteen days of the approximate date on which the goods, etc., should have been delivered."

Mr. Howel Jones appeared for the appellants, and Mr. Close was for respondents.

Counsel said the plaintiffs made no claim until two years afterwards, and the department had no notice of non-delivery until then. It was a loss of thirty bags out of a total consignment of 295 bags. Calder said there had been no notice from the department that these had arrived. The plaintiff pleaded that the Railway could not take advantage of this condition in the Tariff Book, and that the regulation had not been gazetted in the "Government Gazette" as required by section 2, Act 16 of 1861. Judgment, after being reserved, was finally given for the plaintiff, and the Magistrate's reasons for judgment were as follows: "Plaintiff sues for £7 7s. 6d. or the recovery of 30 bags of bran delivered by him to the Cape Government Railway Department on the 28th April, 1904, but subsequently lost. (1) It is admitted that the bran sued for was received by the Railway Department from plaintiff at Cape Town, consigned to Calder and Co., of Wynberg, and that the bran arrived at Wynberg station, but thereafter no mention of its delivery to any person whatever has been furnished. The whole parcel appears to have been lost at Wynberg. (2) The plaintiff in the ordinary course of his business had repeatedly consigned to Calder and Co. at Wynberg, but there does not appear to have been any early and definite system of check of the despatch and receipt of the consignments, and the account current between them remained generally in suspense so far

had been consigned, pending an annual settlement. In this instance the bran left on 28th April, 1904, and reached Wynberg the next day, and the April consignments to hand were not checked by Calder and Co. until the September following, and by plaintiff more than a year afterwards. Plaintiff received no advice of non-delivery or loss of the bran in the meanwhile; then failing to secure payment from Calder and Co., he made demand on the Railway Department on 27th February, 1906, and this action followed. In the railway service it has been customary to issue to the consignee Form T. 118 (notice of receipt of a consignment) and to request consignee to take delivery; in this instance no such advice was received by the consignee, and it is not suggested that such advice was sent, while all other consignments are found to have been duly notified, no record of this one being given has been traced, and thus Calder and Co. assert they were unaware of its arrival at Wynberg. The plaintiff, on the other hand, not having learnt otherwise, left the traffic to be governed as usual, and did not make inquiries, knowing of the railway custom already reported, concluded the bran had been delivered in the usual manner. Defendant pleads that the 154 bye-law puts plaintiff out of Court, as it there provides *inter alia*, 'No claim for any damage, defect, or deficiency will be allowed unless made within three days after the delivery of the goods, etc., nor for total loss unless the claim be made within 14 days of the approximate date on which the goods, etc., should have been delivered.' Plaintiff urged that as these bye-laws have admittedly not been gazetted in terms of section 2, Act 16, 1861, the defendant cannot bar plaintiff, and that the terms of this regulation were not known to plaintiff, and form no part of the contract as not set out in the consignment note. I am of opinion that there is much to be said in favour of plaintiff's contention not only as to the non-publication of the bye-law which involves a total loss of his property, but also on the absence of its terms from the invoice itself, but while I am not prepared to say that plaintiff is wholly supported in this plea I consider defendant's failure to advise the consignee of the arrival of the bran in the usual manner kept both the consignor and consignee in ignorance of the arrival and of its subsequent loss, and thus directly put the plaintiff into a wholly unexpected position, and that it is not now possible for defendant to take cover of this regulation, and so obtain advantage by his own admitted neglect."

Counsel, in argument, referred the Court to the *Cape Orchard Company's case* (15 C.T.R., 421), and *Bergcr v. C.S.A.R.* (Supreme Court, Transvaal, 1903, p. 571), which showed

for a considerable time after the goods that the regulations were binding upon the respondent. Section 2 of the Act of 1861 referred to penalties in the nature of a fine for offences. This regulation was merely a condition to which the plaintiff agreed.

Mr. Close said this special agreement pleaded on behalf of the Railway Department made prescription within a fortnight. The Magistrate found, apart from the regulation, that there was a custom, and that this custom must be read in with the contract, and the contract was that the Railway Department shall carry the goods in terms of the regulation. The custom was when the goods arrived a notice shall be sent out to the consignee, and it was the duty of the carrier to give notice that the goods were ready for delivery. Counsel cited as to the general principle *Petrocochino v. Bolt* (Law Reports, 9 Common Pleas, 361) and *Aktieselskab Helios v. Eckman* (Law Reports, 1897, 2 Queen's Bench, 87). Then there was the case of *Mitchell v. Lancashire and Yorkshire Railway Company* (Law Reports, 10 Queen's Bench, 260). The carrier could delay provided he had reasonable cause for the delay, and he submitted it was not for the consignee to turn up day after day to find out whether the goods had arrived or not. The regulation 154, he submitted, was not in law in force.

Mr. Jones having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (April 18th).

Maasdorp, J.: On the 28th April, 1904, the plaintiffs delivered to the Government Railway Department 295 bags of bran to be carried to the consignee, Messrs. Calder and Co., at Wynberg. Of this quantity a portion arrived at Wynberg, and was ready for delivery on the 29th of April; another portion was delivered on the 2nd day of May, but one consignment of 30 bags was never delivered at all. The plaintiffs now claim from the defendant the delivery of these 30 bags, or their value, amounting to £7 7s. 6d. No exception has been taken to the claim being made by Mills and Sons instead of Messrs. Calder and Co., and it must therefore be taken for the purposes of this suit that the plaintiffs are the right parties to sue. The defendant admits that the Railway Department received from the plaintiffs 295 bags of bran for carriage to Wynberg, and says that all of these were duly delivered, except 30 bags, which were despatched from Cape Town on the 29th of April, to Wynberg Station, where, in the due and ordinary course of transit, it should have arrived on the same day. There is some evidence

that these bags of bran actually reached Wynberg. The plaintiffs' claim in the matter was made for the first time in February, 1906, and the stationmaster who then made inquiries says, in evidence "We traced the consignment from Cape Town to Wynberg, but can't trace it beyond the checker, who has checked it off as received. The checker left 12 months ago, and before the department got notice of this claim." Duncan, who is a partner in the firm of Calder and Co., says that the loss of the bran was discovered by them in September, 1904, while Mills states that his firm was not aware of it until a year after, April, 1905. Notwithstanding this no claim was made till February, 1906. This state of affairs will have some bearing upon the question of the reasonableness of the condition of the contract which is relied upon by the defendant in his defence. Upon the consignment note signed by the plaintiff appears the following condition "We hereby specially agree that this consignment is to be received and to be conveyed and dealt with in accordance with the terms, conditions, and regulations published in the Official Tariff Book in force at this date, with which we acknowledge ourselves to be acquainted." Amongst the conditions and regulations referred to is the following: No. 154. No claim for any damage, defect or deficiency will be allowed unless made within three days after the delivery of the goods, etc., nor for total loss unless the claim be made within 14 days of the approximate date on which the goods, etc., should have been delivered. The defendant pleads that no notice of non-delivery of the said consignment was given by the plaintiffs until the 27th day of February, 1906, and in consequence of the plaintiffs' failure to give notice as by regulation No. 154 required, the said Government is relieved from all responsibility therefor. The plaintiffs do not deny that they were fully aware of condition mentioned, and that it became incorporated in their contract with the defendant, but say that it was not attached to or set out in the document they signed, nor was it duly promulgated in the "Gazette" as a by-law in terms of Act 19 of 1867. It does not appear to me that either of these contentions is an answer to the defendant's plea. The plaintiffs expressly agreed that this condition should be one of the terms of this contract, and he is bound by it. Then it was argued that the condition is unreasonable, but I am unable to discover the right of a party to a contract to complain of the unreasonableness of the conditions of his contract. But if the Court had to go into that question I should hold that the condition is perfectly reasonable, and that the Railway

Department would be put in a very difficult position if a question of this kind could be raised nearly two years after the events, and when their servants, who could supply the required information, had long left their service, as has actually happened in this case. I cannot help thinking that the delay in making the claim arose from the fact that the plaintiffs and Messrs. Calder and Co., themselves felt the difficulty, they must necessarily experience in making good their claim from the uncertain character of the evidence they could adduce after such a lapse of time. I doubt whether it can be said that it is clearly and satisfactorily proved that Messrs. Calder and Co. never received the 30 bags of bran. I merely mention this to show how reasonable it is to have a condition having for its object the prevention of such a state of uncertainty, which would leave the burden of proof on the Railway Department. Under the 154 Regulation, no claim for any damage or deficiency will be allowed for total loss unless the claim be made within fourteen days of the approximate date on which the goods should have been delivered. Now, it appears to me that the approximate time here referred to must be taken in this case to be some two or three days after the despatch of the goods from Cape Town. Such approximate time the plaintiffs are supposed to become aware of from the advice they would in the ordinary course of business receive from the consignors, and not from any notice of receipt from the Railway Department. Even if the department is in the habit of sending notice of goods received to consignees, they do not, and are not required to, send notice of goods lost. And the notice they send cannot affect the question of approximate time, but rather fix the true time of the receipt of the goods. That part of the plaintiffs' contention must, in my opinion, also fail. The plaintiffs should have made their claim within a fortnight of a day or two after the despatch of the goods from Cape Town. This they failed to do, and they have lost their right to claim damages in respect of the short delivery of the bran. Appeal must be allowed, with costs. Respondent to pay costs in the Court below.

[Appellants' Attorneys: Reid and Nephew. Respondents' Attorneys: Buchanan and Boyes.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1907.  
{ Apr. 17th.

Mr. Toms moved for the admission of Frederick Howe Ely as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of King William's Town.

Mr. W. Porter Buchanan moved for the admission of Robert Trevor Stone as an attorney, notary, and conveyancer.

Application granted, oaths to be taken before the Resident Magistrate of East London.

Mr. Gutsche moved for the admission of John James Wiggins as a notary.

Application granted, oaths to be taken before the Resident Magistrate of East London.

Mr. Toms moved for the admission of John Lomax as an attorney and notary.

Application granted and oaths administered.

### PROVISIONAL ROLL.

LOYAL B.A. BUD OF HOPE LODGE V. DOMINICUS.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest from January 1, 1906, and for £2 8s., premiums of insurance and stamps, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

SOLOMON V. NEL.

Mr. De Waal moved for provisional sentence on two promissory notes for £47 10s. 9d. and £26 2s., with interest and commission for collection.

Provisional sentence granted on the amount of the notes and interest, but no order as to commission.

ESTATE LATE HIDDINGH V. FIELD.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £4,500, with interest from January 1, 1906, less £75 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ILLIQUID ROLL.

AYLIFF V. MOHR. { 1907  
{ Apr. 17th.

Mr. Pohl moved for judgment, under Rule 329d, for £22 15s. 8d., for professional services, with interest *a tempore morae*, and costs.

Order granted.

USHER V. SEXTON.

Mr. Gutsche moved for judgment, under Rule 329d, for £88 19s. 8d., being interest due on a loan of £1,000.

Order granted.

CAMP'S BAY EXTENSION CO. V. TRAUTMAN.

Mr. Louwrens moved for a decree of civil imprisonment upon an unsatisfied judgment for £7 10s. and costs.

Defendant said that he had paid one instalment of £2 10s. towards the purchase price of a plot of ground, but he did not want to pay the balance and take transfer of the ground. He did not even know where the ground was situated. He offered to pay £1 a month towards the debt.

In answer to the Court, defendant said that he bought the ground in the good time when people believed that "gold was hanging on the trees."

Decree granted with costs, operation to be suspended on payment of 25s. on the 1st of each month; first payment on the 1st May.

GEPP V. GEPP AND ANOTHER.

This was an action brought by Wm. Frederick John Gepp, fitter, Somerset West, against his wife, Catherina Christina Gepp, also of Somerset West, for divorce on the ground of adultery with one Jan Nielson, against whom £100 damages were claimed.

Mr. Pohl was for plaintiff; defendants had been barred, but were allowed to appear.

W. T. Birch, clerk in charge of the marriage register, Colonial Secretary's Office, gave formal evidence as to registration of the marriage.

The plaintiff stated that he was married to defendant on the 31st January, 1902, at St. Mary's, Woodstock. Witness was a joiner, but he was at present working in the danger area at De Beers Explosive Works at Somerset West, and received 10s. a day. Up to last December he lived on harmonious terms with his wife. On the 6th January, on account of the strange conduct of the defendants on the 5th January,



he had Nielsen removed from his house by the police. Nielsen had boarded in witness's house, and he had been on friendly terms with him for some years. His wife left him on the 7th January, informing him that she would have to go and live with Nielsen. He told her not to do anything of the kind, and she remained, but on the 7th January she left in Nielsen's cart and went to some rooms at the Strand. His wife was now living with Nielsen at a house at the Saltpan. There were three children of the marriage, aged 4 years, 2½ years, and 18 months respectively. He desired to have custody of the children.

By the Court: It was true, as alleged in an affidavit filed by the defendants that the latter lent him money to buy a bicycle. As far as he knew, the money had been repaid by his wife out of the lodging-money she received from Nielsen. The defendants had gone to the Tivoli together with his consent. It was not true that he had condoned their conduct so long as Nielsen had been willing to supply money to keep the house going. He had never said to the defendants "I am going to bed now; you can have a good time." He denied that he had ill-treated his wife, though he admitted having pulled her hair in consequence of her conduct. He denied having misconducted himself with a Mrs. Davel.

Cross-examined by the first defendant: Witness admitted that about ten months after the marriage he struck his wife, but said that it was of no importance. They had had little quarrels but he had never committed a serious assault upon her.

The first defendant said that one side of her face had been paralysed as a result of a severe blow which she received from her husband after the incident of the 5th January.

Cross-examined by Nielsen: Witness admitted having called his wife a coloured woman, but denied that he had said that he would clear out and leave her.

By the Court: Witness had been under the influence of drink at times during his marriage.

Nielsen said that Mrs. Davel told him that she had been sleeping with the plaintiff.

Witness denied that he had slept with Mrs. Davel.

Nielsen, in answer to the Court, said that he did not deny that he was cohabiting with Mrs. Gepp.

John Hurling, of Somerset West, said that up to December the plaintiff and his wife seemed to be living on amicable terms.

Cross-examined by defendants: Witness had not said that Mrs. Gepp was a fool for standing such treatment from her husband.

Mrs. Hurling also gave evidence.

Mrs. Gepp said that she was too poor to employ an attorney to defend the case. She left plaintiff because he ill-treated her. The familiarity between witness and Nielsen commenced in August last. Her husband, who was then working under Nielsen, pressed Nielsen to come to their house, and he must have known of their relationship. Witness had given her husband money that Nielsen had handed to her. He had told her that she must get as much money as she possibly could out of Nielsen. Nielsen had given her £2 or so each fortnight. The assault which plaintiff committed upon her early in January led to a crisis, and witness left the house.

Jan Nielsen, the co-defendant, also gave evidence.

Hopley, J., said it was clear that the defendants had been living in adultery, but, as to the question of whether plaintiff had connived in the guilty conduct of the pair, he was more inclined to believe the evidence of defendants than that of plaintiff, because to his mind it had been given in a more straightforward way. It seemed to him that plaintiff did know what was going on between his wife and Nielsen before they left his house. The judgment of the Court would be absolution from the instance. There would be no order as to costs.

#### RORICH V. RORICH.

This was an action brought by William Siebert Edward Rorich, of Bowesdorp division of Namaqualand, against his wife, Anna Francina Johanna Rorich, of Frenchhoek, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Molteno was for plaintiff; defendant did not appear.

W. T. Birch, clerk in charge of the marriage register, Colonial Secretary's Office, gave formal evidence of registration of the marriage.

Mr. Molteno read the evidence of plaintiff, taken on commission at Springbokfontein. He said that he was married to defendant at Frenchhoek in November, 1899. They resided together in Namaqualand until November, 1903, when defendant left him and went to live with her parents at Frenchhoek. He prayed for forfeiture of the benefits of the marriage, but did not press for costs. Counsel also read a letter from defendant's attorney, stating that Mrs. Rorich did not propose to return to and cohabit with the plaintiff. Mr. Molteno also stated that the plaintiff was now willing to give back to defendant what she had brought into the joint estate.

Decree of restitution granted, defendant to return to the plaintiff on or before the 1st June, failing which to show cause on the 2nd July why a



decree of divorce should not be granted as prayed, and why she should not forfeit any benefits arising from the marriage in community.

REHABILITATIONS. ) 1907.  
( Apr. 17th.

Mr. Upington moved under section 117 of the Insolvent Ordinance for the discharge of Heinrich Bauer.

Granted.

Mr. Marais moved under section 117 of the Ordinance for the discharge of Philip Lodevicus van Heerden.

Granted.

Mr. Toms moved under section 117 of the Ordinance for the discharge of Jabez Henry Whitehead.

Granted.

GENERAL MOTIONS.

FRAME V. BENNETT.

This was an application upon notice to respondent to show cause why applicant should not be discharged from imprisonment in Roeland-street Gaol, wherein he was at present detained, under a writ of civil imprisonment issued in a suit at the instance of respondent against applicant.

It appeared that applicant was arrested on the 11th April, 1907, under and by virtue of a writ of civil imprisonment issued at the instance of respondent by reason of his default of payment of £69 12s., balance of principal and costs of a judgment obtained by Bennett against Frame on the 13th March, 1905 (15 C.T.R., 235). The writ had been suspended upon payment of £5 per month. Applicant had made payments from time to time amounting to £28, the last payment being made on the 4th September, 1905, but he said that at the time of his arrest and for some time previously he had been out of employment, and had been unable to pay any further instalments. A further writ had been issued against applicant at the instance of one B. G. Heydenrych.

Applicant, in his petition, said that he was prepared to offer £3 a month.

Mr. Upington was for applicant, Alexander Kay Frame, accountant, Claremont; Mr. P. S. T. Jones was for respondent, John Thomas Bennett, of the Palace Hotel, Kenilworth.

Mr. Upington said that the only way out of the difficulty, it seemed to him, was for respondent to surrender his estate, and to release him from imprisonment pending the surrender.

Hopley, J., pointed out that, even if he released applicant, he would have to go back to gaol in virtue of Heydenrych's writ.

Mr. Upington: The only way out of the difficulty appears to be insolvency.

Mr. Jones said that no explanation had been given by applicant to show a change of circumstances to prevent him from continuing his instalments. When he was arrested, applicant offered to pay £25 down, so that he must have some funds that he could lay his hands upon.

Petitioner was ordered to be released so far as Bennett's writ is concerned, writ to be suspended on payment of £3 a month, first payment on the 1st May, with leave to respondent to move for an increased amount should circumstances warrant, applicant to pay costs.

JOHNSTONE V. JOHNSTONE.

Mr. Swift moved on behalf of the applicant for a decree of divorce in default of her husband's compliance with an order of restitution of conjugal rights.

Decree of divorce granted.

FARMERS' CO-OPERATIVE CO. (IN LIQUIDATION) V. NOURSE.

This was an application calling upon respondent to show cause why he should not be ordered to pay certain costs incurred by applicants in instructing their attorneys to oppose his (Nourse's) application for discharge from insolvency, notice of which was published in the "Government Gazette" on the 23rd November last.

Mr. W. Porter Buchanan appeared for applicants; respondent did not appear.

From the affidavits, it appeared that applicants were creditors in respondent's estate to the amount of about £930. On the 23rd November last a notice appeared in the "Gazette" to the effect that respondent was about to apply for his discharge, and such creditors who wished to oppose were given notice to do so. Applicants incurred certain costs in having affidavits drawn and a brief prepared for counsel to oppose the application, but at a late date, the respondent, learning that applicants would not consent to his application, determined not to proceed with it.

Ordered that respondent pay all costs of opposition to his proposed application for discharge up to, but not including the 10th January, 1907, respondent to pay costs of this application.

## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

REX V. TOMASO.      § 1907.  
    (Apr. 18th.

Splitting of charges—Immigration Act (30 of 1906), Secs. 5 and 7.

*A person cannot in respect of one and the same act be convicted under both Sec. 5 and Sec. 7 of Act 30 of 1906.*

Buchanan, J.: A case came before me as judge of the week, that of Bene Tomaso, for contravening the Immigration Act. The evidence shows that the accused, in the declaration which he was required to sign before being allowed to land, made one false statement. When asked if he had been previously convicted of any crime in any country he replied: "No." The evidence shows he had been convicted at Johannesburg under the Morality Act. This one act of the accused in giving a false answer has been split up by the prosecutors into two separate charges, one of contravening section 5 and the other of contravening section 7. The evidence was directed solely to the offence committed under section 7, namely, that of making a false declaration. That conviction must be sustained. I am not clear that anybody can be charged under section 5 of the Act. I think it highly improper to split up one act into two offences in this way. A person indicted for arson might just as well be also charged with malicious injury to property. The conviction under section 7 will be sustained, and that under section 5 quashed. It is important to the prisoner that this should be done as the sentences on the two different charges are to run consecutively, and consequently his imprisonment will be materially reduced by the alteration.

VAN HEERDEN V. JOOSTE.

This was an action brought by Anna Elizabeth Jooste, of Krugersdorp, Transvaal, married out of community of property to Petrus Johannes van Heerden, to recover from Francois Daniel Jooste, individually and in his capacity as executor testamentary in the estate of the late Roelof Alwyn Jooste, of Murraysburg, payment of the sum of £250, being her

share of inheritance due to her in terms of the last joint will and testament of the late Roelof Alwyn Jooste and his predeceased spouse, Anna Gertruida Jooste (born Van Heerden) and costs of suit.

The plaintiff's declaration was as follows:

(1) The plaintiff is married out of community of property to Petrus Johannes van Heerden, and by him assisted as far as need be. The defendant resides at Murraysburg in this Colony, and is sued individually and in his capacity as executor testamentary in the estate of the late Roelof Alwyn Jooste. The plaintiff and defendant are the children of the latter.

(2) The said late Jooste and his predeceased spouse, Anna Gertruida Jooste, on November 10, 1884, executed a joint will, whereby each testating spouse appointed as his or her sole and universal heirs the survivor, together with the plaintiff and defendant, and appointed the survivor as his or her executor.

(3) By the said will it was further provided by the two testators that certain landed property in their ownership (to wit one sixth share of the farms Bloemfontein, Klipfontein and Lilyfontein) should after the death of the survivor be sold to Frans Daniel Jooste for the sum of £500. The said words constituted a bequest to defendant taking effect and subject to payment by him of the said bequest price after the death of the survivor.

(4) The testatrix died in or about the year 1891 without revoking the said will which thereupon became confirmed by and took effect at her death, and the testator adiated under the same, and as executor thereunder filed a liquidation and distribution account wherein the said land was noted in the estate as sold to the defendant for £500, payable at the death of the survivor. Neither the said farm nor the said sum of £500 was further taken into account or distributed in such account.

(5) The testator died in or about the year 1902, after having by a will executed on November 19, 1896, and unrevoked and taking effect at the testator's death, appointed plaintiff and defendant his heirs, and defendant his sole executor. The latter, thereafter, took out letters of administration and proceeded to administer the estate, and purported to distribute the property therein.

(6) Thereafter defendant filed an account wherein he wrongfully and unlawfully brought up as an asset in the surviving testator's estate the said land at a valuation of £500 (being the bequest amount) and wrongfully and unlawfully awarded the same to himself without paying into the joint estate the

sum of £500 or paying over to the plaintiff any part thereof.

(7) The plaintiff as co-heir under the aforesaid joint will has been damnified by the defendant's said wrongful action and through his failure to pay in the said £500 as aforesaid or to award and pay over or cause to be awarded or paid over to her as co-heir under the joint will the half thereof, viz., £250. to which as such co-heir she is entitled.

By reason of the premises the plaintiff as co-heir under the joint will is entitled to be paid the sum of £250, or alternatively is entitled to an order that defendant pay into the joint estate for the benefit of herself and defendant as co-heirs therein, the said sum of £500, but the defendant notwithstanding the premises wrongfully and unlawfully refuses to pay to her such sum of £250 or any part thereof.

Wherefore the plaintiff claims payment of the sum of £250 or alternative relief.

The defendant admitted paragraphs 1 to 5, but denied paragraphs 6 to 8, and continued:

"In April, 1903, the defendant, through his agent, applied to the Master of the Supreme Court to call a meeting of the next of kin for the election of an executor dative, and under the instructions of the Master, the said landed property being registered in the name of the surviving testator, he, the defendant, proceeded with the administration. There were no other assets in the testator's estate which was indebted to the defendant for certain sums which sums are still due to the defendant. The said landed property had registered against it a bond of £700, and the defendant took over upon himself the said liability of £700, and the said land and the said bond thereon were transferred to the defendant."

There was also a counter claim by the defendant who alleged: The plaintiff is indebted to the defendant in the following sums of money: (a) £25, being money lent by defendant to plaintiff in two sums of £10 and £15, while she was staying at Aberdeen; (b) £79 being the price of seven horses, all delivered to the plaintiff, which sum is still due and owing by the plaintiff; and (c) £32 being money lent by defendant to plaintiff in three instalments, while she was living in the Transvaal.

To that plea the following exception was taken: The plea is vague and embarrassing, insufficient and bad in law, in that:

(1) No material particulars or dates are given of the plaintiff's alleged indebtedness to defendant.

(2) It is not stated: (a) Whether defendant administered as executor dative or testamentary, nor (b) whether defendant administered solely by authorisation of the Master and, if so, what

the grounds of such authorisation were or in what capacity or right he administered.

(3) Certain items in paragraph 3 are specified as being due to defendant by the testator, but it is nowhere stated that plaintiff or the joint estate is liable therefor; nor (b) is it stated in paragraph 3 when or for what consideration the bond of £700 was passed or that the joint estate was or is liable therefor, and the said paragraph is generally vague and embarrassing.

Mr. McGregor was for the excipient (plaintiff) and Mr. Gardiner was for respondent (defendant).

Mr. McGregor said the plea was so vague that the plaintiff was entitled to come to the Court and say there should be further information. The plea was far too vague, and it did not conform to the rules of Court. Counsel cited the case of *Davis v. McDonnell* (15 C.T.R., 250). The Court should lay down that the pleadings should not be of this extremely vague and loose character. Counsel read the 330th Rule of Court, and submitted that the Rules of Court must be fairly obeyed. There must surely be substantial and fair adherence to them. The plea was a general allegation which could not stand.

Mr. Gardiner thought it hardly necessary for his learned friend to come to Court to obtain particulars which could be obtained in another way. Where the Court had held that a portion of the pleadings was irrelevant, the way to get rid of that was by application to strike it out, and not by way of exception. He submitted it was sufficient for a pleader to set forth the material facts, and leave it to counsel to draw legal conclusions. It might have been better to set forth the date of the bond, but it was so easy to trace this bond that it was not necessary to take the exception.

Buchanan, J.: To the declaration filed in this case the defendant admitted all the material allegations. Then he went on to make certain allegations in the plea to show, notwithstanding the facts admitted on the declaration, that there are certain other facts which bar the plaintiff from recovering. The Rule of Court requires that these facts, if material, must be clearly and concisely stated. The plaintiff excepted to the plea as being vague, embarrassing, and insufficient in law. When I look at the details of the plea, I must say in my opinion there is ground for the exception that it is vague, embarrassing, and insufficient. It is impossible to gather from the plea at what time the property was bonded. The defendant goes on to set forth as the basis of a claim in reconvention certain items in which the plaintiff are indebted to him. Everyone of them is made in a very vague and bare way. Certain amounts are stated, but there

is nothing to show when they were incurred, and other particulars which ought to be set forth in the declaration are not set forth. The exception will be allowed, with costs, and the defendant will be allowed to amend his plea within ten days.

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HARTLEY V. PALMER. 1907.  
HARTLEY V. CENTRAL NEWS { Apr. 18th.  
AGENCY, LTD. " 23rd.

Libel — Newspaper — Privilege —  
Charge of unprofessional  
conduct — Measure of dam-  
ages.

*In the first case, the defendant, a newspaper editor, had in his paper accused the plaintiff, a medical practitioner, a member of the Medical Council and proprietor of a Medical Journal, of having, contrary to the etiquette of his profession, advertised "through skilfully engineered paragraphs in the local press," and also of having "used politics as a medium for advertisement," and further stated that "he ought to be the first proceeded against" by the Medical Council. Defendant refused either to apologize or to withdraw these statements, and virtually repeated them in a subsequent issue of his paper. At the trial he wholly failed to prove the truth of his allegations.*

*Held, that as the words were defamatory and published under circumstances which established neither privilege, fair comment nor justification, defendant was liable in damages.*

*In the second case, the defendant, a company of publishers, published P.'s paper. On plaintiff remonstrating, they apologized and stopped the issue. They, however, published the subsequent issue in*

*which the libel was repeated.*

*Held, that they were liable in damages and that their alleged ignorance of the contents of the paper was no defence.*

*Semle : In assessing damages for libel, the Court will regard not only the plaintiff's probable loss but also the degree of the defendant's malice.*

These were two actions in which the plaintiff sought to recover damages for libel. They were brought by Dr. Darley Hartley, a medical practitioner, and a member of the Colonial Medical Council, and proprietor of the "South African Medical Record." The defendant Palmer was the proprietor of a weekly paper called "Palmer's Weekly," while the Central News Agency were the publishers of the paper, which had now ceased publication. The plaintiff sued the two defendants for £500 for libel alleged to be contained in an issue of the journal in question published on September 21, 1906, containing the following words, which were complained of as being false, malicious, and defamatory:

"If it comes to advertising, there is no one more guilty of this than Dr. Darley Hartley, and yet he had the effrontery to act as chairman of the Medical Council which sat on Dr. Crozier Durham's case." This, said counsel, had reference to an inquiry at which Dr. Crozier Durham was adjudged to have been guilty of improper and unprofessional conduct. The article proceeded: "But then Dr. Darley Hartley does his advertising through skilfully engineered paragraphs in the local press, and he also uses politics as a means for advertising, just as some use the church. Fancy a politico medico of this type talking about observing the spirit as well as the letter! Why, he ought to be the first proceeded against." The innuendo was that the plaintiff had been habitually guilty of improper and unprofessional conduct, for which he ought to be proceeded against, and might have been dealt with by the Medical Council, and that he was wholly unfitted for his profession. The plaintiff complained that he had been injured in his profession and office. The plea filed by the defendant Palmer admitted the paragraphs in question, but set forth that they were not intended to mean what the plaintiff alleged, and were not actionable. He contended that the words were fair and *bona fide* comment upon a matter of great public interest and importance. He denied malice and also denied the damages. The Central News Agency admitted publication, but disclaimed any knowledge of the contents

of the paper. They had already apologised for having unwittingly and unintentionally caused the plaintiff annoyance, and said they at once withdrew the circulation of the paper. They had tendered £5 and costs to date of tender.

Mr. Upington for plaintiff. Mr. Palmer in person. Mr. Burton (with him Mr. Lourens) for the Central News Agency.

Mr. Burton said he would admit that his clients were liable in law as publishers. They did not at the same time admit the point of defamation. They were publishers of many papers.

Dr. Darley Hartley, the plaintiff, said he did not carry on private practice. He was the recognised referee on questions of medical procedure, and received remuneration for some portions of the work. He acted as chairman of the Medical Council at the inquiry into a charge of unprofessional conduct against Dr. Crozier Durham, who was reprimanded. Afterwards he saw a copy of "Palmer's Weekly" containing the passages referred to in the declaration. He objected to the concluding words: "If it comes to advertising . . ." He was injured in the opinion of his professional brethren, who were his sole constituents. He was not in medical practice now, but he earned his living as editor of the "Medical Record" and in subsidiary business connected therewith. That paper depended almost entirely upon the support of his professional brethren, and upon this he relied. Advertising was an extremely discreditable thing, and he regarded "skilfully engineered paragraphs" as a most reprehensible form of it. If it were held that he adopted back-door methods, as insinuated in the paragraph, it would be absolutely impossible for him to retain his connection with the "Medical Record."

Mr. Upington: I just ask you, Dr. Hartley, whether there is the least truth in the statement that you have been guilty of such conduct?

Dr. Hartley: Never, under any circumstances. I have been scrupulously careful during twenty-eight years of my medical life to avoid the slightest suspicion of advertising directly or indirectly.

Continuing, the witness said the paragraph had caused him a great deal of annoyance and pain. On the appearance of the article witness's attorney wrote to both defendants demanding an apology, and that the further issue of the paper containing the article be stopped, and £500 damages paid. A reply was received from Palmer's attorney denying that there was anything defamatory in the article or anything else than fair comment. The Central News tendered £5 and costs.

Cross-examined by Mr. Palmer: He was the proprietor of the "S.A. Medical Record."

Mr. Palmer: You advertise yourself in it as the proprietor of the paper?

Dr. Darley Hartley: I mention on the title page that I am the proprietor.

Further cross-examined, the witness said a few laymen got hold of the paper. He could not prevent that, but only a very few copies were sold other than were subscribed for by members of the profession. There was no broker's business run in connection with the paper. There was a medical agency for the selecting of practices. He was a junior member of the Medical Council.

The witness was cross-examined by the defendant Palmer at some length as to what he considered constituted advertising. He said he was guided by the rules of the British Medical Association, and by the Ethical Committee of the Association, which was the highest authority on the point. Witness did not wish to procure patients. He knew of nothing which could be considered as preventing him from taking the part in public life that he did. If a medical man caused a paragraph to appear in a newspaper to the effect that he had returned from Europe and had resumed practice, it would be objectionable, but if the newspaper people of their own accord wrote and published the paragraph, the medical man could not, of course, be held responsible.

By Mr. Burton: He brought the action to clear his reputation and also to stop what he foresaw would happen—a continuance of these attacks. Palmer had attacked him before. Witness did not object to being criticised as a public man, but he objected to being attacked in his professional capacity. He did not say there was malice on the part of the publishers, but he contended there was a lack of precaution on their part, since they knew what Palmer had previously done. He thought they should at any rate glance over the first copy before they distributed them.

Mr. Burton: Now, you know they are merely a distributing machine, and you sued them because you were afraid you might not get your costs out of Palmer?

Witness: Partially so, and partly because I was very much irritated at their allowing the next issue to come out with an article which practically rubbed the libel in again. Continuing, the witness said the subscription list of the "Record" had since gone down, and the business of the Agency had diminished, but it was impossible to say whether this was due to the article. Since this article appeared, he had been elected by his professional brethren as a member of the Colonial Medical Council. There were seven candidates for four vacancies. He was, however, disappointed at only being elected by the skin of his teeth, as in the Eastern Province he was better known than the other candidates.



Mr. Burton: Did you regard this paper as a leading and influential journal?

Witness: No.

Do you think any of your professional brethren would do so?—Undoubtedly. Medical men in the country districts know nothing of the status of this paper.

Now, do you really think any of your professional brethren were affected in their estimation of your character by reason of this paragraph?—I think it probable, because there is nothing which a medical man regards with so much contempt as surreptitious advertising by back-stairs means. Continuing, the witness said he did not know there was any difference of opinion among the Medical Council as to what constituted advertising.

Re-examined by Mr. Upington: The "Medical Record" was not intended for circulation among laymen, and was in no way put before them. Witness's address was inserted in the paper, because it was circulated among the medical profession. No names were given in the sale of practice advertisements. In his present position advertisements would do him no good. If a patient came to him he sent him to one of his professional brethren. He sometimes acted in consultation with another doctor.

Dr. Richardson, local vice-president of the British Medical Association, said he attended the Medical Conference at Bloemfontein, where, in consequence of something a layman said, he spoke to Dr. Darley Hartley, who showed him this article in "Palmer's Weekly." He thought the statement contained therein was one likely to lower Dr. Darley Hartley's position in the eyes of his professional brethren, apart from the effect it might have in the eyes of the public. It was particularly detrimental to one of Dr. Darley Hartley's position.

Dr. E. B. Fuller, local president of the British Medical Association, said the article in question was obviously meant to do harm to Dr. Darley Hartley in the eyes of his colleagues and the public.

Dr. D. J. Wood, a member of the Colonial Medical Council, said that the facts alleged in the article, if true, would have involved bringing the plaintiff before the Council. He considered the article imputed dishonourable conduct.

By Mr. Burton: So far as witness knew, Dr. Hartley's reputation had not suffered on account of this article.

Mr. Upington closed his case.

Mr. Palmer said he had no witnesses to call.

Mr. Burton called

Ernest J. Woodley, manager of the Central News Agency, who said that the business was a very large one, and in-

involved the distribution of all the principal papers of South Africa. The method of distribution was that the papers were received from the printers, tied up, and sent out in bulk to newsagents. The Agency had been distributing "Palmer's Weekly" for about two months previous to the publication of this article. It was impossible to scan all the publications issued. As soon as the letter was received complaining of libel, witness stopped the rest of the issue of the paper from being sent out. About a third of the number printed were stopped, and it was impossible at that time to interfere with the sale of the copies already distributed. Witness had no knowledge of the article appearing in the paper. The copies of the paper were distributed mechanically, as all other publications were. Nor was the issue of "Palmer's Weekly" of the following week read by witness. He never thought there would be a further article about the matter. Witness had previously spoken to Palmer about the affair.

By Mr. Upington: Witness did not know about an action brought against the company in respect of libellous matter written by Palmer in the "Owl," while Palmer edited that journal. Palmer gave the Agency an indemnity for any damages given against them. Witness did not regard Palmer as a man able to pay substantial damages. It would have been better to keep an eye on the paper for the subsequent issue. It was not the rule of the company to take a guarantee against libel from all papers.

By Mr. Palmer: Witness could not say definitely whether a libel action was brought and damages given against the company in respect of matter written by defendant in the "Owl." That matter was dealt with in Johannesburg.

Mr. Palmer: Have there not been more libel actions in regard to matter in the "Cape Times," the "Argus," and the "S.A. News," than against all the weeklies put together?

Witness: I do not know. These things do not come before me personally, unless they are in the form of lawyers' letters.

Then you have had more lawyers' letters in respect of matter appearing in the dailies than in relation to the weeklies?—We have had as many; I can't say whether we have had more.

This concluded the evidence, and counsel were then heard in argument.

Mr. Upington said that publication being admitted, there were only two matters in question. In the first place, the issue was: were the words complained of defamatory? And the second question was: If they were defamatory, had the plaintiff sustained damage, and to what extent? It was pleaded by the defendant Palmer that this was

*bona fide* and fair comment, but here was a statement of fact and the question of *bona-fide* comment did not in the least arise where a person made statements of fact which were false. Palmer had not justified the words. The position he took up was, first of all, "Oh, my little paper could not injure you," and in the second place, "You (Dr. Hartley) are a public man, and you are fair game." But that was not a position which could not be justified in law. A public man must submit to criticism of his public acts, so long as that criticism was fair and *bona fide*, and did not go beyond what the necessities of the case warranted; but Dr. Hartley had done nothing which could justify any person in assailing him in his profession or business. On the question of the liability of the second defendants, counsel submitted that the Agency should have taken greater precaution to see that the paper did not contain libel, especially having regard to the fact that there had previously been difficulty in respect of matter written by Palmer. Mr. Upington contended that the liabilities of the defendants was a joint one.

Mr. Palmer contended that the paragraphs contained nothing but fair comment. It was not suggested in the article that Dr. Hartley advertised himself in order to secure patients, but that he advertised himself in such a way as to further his business in connection with the journal he owned. It was rather a commendation of Dr. Hartley's good business capacity than a statement damaging his reputation, for in the ordinary sense he was not a medical man, since he did not practice. He maintained that no damage had been done to the plaintiff. He denied that any action had been taken against the Central News Agency, or even threatened, on account of anything he had written. He did not write this article himself, but, of course, the responsibility was his, and he did not take the view that it contained anything defamatory.

Mr. Burton said there was no admission on the part of the second defendants that the article was defamatory, but at the same time they did not contest it. Of course, there was malice in law, but of actual malice and intention to injure there was none. He submitted that in the circumstances the plaintiff was not entitled to more damages than the second defendants had tendered. It had been said that the defendants were jointly liable. That might be so, but in that case why had not the plaintiff joined them in one action? Counsel quoted Odgers on Libel and Slander, 3rd edition, pp. 365 and 441, and referred to the cases of *Duminy v. Thompson and Co.* (Transvaal High Court Reports, 1905, p. 313), *Wilson v. Hulle and Others*

(Transvaal High Court Reports, 1903, p. 178) and *Upington v. Solomon and Co.* and *Upington v. Dormer* (Buchanan, 1879, p. 240). He further argued that no actual damage had been proved. Could an article like this appearing in a squib of this sort, seriously affect the reputation of a man like Dr. Hartley?

Mr. Upington in reply.

*Cur. Adv. Vult.*

*Postea* (April 23rd).

Maasdorp, J.: The plaintiff, who is a licensed medical practitioner, practising at Cape Town, sues the defendant Palmer, the proprietor and editor of "Palmer's Weekly" newspaper, and the Central News Agency, a joint-stock company, the publishers of "Palmer's Weekly," for damages sustained by reason of the defendant's printing and publishing concerning the plaintiff the following false, malicious, and defamatory words, to wit: "If it comes to advertising, there is no one more guilty of this than Dr. Darley Hartley, and yet he has the effrontery to act as chairman of the Medical Council which sat on Dr. Crozier Durham's case. But then Darley Hartley does his advertising through skilfully engineered paragraphs in the local press, and he also uses politics as a medium for advertisement, just as some use the church. Fancy a politico-medico of this type talking about observing the spirit as well as the letter. Why, he ought to be the first proceeded against." The declaration proceeds to state that the words meant that the plaintiff had been habitually guilty of improper and unprofessional conduct, for which he should have been proceeded against, and might have been dealt with in terms of section 13 of Act 7 of 1899, and that he was by reason thereof wholly unfitted for his profession and for being a member and chairman of the Colonial Medical Council. Five hundred pounds is the damages claimed by the plaintiff from each of the defendants as sustained by him in consequence of the alleged injury. The defendant Palmer admits that he printed and published the words complained of, but says they do not bear the meaning put upon them by the plaintiff's innuendo, and he states further that the words, taken with the context in the publication, formed a fair and *bona fide* comment upon a matter of great public interest and importance, and were printed and published without any malice towards the plaintiff. The second-named defendants admit that they published and circulated the issue of the newspaper containing the words complained of, but say they did so without being aware of the contents of the paper, and without any malice or intention to injure the plaintiff. Through their counsel they admitted, what is not quite clear upon the

plea, that the words are defamatory in their meaning, but they plead that before action was brought they apologised to the plaintiff for having unwittingly and innocently caused him annoyance, and undertook not to circulate any further issues of the paper containing the words complained of; they also tendered to pay to the plaintiff the sum of £5, with costs. It appears that the plaintiff, besides being a duly licensed practitioner, is an elected member of the Colonial Medical Council, established under Act 34 of 1891 and Act 7 of 1899. Section 13 of Act 7 of 1899 provides that whenever any *bona fide* information or complaint is laid by any member of the public or by the Minister in control of the administration of the law protecting public health, charging any medical practitioner with improper and unprofessional conduct, the Council shall institute an inquiry, and if such practitioner be judged by the Council to have been guilty of such improper and unprofessional conduct, the Council may reprimand and caution such person in writing, under the hand of the president or chairman, and if such improper or unprofessional conduct be persisted in by such person after due receipt of such reprimand or caution, the Governor may, if he see fit, direct that the name of such person be erased from the register, and that his licence be withdrawn and cancelled. At such inquiries, evidence upon oath is to be taken by the Council. The Council is, therefore, invested with important judicial functions, and their inquiries may result in serious consequences to any practitioner against whom charges of improper or unprofessional conduct are substantiated. In the course of their statutory duties the Council was called upon to inquire into charges made against Dr. Crozier-Durham, and at the sittings of Council held for the purpose the plaintiff acted as chairman. The proceedings ended in a reprimand being administered to Dr. Durham by the Council through their chairman. This is the matter of great public interest and importance upon which the defendant says the publication in question forms a fair and *bona-fide* comment. Nothing has appeared in evidence to prove that any objection could be taken to any of the proceedings carried on in the case by the Council, or to their determination of the questions raised in the matter. The publication does not deal with the merits of the case or call in question the decision of the Council, but proceeds to fasten upon certain words used by the chairman in delivering the ruling of the Court, in order to make strictures upon the Council generally, and upon some members of the medical profession by name. Amongst other things, it accuses them of failing to

be guided by the spirit of their regulations. This is not a question which this Court has now to go into, but I must point out that there is a great difference between a fair and *bona-fide* comment upon the proceedings of the Council, and a justifiable charge apart from such proceedings against public men, conveying imputations of dishonourable conduct. In the one case the facts elicited during the judicial inquiry are put before the public as they appeared, and the comments are confined to such facts. In the other case the person seeking to justify charges made against public men in the public interest must prove the truth of these charges. The charges conveyed in the publication are not based upon anything elicited at the inquiry, but have regard to the conduct at other times of the members of the Council. I do not say that to say of such members that they do not act in the spirit of their regulations is libellous, nor do I say that if some serious charges are made against them acting in their public capacity that such charges if proved to be true cannot be justified in a court of justice upon being properly pleaded. However, the words used by the defendant with regard to the plaintiff are of a different and more serious import than the rest of the paragraph. They amount to this that the plaintiff as chairman of the Medical Council condemned advertising by medical men, and in so doing was guilty of effrontery, seeing that he himself advertizes, but he does his advertising through skilfully engineered paragraphs in the local press, and for such conduct he should be the first proceeded against. I think, in justice to the defendant Palmer, the words must be taken to mean that if advertising is regarded by the Medical Council, under its professional rules of etiquette, as improper and liable to punishment, then the plaintiff has himself been guilty of conduct rendering him liable to proceedings under the rules. The defendant himself does not describe such conduct as dishonourable. But the question remains, has he attributed to the plaintiff conduct, which will bring him into contempt, disrepute, and dishonour, under circumstances which afford the defendant no justification or privilege. It is pleaded that the words used are a fair comment upon the proceedings at the inquiry, but nothing transpired at the inquiry to show that the plaintiff had improperly advertised by skilfully engineered paragraphs in the local press. A charge is made questioning his fitness to sit in a judicial inquiry like the one in question, and virtually stating that instead of sitting as Judge, he should be upon his trial at the bar of

that tribunal. I do not hold that such a charge cannot be made under circumstances which would justify the person making the charge, and who justifies the charge by suitable pleadings, but the least that will be required of him would be proof of the truth of his accusation. Now the question arises whether the words in question impute to the plaintiff dishonourable conduct, which will bring him into contempt and disgrace, and are injurious to his character. The medical profession possess a code of morals, or rules of professional etiquette either expressly enacted or tacitly understood. A breach of these rules brings the delinquent into disgrace with his fellows, and it is only natural that a person disgraced in his own class or profession should become degraded in the eyes of the people generally, and such breach also subjects him to severe penalties. One of the rules of the medical profession forbids public advertisement for the purpose of professional gain. Whatever laymen may think of this rule, it is regarded in the profession as of serious import, and a breach of it, as proved by professional evidence, would lead in the first instance to a reprimand of the delinquent, and, if persisted in, may result in his being disqualified from practice. Now, the defendant charges the plaintiff with advertising, not openly, but in a mean, underhand manner. Such conduct, in the opinion of the medical witnesses, would constitute a breach of their rules, is regarded as improper and unprofessional; and would entail, if a definite charge is made, an inquiry which might in case of proof result in injurious consequences to the plaintiff. We have here, therefore, all the elements of a defamatory publication, that is, words defamatory of the plaintiff, uttered under circumstances which establish neither privilege, fair comment, nor justification. The truth of the words has not been pleaded in this case, and it would, therefore, not be necessary for the Court to decide upon that point. But I must say that in my opinion nothing has been proved to justify the statement that the plaintiff used skilfully engineered paragraphs in the newspapers for the purpose of advertising. The only newspaper referred to in this connection in the evidence is the plaintiff's own paper called the "South African Medical Record." It was contended that the bare fact of editing this paper is itself a species of advertisement, and publishing in the paper an election manifesto as candidate for membership of the Medical Council also amounts to advertisement. It is enough to say that it is not regarded as such by those best able to judge as representative and guardians of the medical profession, who recognise the "Medical Record" as an authorised medium of communica-

tion, and are fully aware of its contents. In considering the measure of damages regard must be had not only to the probable loss to the plaintiff, but the degree of malice in the defendant. When the plaintiff asked for redress in respect of the injury done him by the publication in the paper of the 21st of September, the defendant wrote on the 25th of September that he had nothing to withdraw, or to apologise for, and he proceeds in the paper of the 28th of September to ridicule the plaintiff's claim, and virtually repeats the charge of underhand advertising by saying that the paragraphs forming such advertisements are based upon information supplied in many cases by the medico himself. Considering that the defendant was unable, with the exception of the "Medical Journal," to lay his finger upon a single paragraph to support his charge as against the plaintiff personally, it proves malice on his part to persist in the charge after the complaint was made by the plaintiff, and in the conduct of his case the defendant cross-examined the plaintiff, in a way which could only have for its object the establishment of the truth of his charge. If he had succeeded in that object the measure of damages might have been reduced. But an unsuccessful attempt of this kind has the effect of aggravating the damages. Before deciding upon the damages as against Palmer, I shall now turn to the case of the other defendants. As the publishers of what they themselves admit to be defamatory matter, they are also liable in damages to the plaintiff. But, considering that the degree of malice forms an element in assessing the damages, they might have been regarded as having participated in a slight degree in the wrong done to the plaintiff, had they acted otherwise than they did when they discovered that they had done the plaintiff an injury. When the plaintiff made his complaint to them and demanded redress, they answered in a very proper spirit expressing regret, and promising to stop further circulation of the injurious publication. But while their reply was apparently still forming a subject of deliberation on the part of the plaintiff, they join in publishing the second article mentioned above, which I have characterised as a repetition of the charge of unprofessional conduct. Thereafter, upon the plaintiff issuing summonses against them, they write treating the whole matter slightly; pronounce the business a trifling one, which would be covered by the sum of £5, seeing that the plaintiff wanted some remuneration for having issued summonses. An apology operates in mitigation of damages, but subsequent conduct may neutralise the effect of the apology in this respect. Some difficulty on the point of awarding



damages has arisen from the course adopted by the plaintiff of suing the two defendants in two separate actions. It has also been contended that this action on his part has unnecessarily increased the costs. I do not think that much practical difference has been occasioned in the costs in this matter. The position taken up by the defendants prevented their combining in defence, and rendered two sets of pleadings necessary, while the joint hearing of the case has obviated double costs on that ground. But the ordinary rule of awarding damages against the defendants jointly and severally is somewhat interfered with by the state of the pleadings in this double suit. In assessing damages I bear in mind the principle that an injured person should not be twice compensated for the same wrong, and, without deciding that there may not be cases where by way of penalty for injuries marked by bitter malice, several persons may be mulcted in heavy damages, I am of opinion that in this case the Court should estimate the damages suffered by the plaintiff and adjudge the payment thereof by both the defendants in different proportions. It was argued that the weight of the liability should fall on the first defendant, and the second defendants should be treated as being only technically wrongdoers. I do not quite take that view, but even if that were so, the second defendants may make what use they can of the contract of indemnity they obtained from the first defendant to transfer the penalty from themselves to him. I award as against the first defendant damages in the sum of £30, with costs, and as the second defendant in the sum of £20, with costs.

[Plaintiff's Attorney: W. K. Baxter. First defendant, in person. Second Defendant's Attorneys: Van Zyl and Buisinné.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. } 1907.  
(Apr. 18th.)

Mr. Swift moved for the admission of Johan D. G. Fouche as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Prieska.

### PROVISIONAL ROLL.

STRANGMAN V. PALMER.

Mr. Louwrens moved for provisional sentence on a promissory note for

£432 3s. 2d., with interest from the 17th July, 1906, and costs, the note being payable at the Standard Bank, Worcester.

Order granted.

BOTHA V. CORTSEN.

Mr. Roux moved for provisional sentence on two mortgage bonds for £250 and £150, with interest from the 1st July, 1906, bonds due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

S.A. MUTUAL LIFE ASSURANCE SOCIETY  
V. FILLIS.

Mr. Toms moved for provisional sentence for £3,300, balance of a mortgage bond for £3,500, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### GENERAL MOTIONS.

*In re* CLARKE AND CO., LTD. } 1907.  
(IN LIQUIDATION). (Apr. 18th.)

Mr. W. Porter Buchanan presented the second report and account of the official liquidators, and applied for the usual order as to lying for inspection.

Ordered that the report lie as usual.

TRANSVAAL MINES LABOUR CO. V.  
FECHTER; FECHTER V. TRANSVAAL  
MINES LABOUR CO.

Mr. W. Porter Buchanan appeared for Alfred Ernest Wilson, trading as the Transvaal Mines Labour Co.; Mr. Swift appeared for Fechter (plaintiff in the action).

The former application was for a commission *de bene esse* to take the evidence of Wilson and his witnesses in Johannesburg.

The latter application was for the attachment of certain books, etc., *ad fundandam jurisdictionem*.

It appeared that Fechter had brought an action against the Transvaal Mines Labour Co. to recover £84 for rations supplied to certain labourers prior to their despatch to the Rand to the company. The defendant denied that at any time material to the suit he had been domiciled or resident in this colony, or that he had traded in his own behalf in this colony. He had entered into a contract with one Paul Scott to send up labourers from the Cape at so much per



head, and he denied any liability for the rations alleged to have been supplied by plaintiff. Defendant further said that the books which the plaintiff proposed to attach did not belong to him but to the said Paul Scott. It was stated for plaintiff that the books were called the Transvaal Mines Labour Co.'s books.

As it appeared that certain affidavits were expected from Johannesburg in reference to the second application, both matters were ordered to stand over until the 26th April.

*Ex parte* BAILEY.

Mr. Howes moved under section 4 of Act 11, 1903, for the removal of petitioner's name from the roll of advocates. Petitioner was admitted and enrolled as an advocate on the 13th March, 1905, and he was now desirous of being articulated as an attorney at law practising in this colony, and serving in that capacity.

Order granted as prayed.

STENGEL AND CO. V. SCHAEFER AND CO. AND ANOTHER.

Mr. Searle, K.C. (with him Dr. Greer), moved for leave to sue the second-named defendant, Georg Selle, of Berlin, Germany, by edictal citation, and to attach a certain notarial general bond *ad fundandam jurisdictionem*. Mr. Searle, having read an affidavit by C. Friedlander, plaintiff's attorney, stated that in June, 1906, Schaefer had passed a general bond in favour of Selle, who no doubt was supporting the firm of Schaefer and Co. Schaefer also owed the plaintiffs a sum of £961. Stengel objected to the bond, and the parties then came together, and it was arranged that Selle should settle Schaefer's debt to Stengel, and that another bond should be passed by Schaefer to Selle. The agreed amount was then raised to £2,222 9s. 7d. Schaefer did not owe that amount to Selle, but Selle was going to pay off Schaefer's debt. This bond was passed by Mr. Friedlander, who was acting for plaintiffs, but though Selle had not paid Stengel, the bond remained in Selle's favour against Schaefer and Co. The petitioners wished either to get the money from Selle, or to have the bond set aside, because as long as the bond stood against Schaefer they had no protection for their claim. On the question of attachment, counsel cited *Wright, Crossley and Co. v. Royal Baking Powder Co., of New York* (17 Sup. Ct. Repts., 366).

Ordered that the bond registered on October 30, 1906, in favour of the second respondent, or his interest therein, be attached *ad fundandam jurisdic-*

*tionem*, and that plaintiffs have leave to sue the second respondent by edict, process returnable on June 18, personal service to be effected.

*Ex parte* ESTATE PIET.

Mr. J. E. R. de Villiers moved for the appointment of petitioner as *curator ad litem* to represent certain two minors in the partition of a certain farm in the district of Uitenhage. Petitioner is guardian of the minors under the will.

Order granted as prayed, save that any scheme of partition or transfer arrived at shall be submitted to the Master for his approval before being finally carried out.

*Ex parte* KUUN.

Mr. Howes moved for the appointment of a *curator ad litem* to represent petitioner's sister, Cornelia Kuun, in an action to have the latter's sanity inquired into.

Ordered that a commission issue, and that Mr. Advocate Louwrens be appointed *curator ad litem* of the alleged lunatic, summons returnable on April 30.

*Ex parte* JARMAN AND WIFE.

Mr. Philipson Stow moved for an order authorising an amendment of the marriage register, and certain birth certificates, altering the second named petitioner's name to "Mary Ellen," instead of "Mary Britmart." It appeared that Mrs. Jarman had been known from babyhood as "Mary Britmart," though she was registered in the births' registry as "Mary Ellen."

Order granted as prayed.

*Ex parte* VAN SCHALKWYK AND WIFE.

Mr. Watermeyer moved for an order authorising the registration of a certain ante-nuptial contract, and the mortgage bond executed on December 10. The parties appeared before an attorney at Fraserberg, and executed the documents, but through an omission by a clerk in his employ the contract and bond were not forwarded to Cape Town for registration within 14 days, as stipulated by the Ordinance.

Order granted as prayed, saving any rights of parties which may have arisen in the interim.

*Ex parte* ESTATE BROOK.

Mr. Toms moved for an order authorising the curator of W. A. Brook, a patient in the Pretoria Asylum, to

sell certain shares in order to provide for necessary outgoings. The matter had been ordered by the Court to be referred to the Master for report upon certain expenditure set out in the account appended to the application, and counsel now read a report by the Master, who said that the expenses seemed to have been properly incurred. Order granted as prayed.

**VAN ZYL AND BUISSINNE V. OLIFF AND INCORPORATED LAW SOCIETY.**

**Enrolled agent—Articled clerk.**

*O., an agent, enrolled under Act 20 of 1856, Sec. 38, had entered into articles of clerkship with applicants. The Law Society now objected to his acting as an agent in Magistrates' Courts during his service of articles.*

*Held, that he was entitled to devote a reasonable portion of his time to such agent's duties.*

This was an application upon notice calling upon respondents to show cause (a) why it shall not be declared that the respondent, John Frederick Oliff, an enrolled agent, does not prejudice his service under articles of clerkship with one of the partners in the applicant firm of attorneys by appearing in any R.M.'s Court in this colony under the provisions of section 36 of Act 20, 1856, when specially ordered thereto by applicants and conducting cases on behalf of the clients of the applicant firm upon a power of substitution in his (the said Oliff's) favour from his principals (applicants), and (b) why it shall not be declared, further, that the respondent Oliff is entitled for and on behalf and on account of his principals to recover the prescribed fees and charges payable for the services so rendered by him as an enrolled agent, in like manner as if one of the members of or any attorney employed by the applicant firm had personally appeared and conducted such cases.

Mr. Searle read an affidavit by C. H. van Zyl, senior partner in the firm of Van Zyl and Buissinne, who stated that respondent Oliff had been in practice for several years as an enrolled agent at various Courts of the R.M.'s of this colony, including Beaufort West, Caledon, Worcester, etc. Oliff, about eighteen months ago, signed articles of clerkship with an attorney at the Pearl, and had approached deponent's firm for a cession of his articles. In view of the fact that respondent was an enrolled agent, and in consideration

of his experience in conducting cases in the Magistrates' Courts, deponent had agreed to take cession of his articles, and to pay him a salary. It was never contemplated by him that he would be required to devote more than a portion of his attention to work in the R.M.'s Court. The applicants proposed to depute Oliff to conduct a case in the Magistrate's Court at Robertson. Oliff raised difficulties when asked to go, and produced certain correspondence that he had had with the Law Society, who had expressed the opinion "that an enrolled agent cannot avail himself of his privileges as such while serving under articles of clerkship."

Mr. Searle, K.C., was for applicants; Dr. Greer was for the first respondent; Mr. McGregor was for the second respondents.

Mr. Searle said that before rule of Court 413 was promulgated articled clerks were allowed to appear in Magistrates' Courts under the power of substitution included in the original power and they were allowed to charge fees for their principals. The rule was somewhat altered last year, and it was now a question whether that prevented articled clerks from appearing and charging. Up to last year the practice was regulated by section 13 of schedule B of Act 20 of 1856, which provided that the only people who could recover fees in Magistrates' Courts were advocates, attorneys and enrolled agents, although any person authorised in writing to do so could appear for another in a Magistrate's Court. Articled clerks were allowed to appear and to charge. He cited *Cronje v. Hulse and Hudson* (Buch. 1869, p. 170). He also cited *Randless v. Truter and Another* (3 H.C., 451) and *ex parte Haw* (1 Searle, 22). This case was not likely to arise again as Oliff was enrolled in 1882 and one of the few agents entitled to appear in any Magistrate's Court in the Colony.

[Hopley, J.: Is not the whole application a bit academic and premature, because it is asking me to say that Oliff may go about the country conducting cases in Magistrates' Courts?]

Mr. Searle: The Court has on various occasions assisted articled clerks, as also in the case of *Smith* (4 Juta, 170).

[Hopley, J.: In *Smith's* case the Court knew exactly what it was doing, but I do not know what service Oliff will have rendered as an articled clerk.]

Mr. Searle went on to say that the mere fact of Oliff's appearing should not disqualify him.

[Hopley, J.: I do not think it would.]

Mr. Searle said that that was the attitude the Law Society took up. Under the new rule (413) litigants in Magistrates' Courts are allowed to appear in person, by duly enrolled law agent, by attorney and by advocate,

and the only alteration was that he might not appear by a friend. Under the old rule, if an articled clerk was allowed to charge he was allowed to do so as attorney, because the friend who appeared could not charge. Counsel cited *Longdon's case* (14 S.C., 335), and said that there was nothing inconsistent in an enrolled agent being an articled clerk.

Hopley, J., said that an ordinary articled clerk would only appear in the Magistrate's Court where the principal appeared himself, but a man like Oliff could go all over the country.

Mr. Searle said that applicants wished the Court to say that the mere fact of Oliff's appearing in the Magistrates' Courts did not vitiate his articles. He referred to the cases of *Lance* (Buch. 187, p. 78) and *Johnson* (1 Juta, 40).

Dr. Greer said that Mr. Oliff was willing to accept any order the Court made. He considered that by reason of his being an enrolled agent he was entitled to appear in the Magistrate's Court, although he was an articled clerk. Section 41 of the Magistrate's Court Act seemed to regard the enrolled law agent as the normal practitioner of the Magistrate's Court.

[Hopley, J.: Probably he was the normal practitioner in 1856.]

Dr. Greer argued that that Act provided that an attorney should be considered as an enrolled agent, and there was therefore no inconsistency in an enrolled agent being an articled clerk. If Oliff were to cancel his articles to-morrow it could not be contended that he had ceased to be a law agent. Oliff was entitled to a declaration that the mere fact of his appearing would not vitiate his articles.

Mr. McGregor said that an attorney's Magistrate's Court practice was a subsidiary matter. However able an enrolled agent might be, he could not be said to be *in pari materia* with an attorney. He was not concerned with the question of whether an ex-articled clerk could resume his practice as a law agent. The present motion came before the Court in a wrong form, and at a time when it was not ripe for judicial determination. It was quite novel for two gentlemen to drag a third into Court to have his status determined. Van Zyl and Buissinne had no such pecuniary interest in the matter as would entitle them to a judgment in this Court.

[Hopley, J.: But then no interest can arise until Mr. Oliff applies for his admission.]

Mr. McGregor: Just so, and they are now asking the Court to place itself in an awkward position.

Hopley, J., said that he would not make an order on the second prayer, which seemed to be academic, and he was not going to give any ruling as to fees.

Mr. McGregor said that that was going to be his submission. The Court could not be used as a Court of first instance to determine whether fees in Magistrates' Courts were payable or not. Hard cases made bad law, and it did not tally with the position of an articled clerk that Mr. Oliff should appear in Magistrates' Courts all over the Colony.

Mr. Searle in reply.

*Cur. Adv. Vult.*

*Postea* (April 19th).

Hopley, J.: In this matter I am of opinion that the appearance of Mr. Oliff in Magistrates' Courts in his capacity as an enrolled law agent is not in itself an act calculated to interfere with the course of his instruction as an attorney. In fact, the class of work which he would at such a time have to do is of such a nature that it would be beneficial and helpful to anyone pursuing his studies as an articled clerk. It has indeed been argued that a person should not be at the same time an articled clerk and a practising law agent, and there can be no doubt that the two capacities might be combined in a manner which would be objectionable. But there is nothing in any of the Statutes or Rules of Court or decided cases which prohibits the combination; and in the absence of express prohibition there seems to be no reason to hold that the exercise of the functions of an enrolled law agent in an honourable way should invalidate the articles of clerkship entered into by such agent with an attorney. I may add that I have consulted the other members of the Bench and that we are all of the same opinion on the point. It does not necessarily follow that a too extensive use of such services as an agent may be made, and I think that it would be open to the Incorporated Law Society to appear to oppose Mr. Oliff's admission as an attorney if they could show, for instance, that during a very substantial portion of the time during which he ought to have been serving the applicants under articles he was engaged in travelling to and from various Magistrates' Courts in the country. In such case an additional term of service might possibly be ordered by the Court. . . . This is merely, however, an expression of opinion by way of an *obiter dictum* which I throw out as a warning to the parties concerned. With regard to the other point raised concerning any fees earned by Mr. Oliff in Magistrates' Courts and their disposition, I do not feel called upon to express any opinion on an application like the present. The matter is one of some importance, and I think that the Law Society was justified in appearing and placing its view before the Court. There will be no order as to costs.

S.A. NEWSPAPER CO., LTD., AND OTHERS  
V. S.A. GENERAL WORKERS' UNION  
LOCKED OUT CIGARETTE WORKERS'  
CO-OPERATIVE SOCIETY, LTD.

Dr. Greer moved to make final a provisional order granted for the winding-up of the respondent company, under the Companies' Act, 1892, the appointment of Mr. Levy as official liquidator, with powers under section 143.

Rule absolute.

*In re* THE GOLDEN MILE GOLD MINING  
AND DEVELOPING SYNDICATE, LTD.

Mr. Roux presented the first and final report of the liquidators. Counsel said that there were no assets to realise and no funds to distribute, and he suggested that the Court should grant a final order at once, without any directions as to the report lying for inspection.

[Hopley, J.: I think it would be much better that it should lie in the ordinary way, as there may be some person who objects to the report.]

Report ordered to lie for inspection; one publication in the "Cape Times."

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ROWAN V. ESTATE LOUW ( 1907.  
AND OTHERS. ) Apr. 19th.

Will (joint)—Massing—Intestacy  
*Fidei-commissum*.

*R. and his wife, married in community executed a mutual will containing special bequests of their landed property to their sons, and then instituting each other, together with their children, heirs of the first dying. The respective inheritances of the sons were burthened with fidei-commissum to the extent of £1,000 each: that of the daughter was burthened to its full amount. The children were not to re-*

*ceive their respective inheritances until the death of the survivor. The sons and the Board of Executors were appointed as executors. R. predeceased his wife, and neither of them made any subsequent testamentary disposition. On the death of R., the said executors took out letters of administration, and on the death of his wife similar letters were taken out in respect of her estate.*

*The plaintiff, the daughter, contended that, as there had been no massing of the joint estate under this will, it could be regarded only as that of the first dying, that, therefore, the surviving spouse had died intestate as to the institution of heirs, that the fidei-commissum on her inheritance applied only to such inheritance from the paternal estate, and that, as to the maternal, she was entitled as heir, ab intestato, to receive the same free and unencumbered, and that the administration by the executors testamentary was, in respect of such maternal inheritance, illegal.*

*The defendants denied, either wholly or in part, these several contentions.*

*Held, that the mutual will must be regarded as the separate testament of both R. and his wife: that as she had not died intestate the appointment of executors testamentary was good and valid, and that plaintiff's maternal inheritance was subject to the fidei-commissum imposed by the joint will.*

This was a special case, stated in the following terms: (1) The plaintiff is Elizabeth Johanna Rowan (born Louw), married without community of property to Floris Pieter Rowan, of Durbanville, by whom she is assisted in this action. The plaintiff is the daughter of Abraham Andries Louw and Elizabeth Johanna Louw, both deceased; (2) the defendants are: Johannes Henoch Neethling Roos, in his capacity as the secretary of the Board of Executors, Cape Town; Pet-



rus Adriaan Wynand Louw, Andries Abraham Louw, all in their capacities as executors testamentary of the estate of the plaintiff's father, and also as the executors appointed by the Master in the estate of the plaintiff's mother; and Louis Edmund Benjamin, in his capacity as the *curator ad litem* of William Archibald Brown Rowan, the plaintiff's minor son and sole living issue; (3) on the 24th May, 1900, at Durbanville, the plaintiff's parents, being married in community of goods, executed a will (whereunto a codicil was subsequently added); (4) the will so translated contains, *inter alia*, the following dispositions and directions.

Clause 7: We stipulate that all debts of our children shall be brought into account and deducted from their inheritances, and any debt of our son-in-law, Rowan, shall be brought against his wife as if it were her own.

Clause 8: We appoint each other, together with our children (and one or more of the latter predeceasing, then their descendants), to be heirs of the first-dying, to be effective after the death of both of us, and not sooner.

Clause 10: The whole inheritance of our daughter, married to Floris P. Rowan, we burden with *fidei-commissum*. She shall enjoy the interest during her lifetime, and shall receive the same without the intervention of her husband. Should this interest at any time be interdicted, or should she pledge or dispose of this right, which she possesses for life, then and in that case we revoke this disposition and appoint our executors to be the heirs of the interest, who then shall receive the interest and give it to our daughter, if they think fit. At the death of our daughter her inheritance shall pass over to her child or children, but again burdened with *fidei-commissum*, so that such child or children, whilst being below thirty years of age, shall receive no inheritance, only the interest; and should the child or children die in the meantime, the capital reverts to our estate for the benefit of our other heirs, unless such deceased child shall leave lawful descendants, in which case it shall pass to them.

(5) On the 9th February, 1901, the plaintiff's father died without making any other will or codicil, and on the 25th February, 1901, the first three defendants were appointed executors testamentary to his estate; (6) the plaintiff's mother, after the testator's death, remained in the possession and enjoyment of the entire estate until the 21st June, 1906, when she died, without having at any time made any other testamentary disposition, and on the 5th July, 1906, the Master of the Supreme Court, purporting to act under the terms of the will, appointed the first three defendants as executors testamentary of the estate of the plaintiff's

mother; (7) in April, 1900, the plaintiff and her husband became indebted to the plaintiff's father in the sum of £600 by virtue of a certain acknowledgment of debt stipulating for the payment of interest at the rate of 5 per cent. per annum on the sum. The said sum and interest had not been repaid at the death of the plaintiff's father, and has not since been repaid, but is to be deducted in such manner as the Court may decide. The inheritance coming to the plaintiff out of her father's estate exceeds this sum of £600, together with interest.

The plaintiff contends: (8) That the will does not effect a massing of the joint estate of the plaintiff's parents, and in respect of the appointment of heirs the will is according to the true intent and meaning thereof the will of the first dying only, to wit, of the plaintiff's father; that the plaintiff's mother has died intestate in respect of the appointment of heirs, and that the inheritance coming to the plaintiff from the estate of her father is alone subject to the provisions of clauses 7 and 10 of the will, and only the balance of the inheritance from her father's estate is burdened with any *fidei-commissum*, and that the plaintiff is entitled to claim immediate payment of her inheritance as an heir *ab intestato* of her mother. (9) That the appointment by the Master of the first three defendants as executors testamentary of the estate of the plaintiff's mother is invalid, and that the plaintiff is entitled to claim either that the appointment be set aside or, as an alternative, that the first three defendants be ordered to administer the estate as an intestate estate in so far as the appointment of heirs is concerned. (10) That the aforesaid sum of £600, together with the interest thereon to February 9, 1901, is to be brought into account as against the inheritance of the plaintiff, as heir under her father's will, and deducted solely from the inheritance coming to the plaintiff from the estate of her father.

The defendants contend: (11) That the said will does effect a "massing" of the joint estate of plaintiff's parents and is according to the true intent and meaning thereof the joint will of both. (12) They deny that plaintiff's mother has died intestate in respect of the appointment of heirs, and say that according to the true intent and meaning of the will the children of the testators are appointed heirs to the joint estate of testator and testatrix. (13) They contend that whether or not plaintiff's mother be held by the Court to have died intestate in respect of the appointment of heirs, the entire inheritance coming to plaintiff, whether *ex testamento* from the estate of her father, or *ab intestato* from the estate of her mother or from the joint estate, is subject to the pro-



visions of clauses 7 and 10 of the will. (14) They contend that in any event plaintiff's mother died testate as to the appointment of executors and that their appointment by the Master as testamentary executors of the estate of plaintiff's mother is a legal and valid appointment. (18) They contend that the aforesaid sum of £600, together with the interest thereon to the 21st June, 1906, is to be brought into account as against the entire inheritance accruing to plaintiff from the estate of both her parents, whether accruing *ex testamento* or *ab intestato*, and is to be deducted from such entire inheritance.

Wherefore the parties pray for judgment upon their respective contentions, and pray that the costs of this action may be ordered to come in equal portions out of each of the said estates.

Mr. Searle, K.C. (with him Mr. J. E. R. de Villiers), for plaintiff. Mr. Bisset for the first three defendants. Mr. Benjamin as *curator ad litem* for the fourth defendant.

Mr. Searle, in argument, said he would submit that it was pretty clear that there was no massing of the whole estate because there was no joint disposition of the estate after the death of the survivor, and that was what massing was. The parties did not purport even to appoint heirs to the joint estate, much less to make a disposition of the joint estate after the death of the survivor. In these circumstances, he contended that half of the estate would go according to the will, and the other half would go according to the law of intestacy. Counsel quoted the case of *Barry v. Kunhardt's Executors* (2 Juta, 89), and referred to Maasdorp's "Institutes of Cape Law," vol. 1, 291, Voet, 36, 1, 7, and to *Visser v. Baker* (15 C.T.R., 437), *Du Plessis v. Smallberger* (3 Searle, 383), *Laing v. Laing's Executors* (7 Juta, 85), *Lint v. Zipp* (Buch., 1876, 181).

[Buchanan, J.: I think all those cases may be tersely summed up in the expression that *fidei-commissum* is not to be presumed; that the presumption is against it.]

Mr. Searle: Yes, my lord. I have a number of other cases on the point. Counsel said he did not know of any case in point so much as that of *Barry v. Kunhardt's Executors* (2 Juta, 89). He submitted, in view of these cases, that the first contention of the plaintiff was a sound one, and that the will did not affect the massing of the estates.

Mr. Bisset said that since his learned friend had intimated that he would not contest the question of the appointment of the executors, he did not think he need argue the case.

Mr. Searle said he did not admit the appointment was valid, but in the circumstances it would perhaps be of no use to set aside the appointment.

Mr. Benjamin said that for the purposes of the case of the minor, he did

not think it was necessary to contend there was a massing. That did not affect the present case, because there was no question raised here with regard to a subsequent will revoking the testatrix's portion of the mutual will. The only question which arose was as to the applicability of these particular clauses—seven to ten—of the will to the testatrix's portion of the estate. It was perfectly clear this was a mutual will, and as a mutual will it was to be regarded as two separate wills of the testator and the testatrix. Counsel quoted *Mostert's case* (Buch., 1873, 40), *Dantu v. Hart* (Buch., 1868, 64), *Van der Keesel, Thesis*, 290, Voet, 28, 1, 1, and 2 Menzies, 408. On the question of the imposition of a *fidei-commissum* on an inheritance in an intestate estate, counsel quoted Grotius, 2, 20, 3, and Voet, 36, 1, 6, and 30, 31, 32, 16, 11, and, proceeding, said it would have been perfectly competent for Mrs. Louw to make a will which would have provided that the 10th clause of this mutual will should not apply to her daughter's inheritance, or any other inheritance; but his (counsel's) contention was that if she did not do so then the clauses of the mutual will remained in force and operated on her half of the estate, every clause which possibly could apply.

Mr. Searle, in reply, quoted the cases of *Morrison v. Morrison* (1879, Buch., 24), *Kruger v. Kruger* (15 Cape Times, 316), *Klopper v. Smit* (9 Juta, 167).

Buchanan, J.: In this case, Mr. and Mrs. Louw, husband and wife, married in community of property, made a joint will. By this will, they first bequeathed certain landed property to their sons, and made several other bequests. Then in the 8th clause, they appoint each other, together with their children, to be the heirs of the first dying. Then they go further and put a certain burden of *fidei-commissum* upon portions of the inheritance taken by their sons, and upon the whole inheritance taken by their daughter, the children of the marriage. They then mutually appoint their sons and the Board of Executors executors of this testament. The principles of our law, which have been laid down ever since the case of *Mostert*, regard wills of this kind, though, in form, mutual, as being separate testaments made by both parties, and it is also recognised by our law that a will so made may be revoked, so far as concerns one-half of the estate by either the testator or the testatrix during the lifetime of both, and also, after the death of the one, by the survivor, in so far as regards his or her estate, providing, however, that such survivor shall not make any fresh disposition antagonistic to the provisions of the mutual will, if he or she has taken the benefits of the mutual will.

In most of the cases that have come before the Court, the survivor has made a subsequent will, and the question at issue in these cases has been, how far the provisions of the subsequent will conflict with the mutual will. In the present case, the husband died first, and the wife afterwards, and neither has revoked any disposition. Consequently, there is no case of a conflict with the mutual will. In the case when such a matter comes before the Court. Applying the first principle which I have referred to, to this will, it must speak, firstly, as to the will of the first dying, and secondly it must speak to the will of the survivor. It has been customary in these mutual wills, to make provision that the survivor shall remain in possession of the estate, and that there is a direct institution of the heirs of the survivor. This will only by inference allows the survivor to remain in possession, because it says that the legacies and bequests shall not come into force until the death of both and also as to the bequests in the 8th clause, these bequests are not to be made effective until the death of both. In consequence of these provisions in the will, the survivor remains in possession of the whole estate until her death. She has now died, and under this will the executors have taken out letters of administration, first, as executors of the husband, and secondly, as executors of the wife. The first matter that is in issue is: Is this appointment of the executors of the wife a valid appointment? I think this will, reading it as a will of the wife, authorises the appointment of executors, and consequently the contention of the defendants in paragraph 14 that the appointment is a legal and valid one must be answered in the affirmative. Now, when we come to consider the will as a will of the wife, it is not in dispute that the bequests made in the will by the wife, and to the other people, are good and valid and binding. Looking at this will as a will of the wife only, it must be admitted that there is no specific disposition of the remainder of the estate which is not specifically disposed of. In the husband's will there is such a disposition, but there is no such disposition in the wife's case. It is not now alleged that the wife's will is altogether invalid. On the contrary, the plaintiff's contention in this case is rather based on the idea that there is no will at all made by the wife. If there were no will made at all by the wife in this case, several of the contentions of the plaintiff would require further consideration, and some of them probably might be sustained. But there is a will of the mother, and consequently the estate must be distributed according to this will. Though there is no institution directly of the sons and

of the daughter to the survivor's portion of the estate, still, it was evidently the intention of the parties that the sons and daughter should step in after the specific bequests have been dealt with, and what the Court always tries to do in these cases is to carry out the intention of the parties. But, assuming that the residue of the estate is not specifically disposed of, disposition is provided for by law, and disposition by law would take effect in this case. But then we come to this—that when the disposition by law takes effect, the question is, does the wife's will impose a burden of *fidei-commissum* on the inheritance? There is no doubt there have been repeated decisions of this Court that *fidei-commissum* should not be lightly presumed, and that if there is any doubt at all in the will the doubt should be given against the burden rather than in favour of it. But that generally arises in construing the terms of a will. In this case, looking at the terms of the will, there is clearly absolutely no doubt that a *fidei-commissum* is imposed, and, if the will is valid at all, this *fidei-commissum*, as expressly imposed, must take effect. I think that the inheritance taken out of the wife's estate must be subject to the provisions of the wife's will, and it had imposed *fidei-commissum* to the extent of £1,000 on each of the sons, and on the whole of the inheritance of the daughter. I think that was the intention of the parties, and I think that the facts of this case distinguish it from others decided, and do not make it conflict with previous decisions. This is rather a case of first impression, and I think my decision is quite consistent with previous decisions of the Court. The defendants' contention (14) will be sustained—that the executors have been properly appointed, and the decision of the Court is that the inheritance of the plaintiff out of the estate of her mother is subject to the provisions of seventh and tenth clauses of the mutual will. The costs will come in equal portions out of each of the estates, as prayed.

[Plaintiff's Attorney: G. J. R. D'Oliviera. Defendants' Attorneys: Van Zyl and Buessinné, T. P. Peters.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ODENDALL V. VAN DER BERG } 1907.  
AND ANOTHER. } Apr. 19th.

Exceptions—Plea in abatement.

This was an argument on exceptions. The declaration set out that the parties resided at Loskoppen, in the divi-

sion of Philip's Town. The defendants were sued jointly and severally under the joint will of the late R. H. Zwiegers and his wife, C. S. Zwiegers. The survivor was entitled to the life usufruct in the farm Loskoppen. The testatrix survived the testator, and became and was the person entitled to the life interest at the date hereinafter mentioned. About 23rd December, 1905, C. S. Zwiegers assigned and ceded her life interest unconditionally to the defendants' two sons, J. P. and R. A. van der Berg. About 10th January, 1906, J. P. and R. A. van der Berg ceded their interest in so far as it affected a certain portion of the farm to the plaintiff. About 22nd May, 1906, R. A. van der Berg confirmed in writing a previous verbal cession to his brother J. P. van der Berg, and all his interest in the farm which he had by virtue of the cession dated 23rd December, 1905. About 19th March, 1906, J. P. van der Berg made over to plaintiff the entire interest which he and his brother had in the farm by virtue of the cession to them by the widow C. S. Zwiegers, so that the plaintiff was entitled to possession of portion of the farm from 10th January, 1906, and of the whole from 19th March, 1906. The several cessions were all made by written agreements. The defendants had been living on the farm since 2nd March, 1906, together with their stock, and though plaintiff had frequently requested them to quit the property they refused to do so. Plaintiff claimed an order declaring him entitled to the occupation of the farm and declaring the defendants to have no lawful right of occupation thereto; an order ejecting defendants, and £50 damages for trespass.

The defendants' exception and plea in abatement was that the declaration was vague, embarrassing, and bad in law, and disclosed no cause of action, because it was not alleged that C. S. Zwiegers, being the usufructuary, gave her consent to the assignment and cession of their rights by J. P. and R. A. van der Berg, nor were the rights which the two last named were said to have assigned and ceded capable of being so assigned and ceded, nor could there in law be any unconditional cession of a usufructuary's life interest in a *praedium rusticum*. It was not alleged at the time of the cession, 19th March, J. P. van der Berg had any title or authority to dispose of the rights still subsisting in his brother in respect of the farm. No consideration or *justa causa* was shown for the alleged cessions, especially that of May 22, 1906. It was not alleged that plaintiff was the registered owner of the farm, or that plaintiff sued by authority of the owner or usufructuary, or that defend-

ants held or occupied under plaintiff. Defendants prayed that the declaration be set aside, and the claim dismissed, with costs. For a plea in abatement, defendants said it was not competent for plaintiff to sue without joining the usufructuary.

Mr. McGregor was for the excipient (defendant in the case), and Mr. Burton was for the respondent.

Counsel, in the course of his argument, cited Grotius (2.39.4), Van Leeuwen (2.9.14) (Kotze), *Eastern Rand Exploration Company v. Nel* (T.R., 1903, p. 42), Voet (7.6.2), Donellus (Comm. on C.L., 10.12.3). *De Vries v. Alexander* (Foord, p. 43).

Mr. Burton, on the question of the right of the usufructuary, briefly referred to the case of *Purkin v. Lippert* (5 C.T.R., 710).

Maasdorp, J.: In this case it is alleged in the summons that Mr. Zwiegers is entitled to the life usufruct of the farm of Loskoppen, under the will made by herself and her husband. It is alleged that she ceded this right to J. P. and R. A. van der Berg, and they, either directly or through intermediate cession, passed on their rights to the plaintiff in this case. The right that was so ceded is a right to the use and occupation of the farm Loskoppen. The plaintiff now upon his cession wishes to take possession of this farm for the purpose of using it, and finds it is occupied by the defendants, and by virtue of his rights, as cessionary, he claims possession of the farm, and that the defendants be ejected. The defendants take exception to this declaration upon the ground that the Van der Bergs could not, without the consent of Mrs. Zwiegers, cede any rights and enjoyment of this property which they might possess. That ground of objection is one, to my mind, which cannot be raised by the defendant in this case. It does not follow that cessions made without the consent of Mrs. Zwiegers are necessarily null and void. They hold good until the parties who are entitled to object raise objections. The only parties who could raise objections to the action of the Van der Bergs in ceding to the plaintiff might be Mrs. Zwiegers, or might be the heirs, who are ultimately entitled to the property. They may take steps to have this cession declared null and void, if under the law they are entitled to do so, but until they take such steps they may be reasonably taken to be consenting parties to the enjoyment of the rights by the cessionaries. That, I think, is sufficient ground for holding that it is no good ground of exception that Mrs. Zwiegers has not actually given her express consent to the cession of these rights. I do not hold that such express consent was absolutely necessary.

That question may still be raised upon the pleadings, because it may appear that the defendants have certain rights which they hold from the cessionaries, and they may insist that the cessionary should assert her rights in order to protect them. And they may be able to show that the usufructuary had a right to insist upon the consent before taking these steps, on the assumption that Mrs. Zwiegers could have objected to this cession, that she is the only person who could object to a cession being made without her consent. The further ground of exception is that there is no allegation that the one cessionary had a right to cede his interests to his brother cessionary. Now the other allegation is on the grounds that the rights were ceded in the first instance by the usufructuary to him. A further point raised is that there is no allegation that any consideration passed between the cessionaries themselves. That is not a question which any third party can raise. Any cessionary has a right to part with his rights without any consideration at all. If it should appear that the cessionary insists upon a contract with the person from whom the cession comes, then the question of consideration can arise between them. The fourth ground set up as showing that this declaration is vague and embarrassing is that it is not alleged that the plaintiff himself is the owner of the farm. In the ordinary course, he is supposed to have all the rights in himself, and he sues upon his rights as cessionary. It may be that all these allegations may hereafter be a question of the position in law occupied by these parties, and it may be found that the plaintiff cannot establish the validity of all these cessions, but that question can only arise as between the defendant and the plaintiff when the defendant himself can set up some legal right vested in him which enables him to question what has taken place between the plaintiff and the cedents of this property. Upon these grounds I must overrule this exception. Then there is a plea in abatement to the effect that it is not competent for the plaintiff to sue in this action without joining in the usufructuary, and in order to support this plea certain cessions have been put in evidence. Now, I see nothing in the cessions which makes it necessary for the cessionary in this case, who holds these rights under these documents to compel him to join the cedent, as well as the parties and apart from these documents there is nothing to support this plea in abatement. The plea in abatement must be overruled, with costs.

[Excipient's Attorney: G. Trollip.  
Respondents' Attorneys: Mostert and Son.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### PROVISIONAL ROLL.

MALMESBURY BOARD OF EX-  
ECUTORS AND TRUST CO. { 1907.  
V. DE JONGH. { Apr. 19th.

Mr. Douglas Buchanan moved for provisional sentence on four mortgage bonds for £100, with interest from April 16, 1904; £250, with interest from April 1, 1904; £100, with interest from October 3, 1905; and £150, with interest from October 1, 1905; less £20 17s. 11d. received on account, bonds due by reason of three months' notice having been given; counsel also applied for the property hypothecated to be declared executable.

Defendant appeared, and admitted liability.

Mr. Buchanan thereupon applied for final judgment.

Final judgment granted, with costs, property executable.

#### HOFMEYR AND SON V. ROSS.

Mr. Van der Byl moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

#### KEMP V. ENGELBRECHT.

Mr. Lewis moved for provisional sentence on a mortgage bond for £350, less £25 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ILLIQUID ROLL.

#### WEBER V. BARSDORF.

This was an application for judgment under Rule 329d, directing defendant to give transfer of certain property, or, in the alternative, refund the purchase price, and for damages and costs.

Mr. Gutsche moved. Counsel said that since issue of summons, transfer had been passed, and he had now to ask for costs and for interest on the purchase price for three years, viz., since April, 1904.

The Court declined to grant an order for interest, but ordered defendant to pay the costs as prayed.



## REHABILITATION.

Mr. Lewis moved, under section 14, of Act 38, 1884, for the rehabilitation of Marks Rappeport.  
Granted.

## GENERAL MOTIONS.

*Ex parte* ADAMS. { 1907.  
{ Apr. 19th.

Mr. Lewis moved for leave to applicant to sue *in forma pauperis*. Counsel said that he had not read the papers, and was, therefore, unable to certify at present.

Referred to Mr. Lewis for certificate.

*Ex parte* GREEVE.

Mr. Roux moved, on the petition of Magdalena Greeve, of Mount Currie, East Griqualand, for the appointment of a *curator ad litem* to represent one Sydney Herbert Keal, late of Mount Currie, in an action to be instituted by petitioner or to recover damages in the sum of £100 for alleged seduction, and for leave to attach a certain inheritance and to sue respondent by edictal citation. Petitioner alleged that the acts complained of took place between April and August, 1905, and that on the 21st February, 1906, she gave birth to a child, of which Keal was the father. On the 1st October he promised, in writing, to marry her when he returned from the Argentine, after five years. Petitioner was a major, and respondent was 19 years of age. Under the will of his late mother he was entitled to an inheritance of £108 12s. 2d. His father, who had married a second time, had since died. No tutor testamentary to the respondent had been appointed. Petitioner was unaware whether respondent had proceeded to the Argentine, or where he was at present.

Hopley, J., said that these two young people seemed to have made fools of themselves, and now one wanted to get money out of the other's estate during his supposed absence from the country.

Mr. Roux said that petitioner could not prevent respondent from going away. It was suggested that John Bernard Keal, brother of respondent, should be appointed curator. He submitted that the case was one in which the Court would grant relief.

Hopley, J.: This is a very unusual application. I suppose that for a tort of this sort a minor would be liable, but I should think that the Court would want extremely strong proof that he alone was responsible for what happened. He seems to have been about 16 or 17 years of age at the time, and about two years junior to the petitioner. I do not think that, considering his age, very heavy

damages would be given against him. It is just a question for petitioner whether it is worth her while going on with the case. However, I will grant an order, but I think it would be a good thing if the curator thinks that his ward is the father of this child, for him to try to compromise the matter so as to save the expense of the edictal process and the other formalities. Before the citation is issued I should like to know from the curator or the friends of this boy whether they do not know where he is, so as to save the expenses of publication.

Ordered that John Bernard Keal be appointed *curator ad litem* to respondent, and that the sum of £108 12s. 2d. be attached, leave granted to sue edictally, if necessary, and service of citation, intendit, etc., to be appointed in Chambers at a later date upon further information.

## SUPREME COURT

## FIRST DIVISION

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

IMPERIAL COLD STORAGE v. { 1907.  
CIVIL COMMISSIONER, CAPE. { Apr. 22nd.

Transfer duty—Valuator—Civil Commissioner.

*The applicant Company purchased all the assets of another Company for a fixed price, and included among such assets, there was certain land reclaimed from the sea as to which no specific price was mentioned in the contract of sale. In order to ascertain the value, the applicant Company appointed an appraiser and applied to the Court for an order on the Civil Commissioner to issue a transfer duty receipt for the duty tendered upon the basis of such appraiser's valuation.*



*Held, that in the absence of proof that the parties to the sale had valued the reclaimed land at a higher price than that found by such appraiser, it was the duty of the Civil Commissioner, if he considered the amount so found to be less than the just and fair value, to appoint a valuator in terms of the 14th Sec. of Act 5 of 1884.*

This was an application on notice of motion brought by the Imperial Supply and Cold Storage Company against the Civil Commissioner, calling on him to show cause why he should not be ordered to issue the usual transfer duty receipt for £1,772 18s. 5d. paid in connection with certain property on the Dook-road. There was subsequently another notice given, which stood over from time to time, an alternative notice that the Court would be asked for alternative relief, and direction as to the manner in which the duty payable was to be assessed in the event it be held that the applicant was not entitled to the order in terms of the original notice. The matter had been before the Court in other forms. The land was reclaimed from the sea under an arrangement with the Government in 1895, which was entered into with Combrinck and Co., the latter undertaking to reclaim a certain portion of land, and the Government undertaking, if Combrinck complied with certain conditions, they would at the end of ten years issue title to the lands reclaimed. A large portion of this land belonged to Combrinck and Co., and a certain strip of this land was in question in this case. Combrinck and Co. got their title in 1905, when the ten years had elapsed. The Government then said they would issue title to Combrinck and Co. At that time Combrinck had sold the rights to a portion of this land to other companies. The Government in 1905 took up the position, although they consented to these different alienations, they would issue to Combrinck and Co. title to the whole and, in consequence of that, title to the whole of the ground was issued to Combrinck and Co. In July, 1905, it became necessary for the last of the companies to apply under the Derelict Lands Act for a vesting of a portion of the land, inasmuch as the previous company which had alienated the ground had been dissolved and the other companies could not give transfer. In July, 1895, there was an agreement between the Government and Combrinck and Co. as to the reclamation of the land, certain conditions as to the Harbour Board getting

a certain portion of it. In May, 1899, there was an agreement whereby Combrinck sold to the S.A. Supply and Cold Storage Company their general business, and their property, including the right to a certain portion of this reclaimed land. They sold the whole of their business for £272,000, and then by subsequent arrangement of the 5th August, 1899, there was an agreement whereby the Government agreed to accept this S.A. Supply and Cold Storage Company as grantee under the agreement of 1895 of the reclaimed land. Then on February 27, 1902, there was an agreement whereby the S.A. Supply Company sold their undertaking, including the portion of the reclaimed land, to the S.A. and Australasian Company. On the 5th November, 1902, there was an agreement with the Government, the Government recognising the South African and Australasian Company in respect of the reclaimed land. On 28th May, 1903, an agreement was entered into whereby the South African and Australasian Company disposed of their undertaking and this property to the Imperial Cold Storage and Supply Company. They said they sold, but no sum of money was mentioned in cash. The amount was £1,650,000, of which £500,000 was in debentures and £1,150,000 as shares in the Australasian Company. In July, 1903, the South African Supply Company went into liquidation. The Australasian Company went into liquidation also and was dissolved. The South African Supply was not yet dissolved, although it was in liquidation. On February 18, 1904, there was an agreement whereby the Government agreed to recognise the Imperial Company in respect of this land. In July, 1905, the Government issued to Combrinck and Company a grant of the whole of the reclaimed land. At that time it was pointed out on behalf of the Imperial Company that the company took up the position that this was not the proper procedure, as the Government, recognising their rights in respect of this matter, they should have a grant. The Government took up the position that they were going to issue grant of the whole of the land to Combrinck and Company, and that grant was issued. Combrinck and Company paid no transfer duty. It was a direct grant. In effect Mr. Justice Maasdorp's judgment was that May 28, 1903, was the date of sale and purchase. On the 26th February, 1906, there was a rule nisi granted under the Derelict Lands Act, the Imperial Company pointing out that they could not get declarations of seller and purchaser signed in the ordinary course, because this Australasian Company was dissolved. They asked for a rule nisi under the Derelict Lands Act that they were entitled to the title of this portion of ground. That was granted, and on

March 13 the rule was made absolute for transfer of the reclaimed land along the Dock-road, and on the same date a rule nisi was granted calling on the Treasury to show cause why applicant should not be allowed to declare July 8, 1905, as the date of alienation, the value of the land to be ascertained by the valuation of a referee. Applicants took up the position that the land had not been fully reclaimed in 1903, the whole of the land was not reclaimed until 1905. They took over the rights, and the Government recognised these rights, and until the Government was in a position to make a grant of the land transfer duty should not be paid. The point was the applicants were not entitled to this land until it had been reclaimed, though they bought the rights.

Mr. Searle, K.C. (with him Mr. Burton), was for the applicant, and Mr. Howel Jones was for the respondent.

Counsel referred to the judgment of Mr. Justice Maasdorp in the previous application (16 C.T.R., 276), which, however, did not decide the question of how the transfer duty had to be paid. On the 31st May, 1906, the liquidator of the Australasian Company (Mr. Reid) made a declaration in regard to the property, stating that he could not actually know the purchase price of this particular portion of land. It seemed pretty clear that the effect of the transaction was a reconstruction of the Australasian Company under another name. Now, they had tendered upon a valuation, and it was pointed out to the Civil Commissioner's Chief Clerk it was impossible for them to do otherwise. The Government took up the position that they would have no valuation of this land, and that there must be a declaration as to what it was sold for, and the applicants said no price was mentioned. It was impossible for the applicants to comply with the request, and the Government would not accept their valuation. The Chief Clerk of the Civil Commissioner said there must be a valuation whereupon they got a valuation made for £68,000, and the duty, £1,772 18s. 5d., had been in the hands of the Government since June, 1906. Counsel submitted the valuation should be accepted in terms of the Act.

[De Villiers, C.J.: The point is whether you are content to accept the valuation?]

Mr. Jones: The main objection is that the valuator was never appointed by the Civil Commissioner at all.

[De Villiers, C.J.: Supposing the Court orders that the valuation should be made on the basis of 1903, is it not possible that another valuation may make it much less?]

Mr. Jones: That I cannot say.

[De Villiers, C.J.: The question for the Government is whether it is not better to accept the valuation.]

Mr. Jones: I might point out that this land was valued at £188,000 when Combrinck sold in 1899. I should like to put a few questions to Mr. Reid as to the value of the property, and also ask him to produce his books.

[De Villiers, C.J.: I do not think the Court is in a position to fix the amount. The question is whether you are bound to accept the valuation. If not then it is competent for the Civil Commissioner to appoint a valuator.]

Mr. Searle, in further argument, urged it was the intention of the Act that there should be a valuation in the circumstances present in this case.

[De Villiers, C.J.: The Act requires that the Civil Commissioner should appoint a valuator, and the Civil Commissioner would not be justified in saying, "You appoint your own valuator."]

Mr. Searle: Supposing he says: "Any sworn appraiser will do"; I submit then that the Civil Commissioner would not be committing a breach of duty. We would never have got Mr. Hablutzel unless we were under the impression that that was what the Civil Commissioner wanted. Counsel read sections 13, 14, and 15 of the Transfer Duties' Act, and said that if this were called a sale and purchase, then it was not a sale and purchase for any price at all. The particular properties were not valued specifically; there was no allocation of the purchase price to the particular properties.

[De Villiers, C.J.: What would have been the position if the Civil Commissioner had said: "I shall now have a separate valuation and appoint my own valuator"? Would you have objected to that?]

Mr. Searle: No, my lord. I am not prepared to object now.

[De Villiers, C.J.: That is the ultimate course which must be adopted, I think..]

Mr. Searle: It seems to me the only way out of it. I am now prepared to consent to that course, and I cannot see any possible objection.

[De Villiers, C.J.: But in your motion you insisted upon having your own valuator.]

Mr. Searle: We did take up that attitude, but we said we were misled. Counsel contended that, reading sections 14, 15, and 16, this was a case where there must be a valuation. That was the only possible construction of the Act.

De Villiers, C.J., said the Court would hear Mr. Jones on the point.

After hearing Mr. Jones in argument,

De Villiers, C.J., said that if there were any doubt, the Court would allow Mr. Reid to be called.

John G. Reid was then called. He said he was the liquidator of the Australasian Company. The property taken over from Combrinck was transferred to the Imperial from the Australasian.

Witness did not know whether the property was taken over at the prices scheduled in the transaction with Combrinck. Witness was in London at the time. In arriving at the £1,650,000 purchase price, no items were fixed; that was specifically avoided.

Mr. Jones pointed out that in the report of the Imperial Company it was stated that the property was taken over at "cost."

The witness said that this should have been "book value," not "cost."

Mr. Jones asked the Court to make an order for the production by Mr. Reid of the books.

De Villiers, C.J., said there appeared to be no necessity to order the production of the books.

Mr. Jones said there were necessarily negotiations in the matter, and there must have been an understanding as to the basis on which the property was taken over. The whole of the circumstances showed that the companies acted on the same basis as was laid down in the schedules in the transaction with Combrinck.

[De Villiers, C.J.: The written agreement before the Court doesn't specify any price. You want to go behind that written agreement.]

Mr. Jones contended it was quite improbable that in a transaction of this sort no price was fixed. There must have been a schedule of properties with the prices attached. It was quite certain that the properties were valued in the books, and for this reason he urged that the books should be produced. Only in the event that the Court considered it impossible for the company to fix the value could a valuator be appointed.

After hearing Mr. Searle in reply, the Court refused the application.

De Villiers, C.J.: The notice of motion served in the first instance upon the respondent, the Civil Commissioner of the Cape, called upon him to show cause why he should not be ordered to issue the usual transfer duty receipt for the sum of £1,772, being the amount due and owing in connection with the alienation to the Imperial Cold Storage and Supply Company, Limited, of certain premises and so on. The ground upon which this amount is fixed as the transfer duty payable by the applicant company is that this amount is based upon a valuation made by the valuator, Hablutzel. He was appointed by the applicant company, and there is no evidence, in my opinion—not sufficient evidence—that the respondent had consented to accept Mr. Hablutzel as valuator, in terms of the Act. The terms of the Act are clear that if a valuator is to be appointed, the appointment is to be made by the Civil Commissioner, and not by anyone else, and it would require the clearest proof possible that the Civil Commissioner has consented to appoint

as valuator the person appointed by the applicant company before an order can be made such as is now claimed. But I suppose that the applicant saw it would be impossible to succeed on the original application, and he gave notice that the Court would be asked for alternative relief, and for directions regarding the manner in which the duty payable is to be assessed. But this is a most unusual form of notice. It is usual when a person seeks relief to state to the opposite side and to the Court what the relief sought is. In the present case there is no such statement, and therefore the Court is unable to give directions in terms of the application. But I am quite prepared to express the opinion which I entertain in the matter for what it is worth, and possibly it may prevent any further litigation in the matter. It appears to me we must look at the terms of this agreement between the Australasian Company and the Imperial Company. There was a purchase there of assets en bloc, and the specific value of each of these assets was not stated. When it came to the payment of the transfer duty it appears that the purchasers were able to state the price paid for certain properties in Aliwal North and elsewhere, but were unable to state the amount which they had agreed upon as the purchase price of the property now in question. The agreement itself does not specify the amount, and it therefore, in my opinion, now would lie upon the Civil Commissioner to show that there was an agreement between the parties, by which the price was fixed at a higher sum than that upon which the amount of transfer duty is now offered. If the Civil Commissioner has no proof to that effect he should treat that amount as being the price, and it then will become competent for him to cause a valuation to be made in terms of the 14th section of Act 5 of 1884. Then all these facts which have been brought to the notice of the Court by Mr. Jones would be brought before the valuator. The valuator, in appraising this property, would consider all the circumstances of the case. He would consider what was stated in the report which has been read. He would consider also what the Australasian Company paid for this property, and then he will make his own appraisal; and if the applicant is dissatisfied with the appraisal, he has his remedy under the Act. But at present it seems to me this Court is not in a position to fix the amount of duty payable by the applicant. My opinion is, therefore, that the applicant should fail, that there should be no order upon the application, and that, inasmuch as the applicant has not indicated in his second notice, the directions which he wishes the Court to

issue, he is not entitled to his costs. On the contrary, the costs of this application should be paid by the applicant.

Buchanan, J., concurred.

[Applicants' Attorneys: Van Zyl and Buissinné. Respondents' Attorneys: Reid and Nephew.]

#### *Ex parte* BEARD AND OTHERS.

Mr. Gardiner, for the petitioners, said this matter came before the Hon. Mr. Justice Maasdorp, in Chambers, under the Derelict Lands Act, and his lordship made no order, but granted leave to the petitioners to take the petition into court for argument and decision if they desired to do so, with leave to give fuller information if they were so advised. Since then a number of affidavits had been filed, which had not been before his lordship on the previous occasion, and which counsel read. The petitioners prayed that their lordships might, in terms of section 2 of Act 28, of 1881, order the registration of title to a certain roadway at Wynberg in their names, subject to certain conditions to be inserted in the respective transfers of the land to petitioners, or to grant such other order as to their lordships seemed meet.

De Villiers, C.J., said ample notice would have to be given to any persons interested. The widow of one of the heirs was alive, and she, at all events, should have notice. A rule would be issued calling on all concerned to show cause on the 14th July why an order should not be made as prayed on the conditions mentioned in the letter written by the Colonial Secretary to Messrs. Fairbridge, Arderne and Lawton, on the 11th March, 1905, the rule to be served on the Wynberg Municipality, to be forwarded by registered letter to Mrs. Stewart, and to be published once in two Cape Town newspapers.

Buchanan, J., concurred.

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. ANGELL.

( 1907.  
{ Apr. 22nd.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Cape, who had convicted the appellant (Edward Angell) of a charge of indecently assaulting a child of six years, residing in Grey's Pass, Cape Town, and sentenced him to pay a fine of £10, or to be imprisoned for three months with hard labour.

The grounds of the appeal were (1) that the judgment was not supported by the evidence given before the Court, and (2) that it was contrary to law.

Dr. Greer was for appellant; Mr. Nightingale was for the Crown.

Dr. Greer said that he proposed to rely on the first ground only. He submitted that the Magistrate, sitting as a juror, had not sufficient evidence on which to found the conviction. It was important to note that professional assistance had been engaged to represent the accused, but, for some reason or other, that assistance was not forthcoming at the trial. The whole of the case rested on the mother's evidence, and arose out of her suspicions. There was, he submitted, such an element of doubt in the matter that the accused ought to have been acquitted.

Hopley, J.: It is unnecessary, in my opinion, to call upon Mr. Nightingale for the Crown in this matter, as nothing that Mr. Greer has said has in the least tended to make me think that the Magistrate has come to anything like a doubtful or wrong decision. One must bear in mind that the stigma which attaches to such a crime and the infamy attaching to the conviction must have been points which would be before an experienced Magistrate like the one who tried this case. He would not lightly or upon doubtful evidence convict a man of such a crime as this. The evidence seems to me to be really all one way. The accused went up a lane with this little girl, and the circumstances were favourable to the commission of such a crime. When the child came out of the lane she forthwith made the charge against the accused. She repeated the story before the Magistrate, and it can hardly be said that her evidence was given in order to confirm the mother's suspicions. The Magistrate saw the witnesses, and he was in a better position to weigh the evidence than this Court can be. The appeal will be dismissed.

#### THURNAU V. PICARD.

This was an appeal from a judgment of the Resident Magistrate of Mount Fletcher in an action brought against appellant by respondent to recover £30 damages for alleged breach of contract.

From the record it appeared that respondent advertised in the "East London Dispatch" for a situation as assistant in a country store, and that appellant replied, and stated that he required an assistant to take sole management of an out-station, 2½ hours' ride from Mount Fletcher. Correspondence ensued, and respondent went up to the defendant's place and presented himself. He then proceeded with defendant to the out-station, and after their return to Mount Fletcher defendant dispensed with plain-



tiff's services, saying that he (Picard) was not sufficiently well up in the Kafir language. Plaintiff alleged that defendant had summarily dismissed him without reasonable or just cause. Defendant said that he found plaintiff would not suit his requirements and advised him accordingly. He had never considered that plaintiff had been engaged by him. Plaintiff said defendant had engaged him outright on his credentials at £6 per month and board and lodging, and his claim for £30 damages was made up of one month's salary, expenses of travelling from Port Elizabeth to Mount Fletcher and back again, and subsistence allowance during the dispute. Defendant said the correspondence was a swindle, because he had found that plaintiff could not speak Kafir and was not fitted by business capacity for the position.

The Magistrate, in his reasons for judgment, said he found that defendant entered into a contract with plaintiff to engage his services, and that plaintiff's intention to act *bona-fide* was manifest throughout. He also commented upon the unsatisfactory manner in which defendant had given his evidence and said he placed very little credence upon Thurnan's statements. He gave judgment for plaintiff for £25 15s.

Mr. Long was for appellant, Henry Charles Thurnau, storekeeper, Mount Fletcher; Mr. Benjamin was for respondent, Clifford Richard Picard, late of Port Elizabeth.

Mr. Long said that the sole question was whether upon the correspondence a contract had been entered into between the parties. Defendant in his letter offered the post to plaintiff, and said that the reply must be sent by return post. The reply was not sent by return post, and counsel contended that *ipso facto* the offer lapsed. He cited *Kirby v. Trotter* (1 Foster and Finlayson's Reports, 544). Furthermore, plaintiff, when he did reply, stipulated that his expenses from Port Elizabeth to Mount Fletcher should be paid, and counsel submitted that this conditional acceptance by plaintiff could not be held to have clinched the matter between the parties. Defendant had not written to plaintiff agreeing to the stipulation. Counsel quoted Anson on Contracts (p. 51). This contract must, he urged, be decided upon the correspondence, and the Magistrate was wrong in allowing the subsequent conduct of the parties to influence him on the construction of the contract. Not only so, but the conduct of the parties did not even justify the interpretation put upon it by the Magistrate. In further argument, Mr. Long submitted that, even supposing there had been a breach of contract, the Magis-

trate was wrong in allowing respondent his expenses back to Port Elizabeth.

Mr. Benjamin submitted that the Magistrate was justified on the documentary evidence in coming to the conclusion that there was a contract between the parties. The conduct of the parties subsequently was such that one could reasonably infer the existence of a contract. Appellant, in his offer of the post, added "Let me know per return of post if you accept this offer, and oblige." This could not be regarded as a conditional offer. The parties arrived at a contract, and there was no repudiation by appellant. Even though respondent telegraphed three days before he left Port Elizabeth that he was coming via Maclear, appellant did not reply.

Hopley, J., said he was with respondent as to a contract having been entered into. A question remained as to the amount of damages.

Mr. Benjamin submitted that the Magistrate had gone on right and equitable principles in allowing respondent's expenses of returning to Port Elizabeth from Mount Fletcher.

Hopley, J., said: In this matter the plaintiff, now respondent, had advertised in a newspaper that a young man of 26 was willing to take the position of manager in an up-country business, and could speak Kafir. To this advertisement defendant, now appellant, replied asking him to enclose testimonials, and telling him that Sesuto would be required in the district where he wanted him to take charge of his business. The plaintiff thereafter telegraphed on the 21st December: "Reply just received, writing you. Wire me if too late." This was after a letter which he had written to defendant on the 20th telling him that he would be ready to come at any salary which the defendant considering the position to be worth. On the 2nd January the defendant wrote to the plaintiff as follows: "In reply to yours of the 12th ult., I am prepared to give you £6 per month, with board and lodging, to take sole management of my out-station, with a prospect of rise should business warrant it. Will you please arrange to be here to take up the situation on the 1st February?" That, in itself, is a concluded contract, and it does not seem to be dependent upon any other term or condition. Then the appellant added, as a sort of after-thought: "Let me know by return of post if you accept this offer, and oblige." I do not know that there was no reply by return of post, because there seems to be no evidence on the point in this rather lengthy record. If very strong reliance were placed, as has been done in the argument to-day, on the fact that this letter was not replied to by return of post,



one would have expected to find some evidence on the record to show that it was not replied to by return of post. All we know about the course of post between Mount Fletcher and Port Elizabeth comes from instructions to the appellant's counsel from his legal adviser here. From what I can gather, if the letter of the 2nd January was written some little time before the post left Mount Fletcher and reached Port Elizabeth just in time to miss the return post, the letter of the 13th might really be an answer by return of post. I can, however, dismiss this point from my mind, the more easily because it does not seem to be at all relied upon in the defendant's plea. In his plea he mentions that he asked the plaintiff to inform him by return of post, but does not say that he did not do so, but says "on the contrary, the plaintiff did not accept, but stipulated that the defendant should undertake to pay his expenses from Port Elizabeth . . . and that on receipt of this letter the defendant considered that he was free to negotiate with others, and did so accordingly." The defence to that portion of the case is not that the terms in the letter of the 2nd January were not accepted by return of post, but that an additional stipulation was imported that he (defendant) should pay plaintiff's expenses from Port Elizabeth to Mount Fletcher. In any case the plaintiff replied on the 13th: "Yours of the 2nd to hand. I am willing to accept your offer, providing you refund my expenses in getting up to your place. I shall arrange to leave here so as to arrive and take over on the 1st February." It is perfectly clear that when plaintiff had written that letter he was bound to go up if he heard nothing to the contrary. It seems to me that he had committed himself, and that he could not in fairness get out of going. It may be that had the present plaintiff been the defendant in a case brought by the present defendant for a breach of contract he might have set up the plea: "As I did not hear whether or not he would pay my expenses I did not complete my contract." Still, I doubt very much whether the present defendant's plea can be upheld under the circumstances, because he must have received that letter in plenty of time to have stopped the plaintiff from starting from Port Elizabeth. He took no steps. He left the matter exactly where it was, leaving the plaintiff to infer that the stipulation as to expenses had been accepted. Now, to make matters certain the plaintiff telegraphed on the 24th January, before leaving Port Elizabeth: "Leaving here to-morrow via Maclear." Even then there would have been time to have communicated with plaintiff, because the telegram reached Mount Fletcher at midday. The defendant took no notice

of the telegram. He received it and produced it at the trial, but he wishes the Court to believe that he did not think that the plaintiff was coming to him in pursuance of the correspondence which had passed between them.

It seems to me that no honest man could have any doubt that this man was coming to him in pursuance of the correspondence which had passed between them as to the plaintiff's services. His attempted explanation that he thought the defendant might have been passing along to Natal and had decided to come that way, although he knew that there was no engagement waiting for him, but in the hope that he might still pick up the engagement seems to me incredible. The Magistrate, I think rightly, took no particular notice of the explanation. The defendant sent no telegram in reply, but allowed the plaintiff to proceed on his journey.

I think that any Court would be perfectly justified in holding, upon the correspondence and the telegrams, which were left unanswered, that there was such a concluded contract that neither side could get out of. If that is so, there is no plea that there was dismissal for good and just cause.

The defendant relies wholly upon the contention that there was no concluded contract. I think that the Magistrate was right and, therefore, I must hold that the plaintiff was properly engaged. As there was no plea of dismissal for good cause before the Magistrate I cannot now consider that question, therefore all the allegations which the defendant indulged in in the Court below as to the unbusinesslike way in which the plaintiff went about managing the branch store, and his inability to speak Kafir, must be disregarded entirely in the consideration of this case. He seems to have got upon the nerves of the defendant after a few days, and he sent him about his business, but he does not plead that he did this justifiably, and the Magistrate is right in holding that it was an unjustifiable dismissal.

The only question that remains is as to the question of damages. I do not think that it was necessary for the Magistrate to go into details as to how he arrived at the amount of the damages, but he says that he took a fair and equitable view of the matter. He considered that the plaintiff had been allowed to incur considerable expense in travelling all that long distance from his home at Port Elizabeth, and that he had to get back before he could be put *in statu quo*. His finding of a lump sum would have been equally satisfactory, but I cannot say that there is any particular exception to his having done what he did on an arithmetical basis. Plaintiff, in his summons, claims these damages, the Magistrate considers that

they were fair damages, and I do not consider that it was wrong or inequitable on the part of the Magistrate to arrive at that decision.

To bring a man, or to allow him to come, from the coast to Kafirland and then turn him adrift without any consideration whatsoever seems, on the other hand, to be a highly inequitable thing, not resting, as far as I can see, on any sound legal basis.

The appeal must be dismissed, with costs.

[Appellant's Attorney: G. Trollip.  
Respondent's: Dold and Van Breda.]

LATEGAN V. BRINK.

Magistrate's jurisdiction—Amount  
—Claim in reconvention.

*L. claimed £16 10s. in a Magistrate's Court on a liquid document. Defendant counter-claimed £53: an illiquid claim. He set off L.'s claim and abandoned £15 to bring his counter-claim within the jurisdiction (£20). The Magistrate gave judgment for plaintiff and for defendant according to their respective claims.*

*Held, on appeal, that as the Magistrate tried, in point of fact, an illiquid counter-claim amounting to £35 10s. (even after the set-off of plaintiff's claim, he had exceeded his jurisdiction.*

*Colonial Government v. Stevens and Hollingsworth (10 Juta, 140) followed.*

This was an appeal from a judgment of the Resident Magistrate of Worcester in an action brought by appellant against respondent to recover £16 10s. and interest upon a certain promissory note.

Plaintiff claimed £17 10s., less £1 paid on account, and interest from the 2nd January, 1906, on a promissory note signed on the 2nd September, 1905, and due on the 2nd January, 1906. The claim was admitted, but defendant set up a counter-claim for £53, and said that, after deducting the amount of the plaintiff's claim and abandoning £15 10s., there was a balance of £20, which he (Brink) claimed in reconvention, with costs. Exception was taken by plaintiff to the counterclaim that it was beyond the Magistrate's jurisdiction. The exception was overruled. The counter-claim was accordingly tried. The Magistrate gave judgment for plaintiff

for £16 10s. and interest, and for defendant for £20, each party to pay his own costs.

Mr. J. E. R. de Villiers was for appellant; respondent did not appear.

Mr. De Villiers submitted that the defendant, having waived £15 10s. only of his claim, his counter-claim was for £37 10s. The claim was unliquidated, and it was, therefore, beyond the Magistrate's jurisdiction. He cited *Colonial Government v. Stevens and Hollingsworth* (10 Juta, 140). The Magistrate's judgment certainly did not go beyond his jurisdiction, but he had no right to try the case at all, and plaintiff took exception to his jurisdiction at the outset.

Hopley, J.: It seems to me, on the principles laid down in the case of *Colonial Government v. Stevens and Hollingsworth*, that in this case the Magistrate has gone wrong. A claim for £17 10s. on a liquid document was brought before the Magistrate by the plaintiff (now appellant). The defendant admitted that he owed £17 10s. on this liquid liability, but he said that he had a claim in reconvention for £53 for certain wire, posts, gates, and a certain plough, unjustly kept from him by plaintiff, or used and broken by plaintiff, so that they were no longer serviceable to him (defendant), and he proceeded then to take from this amount of £53 an amount of £17 10s., and so brought this unliquidated counter-claim to £35 10s., by compensating this liquid claim of the plaintiff's; and, the amount of £35 10s. being still too large for the Magistrate's Court to have jurisdiction, he further says: "I now drop my so reduced claim by £15 10s., and I bring it to £20, and that will give the Magistrate jurisdiction." But it is obvious that this is exactly the same thing as was done by Stevens and Hollingsworth in the Magistrate's Court at Kimberley in the case to which I have referred, and it is perfectly obvious also that the Magistrate in this particular case now under consideration was trying a counter claim to the extent of £37 10s. on an unliquidated account, and that was beyond his jurisdiction. The £17 10s. was not disputed by the defendant, but on the other side there was a disputed amount of £53, and from that disputed amount he dropped £15 10s., but that still left the counter-claim at £37 10s., and the defendant could not bring that within the jurisdiction of the Magistrate by writing off the £17 10s. which he admitted was owing by him. The Magistrate has, in effect, had before him, even after the amount of £15 10s. was dropped, an unliquidated counter claim of £37 10s., and for that the Magistrate had no jurisdiction. It seems a pity, from the finding of the Magistrate, that the defendant did not at once drop the whole of the claim

from £53 to £20, and let the case proceed on that basis, and the result might then have been the same as the Magistrate has found for. The exception of want of jurisdiction on the claim in reconvention will be sustained, and the judgment of the Magistrate must, therefore, be changed to one for £17 10s. for the plaintiff (now appellant). The appeal will be allowed, with costs. [Appellant's attorneys: Walker and Jacobsohn. Respondent in default.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

URMANN V. URMANN. { 1907.  
Apr. 23rd.

This was an action for judicial separation.

Mr. Lewis was for the plaintiff; Mr. W. P. Buchanan was for the defendant.

Mr. Lewis applied for judgment in terms of a consent paper filed, by which the parties agreed to a separation, the plaintiff to have the custody of the minor child, and the defendant to contribute £10 per month.

Judgment was given in terms of the consent paper filed.

LOUW V. DAWOOD AND ABDURAMAN.

This was an action for the recovery of money alleged to be due in respect of the purchase of certain stock.

The action was brought by William Petrus Louw, a farmer, against Mahomet Dawood and Mahomet Abduraman, trading in partnership as butchers in Cape Town and Claremont, to recover a sum of £112 16s. 11d., being balance due on an account for sheep, lambs, and goats sold by the plaintiff to the partnership. One of the defendants had filed a plea, but it appeared that the men had since left the country, and the action was now undefended.

Mr. Louwrens appeared for the plaintiff; the defendants were not represented.

Formal evidence as to the debt was given, and the Court gave judgment for the plaintiff, as prayed, with costs.

## THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1907.  
Apr. 23rd.

Mr. P. S. T. Jones moved for the admission of Cecil Francis Hopestill Heathcote as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Umtata.

Mr. Struben moved for the admission of Ockert Johannes Meintjes as an attorney.

Application granted, oaths to be taken before the Resident Magistrate of Barkly East.

## PROVISIONAL ROLL.

MALING V. SCHAFF.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

HOLMES V. ODENDAL AND VAN SCHALKWYK.

Mr. Swift moved for provisional sentence on a promissory note for £305 12s. 2d., with interest from 22nd July, 1905, and costs.

Order granted.

S.A. LIFE ASSOCIATION V. MASTERTON.

Mr. Marais moved for provisional sentence on a mortgage bond for £2,000, with interest from the 1st June, 1906; counsel also applied for the property hypothecated to be declared executable.

Order granted.

WIID V. VAN DER MERWE.

Mr. Marais moved for provisional sentence on two promissory notes for £87, less a certain amount paid on account, with interest from 28th September, 1906, and £805, less £287 10s. paid, with interest from the 16th November, 1906.

Ordered to stand over until translations of the notes have been put in.

Later, Mr. Marais stated that the notes had been translated and copies put in.

Order granted.

CREAGHE V. JONES.

Mr. De Waal moved for provisional sentence on a mortgage bond for £400, with interest from 18th June, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable. Mr. De Waal said that the summons was served on Mr. Stephan, who said he held defendant's power of attorney.

Order granted.

WALKER V. JANUARY.

Mr. De Waal moved for provisional sentence on a mortgage bond for £50, less £2 paid on account, with interest from 1st January, 1906, bond due by

reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ILLIQUID ROLL.

MAKAAB AND CO. V. SHAMMA. { 1907.  
Apr. 23rd.

Mr. P. S. T. Jones moved for judgment, under Rule 319, for £41 10s., for goods sold and delivered, with interest *a tempore morae*, and costs. Counsel said that defendant had been placed under arrest, under Rule 8, by reason of the fact that he intended to leave the Colony. There was a danger that when judgment had been given, and defendant had been released, he would take his departure for Lobito Bay.

Buchanan, J.: The application before the Court is for judgment on a declaration to which no plea has been filed. Plaintiff, therefore, is entitled to judgment as prayed. Defendant was arrested, and on the writ of arrest he was lodged in gaol. Now judgment has been given against him and he is entitled to his release. If plaintiffs wish to take any further proceedings they must do so as properly advised. I cannot make any order to detain him in gaol now without an application in proper form. Judgment as prayed and defendant ordered to be released.

CUNNINGHAM AND GEARING V. KLIPHEUVEL FARMERS' DAIRY CO., LTD.

Mr. Swift moved for judgment under Rule 329d for £59 10s. 1d., work and labour done, with interest *a tempore morae*, and costs.

Order granted.

MOORREES V. VISSER.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £312 0s. 8d., for certain articles bought at public auction and commission, with interest and costs.

Order granted.

IMPERIAL COLD STORAGE AND SUPPLY CO., LTD. V. ROSENBERG.

Mr. Roux moved for judgment under Rule 329d for £187 16s. 10d. goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

DE WIT V. DE WIT.

This was an action to have Maria Petronella de Wit, of Prince Albert, widow of Johannes Frederick de Wit, declared of unsound mind, and a curator appointed of her person and property.

Mr. Upington was for plaintiff; Mr. De Waal appeared as *curator ad litem*; Mr. J. E. R. de Villiers appeared on behalf of certain parties interested in the property.

Dr. Luttig gave evidence with regard to the respondent's condition. He said that defendant would be 92 years of age next October. She was not competent to attend to her own affairs.

Frederick F. de Wit, a farmer, Oudtshoorn division (son of the respondent), said that he proposed Mr. Jan Haak, of Prince Albert, as the curator. He objected to the appointment of Mr. Luttig, as he was over 80 years of age.

Mrs. Jacob Malan (daughter of the respondent) said she preferred that Mr. Haak should be appointed.

Mr. De Waal reported that a curator should be appointed to look after Mrs. De Wit, and suggested the naming of Mr. Haak.

Pieter de Wit (called by Mr. De Villiers) said that he was the respondent's grandson. He had held the farm in the estate under lease for some years, and had made several improvements upon it. Mr. Luttig, whom he nominated as curator, was well-known in the district and held several public offices. Witness had no personal objection to Mr. Haak, but he knew that when the lease expired, Mr. Haak would want to change the lease-holder. Witness wished to have a fair opportunity of bidding for the lease in open market.

Counsel having been heard on the question of the curatorship,

An order was granted declaring respondent to be of unsound mind, and appointing Mr. Jan Haak as curator of her person and property, costs of this action and of all parties to come out of the estate.

GROBBELAAR V. GROBBELAAR.

This was an action brought by Margaretha Grobbelaar, of Graaff-Reinet, against her husband, Johannes J. Grobbelaar, of Clanwilliam, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Howes was for plaintiff; defendant did not appear.

Wm. Thomas Birch, clerk in charge of the marriage register, gave formal evidence of the registration of the marriage, which took place at Somerset East on the 9th April, 1888.

Margaretha Grobbelaar said that she was the defendant's wife, and resided at Graaff-Reinet. There were three children of the marriage surviving. In March, 1899, her husband was convicted of theft at Clanwilliam and sentenced to six months' hard labour. Defendant had not returned to her since then, nor had he contributed anything towards her



support.

By the Court: Witness was informed that defendant, who was a farmer, was still in the district of Clanwilliam.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 1st June, failing which a rule to issue calling on defendant to show cause on the 11th June why a decree of divorce should not be granted, with custody of the children and costs.

#### SILBERMAN V. SILBERMAN.

This was an action brought by Mary Silberman, of Waterkant-street, Cape Town, against her husband, Iser Silberman, whose address is unknown, for restitution of conjugal rights, failing which a decree of divorce and custody of the child of the marriage.

Mr. Lewis was for plaintiff; defendant, who was sued by edictal citation, did not appear. Substituted service had been given.

The plaintiff said that she was married to defendant in Russia on the 25th February, 1897. They lived together in Russia for three years. In 1900 defendant left her, without stating where he was going. She had not seen him since. Hearing that defendant was in Cape Town, she came out here in 1906. She had made inquiries as to defendant's whereabouts, but had been unable to discover any trace of him.

The Rev. Mr. Lyons, a minister at the Synagogue, said that he had known the defendant while he was in Cape Town. He believed that defendant, when he came out, intended to stay here. Witness obtained work for him at the Plague Camp.

Decree of restitution granted, defendant to return to or receive plaintiff on or before 1st June, failing which rule to issue calling on defendant to show cause on the 11th June why a decree of divorce should not be granted, with custody of the child, service as before.

#### ROWE V. ROWE.

This was an action brought by Arthur Edwards Rowe, of Cape Town, against his wife, Alice Rowe, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Struben was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Mr. Struben read an affidavit by an agent, who had served the citation upon defendant at MacArthur, in the State of Victoria, and who stated that defendant was living at a certain address with a butcher named Charles Burke. The pair appeared to have lived together as man and wife. Defendant declared that if her husband sued her on the ground of adultery she would make counter accusations against him.

W. T. Birch (clerk in charge of the marriage register) gave evidence as to the marriage.

The plaintiff said he was married to defendant in Cape Town on February 3, 1897. He was then a lighthouse-keeper at Green Point. In 1902 he bought a butcher's business for his wife. He was then transferred to Cape Point. Subsequently he was transferred to the Customs. On October 20, 1903, witness told his wife that he was going to look into the books of the business. On the following day, however, his wife disappeared. He had had no suspicion that she was going away. Witness had known nothing about misconduct on her part with Charles Burke. Burke had been in his (witness's) employ in the butcher's business. Witness had to get rid of the man because he came to the shop under the influence of liquor the day after his wife had disappeared. His wife had written saying that she did not intend to return to him. The accusations contained in her letter were untrue.

By the Court: Witness had not turned his wife out of doors, and told her to get her living as best she could. It was not true that he was the father of an illegitimate child.

Decree of restitution granted, defendant to return to the plaintiff on or before August 1, failing which, rule to issue calling upon her to show cause on August 13 why a decree of divorce should not be granted, personal service, failing which service by registered letter, and one publication in the "Melbourne Argus."

#### TOWNSEND V. TOWNSEND.

This was an action brought by Emily Kate Townsend, of Cape Town, against her husband, Samuel Robinson Tall Townsend, whose address is unknown, for restitution of conjugal rights, failing which a decree of divorce.

Dr. Rainsford was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Plaintiff said that she was married to defendant in October, 1882, at Kingston-upon-Hull, England. In 1890 they came together to this country, intending to live here. Witness went to England in 1898 on a visit. On her return, in October, 1899, she found that her husband had left Cape Town three days prior to her arrival to join Rimington's Guides. He sent her about £5 a month until September, 1900. The last letter that she received from him was dated Pretoria, August, 1901.

Decree of restitution granted, defendant to return to, or receive, the plaintiff on or before June 1, failing which, to show cause on June 11 why a decree of divorce should not be granted, service as before.



REHABILITATION.

Mr. Howes moved, under Act 38 of 1884, for the discharge from insolvency of Percival Lennox Birt.  
Granted.

GENERAL MOTIONS.

ABRAHAM V. ABRAHAM ( 1907.  
( Apr. 23rd.

Dr. Greer moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.  
Rule absolute.

EVANS V. EVANS.

Mr. Roux moved for an extension of the return day of a certain rule calling upon defendant to restore conjugal rights to plaintiff.

Return day extended, defendant to return to, or receive plaintiff, on or before July 1, failing which to show cause on July 12; personal service, failing which, one publication in the "Victoria West Messenger."

*Ex parte* LIEBENBERG.

Mr. Pohl moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* STEVENS.

Mr. Van der Byl moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* ESTATE DU PREZ.

Mr. J. E. R. de Villiers moved, on the petition of the surviving spouse and executor testamentary, for the appointment of a *curator ad litem* to her minor children to enable them to receive transfer of certain property in the estate of their grandparents.

Order granted appointing Johannes Carolus du Prez as *curator ad litem*, with full power to pass transfers.

*Ex parte* COLONIAL GOVERNMENT.

Mr. Louwrens moved for an order authorising the Registrar of Deeds at King William's Town to amend a certain deed of transfer of two pieces of land in the division of Komgha.

Order granted as prayed.

*Ex parte* ESTATE MULDER.

Mr. M. Bisset moved for an order sanctioning a certain agreement in which minors are interested.

Order granted as prayed.

INCORPORATED LAW SOCIETY V. PRETORIUS.

This was an application upon notice to respondent to show cause why his articles of clerkship should not be cancelled by reason (1) of his having entered into articles of clerkship while he was still on the roll of advocates, and (2) having appeared as an advocate in the R.M.'s Court at Steynsburg while serving under articles of clerkship.

Mr. P. S. T. Jones was for applicants; Mr. Burton (with him Mr. Pohl) was for respondent.

It appeared from the affidavits that the respondent made application on the 1st February last to be removed from the roll of advocates, and to count the service that he had already given under his articles. The Law Society said that under a misapprehension at the time they did not appear to oppose the application. The Chief Justice allowed the applicant to be removed from the roll of advocates, and directed the service that he had given to count.

[Buchanan, J.: I think, under these circumstances, the matter had better be referred to the Chief Justice to hear. The matter will be referred accordingly.]

DREYFUS AND CO. V. ESTATE ( 1907.  
NAPIER. ( Apr. 23rd.

Pledge—Cession—Insolvency—  
Proof of debt—Master and trustee—Sec. 108 of Ordinance.

*D. & Co. had proved upon the insolvent estate of N., and stated that they had security, viz.: a certain "pledge." This "pledge" was an order from N. on the Town Clerk of the Municipality of C. to pay to D. & Co. a certain sum from moneys alleged to be due to him from the Town Council for work and labour done. D. & Co. obtained judgment against the estate of N., but, on taking out execution, were informed by the Town Clerk that there was no money due and payable from the Council to N. The Master had meanwhile admitted the proof of*

*debt; but the trustee refused to recognize the claim of D. & Co. as preferent.*

*Held, that as the authority given by N. to D. & Co. to draw the money from the Town Council might have been revoked at any time, such authority was neither a pledge nor a cession, and hence gave no preference in insolvency: and that the trustee had acted rightly in refusing to recognize the claim of D. & Co. as preferent, the Master's decision notwithstanding.*

*In re Brink (1. Rosc, 305) followed.*

This was an application upon notice to the trustee in the respondent estate to show cause why the distribution account should not be amended, and why applicants' claim should not be brought up as preferent.

The affidavit of applicants stated that Napier's estate was sequestrated on 24th November, 1905, and that they had duly proved against the estate for their claim of £253 4s. 10d. Prior to the insolvency of Napier, the Cathcart Municipality were indebted to him in certain sums in connection with the erection of the Town Hall. On the 7th October, 1905, Napier was indebted to applicants in the sum of £210 19s. 8d., and thereupon Napier signed an order in their favour authorising the Town Clerk of Cathcart to retain this sum. Thereafter the applicants obtained an interdict in the E.D. Court restraining the Municipality from parting with the money to Napier pending judgment being obtained by applicants against Napier. Judgment was obtained on the 15th November, 1905, against the said Napier. Subsequent to the order given in their favour by Napier, applicants had incurred costs which brought their claim to £253 4s. 10d. Applicants said that they claimed as preferent by virtue of the order of the 7th October, 1905, and no objection was taken to their proof of debt. In the distribution account framed by the trustee applicants were only awarded a dividend of £24 0s. 11d.

The trustees, in an answering affidavit, said that when the alleged order was obtained the said George Napier was in a hopeless state of insolvency, and applicants must have been aware of this fact. The sole asset in the estate was the claim against the Municipality.

The applicants, in a replying affidavit, said that they believed Napier

was solvent when they obtained the order from him, and that after that time they supplied him with goods.

Mr. Upington was for applicants; Mr. Benjamin was for respondent.

Mr. Upington submitted that the document gave Dreyfus and Co. a hypothec over against the claim of Napier against the Cathcart Municipality. The document, combined with the action of the Municipality, constituted a valid pledge against the retention money. The trustee was wrong in his distribution account, more particularly as the proof of debt as a preferent debt was accepted until the distribution account should be amended so as to make the claim of Dreyfus and Co. preferent upon the moneys received from the Cathcart Municipality.

[Buchanan, J.: Is this document from Napier in any better position than a cheque upon a bank which the bank does not pay?]

Mr. Upington submitted that it was, and pointed out that the document authorised the Municipality to retain the money on behalf of Dreyfus and Co.

Mr. Benjamin said that his learned friend had argued that this document was a pledge, and he had advanced the alternative view that it should be regarded as an out and out cession. But the position taken up on the application was not that it was a cession, but a pledge. Before the Magistrate a proof was put in of this debt, accompanied by what was represented to be a pledge. When the trustee looked into the document he found that it was not a pledge at all, and he could not bring it up as preferent in the distribution account. Dreyfus and Co. claimed a preference upon what did not even purport to be a pledge. The trustee could only rank them as concurrent creditors, and this he had done under the 108th section of the Ordinance. All the elements of undue preference were present in this case.

[Buchanan, J.: I don't think that question arises now.]

Mr. Benjamin said that the document was not a pledge, and if it were anything it was an out and out cession, and this was not the procedure for establishing a claim of that kind.

Mr. Upington, in reply, cited *In re Baxson* (1 Roscoe, 369).

Buchanan, J.: The applicants, Dreyfus and Co., proved upon the insolvent estate of Napier for £250 odd. The affidavit for the proof of debt is in the form of a proof for an unsecured debt, but in this affidavit they say they have no security except the right to prove by virtue of a certain pledge annexed thereto. When we look at the pledge, which is annexed to the proof of debt, we find that it is in the form of an order by Napier on the Town Clerk of Cathcart, authorising him to

retain from the balance still due to him on his building contract the sum of £210, and pay this sum to Messrs. Dreyfus and Co. The moot question in this case is: Is this a pledge or a cession of the amount coming from the Municipality to Napier for the claim of Dreyfus and Co.? It is certainly not a pledge in the ordinary form, and as between Napier and the Town Clerk it is impossible to say on this document that Napier was precluded, between himself and the Municipal Council, from at any time withdrawing this authorisation to pay Dreyfus and Co. the amount. Dreyfus and Co. did not treat this as a cession to them, because if it had been a cession to them of their claim they need not have taken further proceedings, but, after this letter had reached the Municipality, they applied to the Eastern Districts Court for an order interdicting the Council from parting with this money until they obtained judgment against Napier. They took judgment against Napier, and thereupon they took out an execution, and a reply was afterwards received that "there is no money due by the Council to Napier; there is in our hands a certain amount of retention money, but this will not be payable for months to come, and there is nothing due now with which we can satisfy the debt." Dreyfus and Co. proved in the form I have stated on the estate, and Mr. Upington has referred to the case of *In re Basson* in which the Court laid down that a trustee is not authorised to reject altogether or treat as not having been proved any debt which the Master has once admitted. The debt has been admitted in this case, but when we look to the same volume of reports in which Basson's case appears, it appears that there is a case *In re Brink* in which two judges—the Chief Justice and Mr. Justice Bell—sat, and the creditors proved a debt which was admitted by the Master, but afterwards partially disallowed by the trustee. In this case we have a distinct conflict of opinion between the Court as to what should be done, and it seems to me that the 108th section indicates what the trustee should do in this case. He cannot reject the proof of debt, but when he frames the plan of distribution and awards the dividends on the proofs of debt, he must look at these proofs of debt, and give his award in the distribution account in the order of preference such as the parties are entitled to claim by law. I do not think he was wrong in disregarding this alleged pledge, instead of coming to the Court to amend the proof of debt. It might perhaps have been safer had the amount been a large one, or the funds in the estate allowed it, to apply to the Court, but judging from what has occurred in the cases I have quoted, and in other cases, it seems that the practice of the

Court does not compel him so to do. In a case under the same section of the Insolvent Ordinance, I see that the Court allowed a trustee to reduce the dividend on a proof of debt, where it was found that the creditor, though he had proved for a larger amount had received from another estate a dividend on account of the same debt. He was there, without coming to the Court at all, allowed to reduce the proof of debt in accordance with the actual facts of the case. I do not think, therefore, that I am bound to hold that the trustee in this matter should have applied to the Court. The question comes back, has there been a pledge or a cession of action? There clearly has been no cession of a claim of Napier upon the Municipal Council to Dreyfus accepted by the Council. If there had been such a cession, then the Council would be liable on the acceptance of such cession to have paid the claim of Dreyfus and Co. When we come to look at this document, it amounts to my mind to a cheque upon the bank. The bank may have moneys belonging to the debtor, and the debtor gives the creditor a cheque. In this case, as far as I can see, the funds in the hands of the Cathcart Municipality remained in their hands on behalf of Napier, and never on behalf of Dreyfus and Co., and I think I must refuse this application, with costs.

[Applicants' Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorneys: Wahl, Fuller and Le Klerk.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

MDLAZULWANA V. WADE. { 1907.  
Apr. 24th.

This was an appeal from a judgment of the Resident Magistrate of St. Mark's, sitting at Cofimvaba, in an action brought by appellant (Mdlazulwana) against respondent (Frederick Albert Wade) for delivery of a certain cow, or payment of its value (£6) and 30s. damages for trespass.

From the record, it appeared that there had been a previous case between the parties and that in consideration of the present appellant agreeing to give up and relinquish his claim to a certain

piece of ground, defendant was to give him a beast. Defendant said he caused a beast to be delivered at plaintiff's kraal, and otherwise denied liability.

The Magistrate elected to believe the evidence of defendant's witnesses in preference to those of plaintiff, and gave judgment for defendant, with costs on the first part of the claim and absolution from the instance on the second.

Mr. Louwrens was for appellant; Mr. W. Porter Buchanan was for respondent.

Mr. Louwrens having been heard in argument on the facts,

De Villiers, C.J.: The decision of this case depends entirely upon the question as to which witnesses in the case should be believed. It is quite clear that if the defendant's witnesses speak truthfully, the plaintiff had no case against the defendant. According to these witnesses, the black cow now in question was delivered at the kraal of the plaintiff to the wife of the plaintiff. It is said she wished to consult some other persons, but afterwards they say she said the cow might be left at the kraal. Then subsequently the plaintiff came to the defendant and asked for the beast, which had gone away from the place, and later the plaintiff was seen driving this very beast away towards his place, and afterwards his son was seen driving it. Now, if these are facts, there can be no doubt that there has been an acceptance by the plaintiff of this particular cow, which he now refuses to accept. It is said that the cow is both blind and lame, but the witnesses who took the cow to the plaintiff's kraal say that she was not either lame or blind at the time when the delivery was accepted, and the Magistrate thinks that if she were lame at all, although he doubts the lameness, it must have originated after the delivery. The blindness seems to be only a discolouration of the eye, and no such actual blindness as would justify the plaintiff now in rejecting this cow. In any case he had an opportunity, when he was driving this cow, of inspecting it, and if he exercised ownership by actually driving her towards his own house and instructing his son to do so, then it may be taken that he accepted the cow. Then with regard to the trespass, the only particular beast that can be said to have trespassed was this black cow, which had been left by the defendant's servants upon the plaintiff's property, and which remained there. Well, that is not a trespass. If there was a delivery of the cow for the purpose of fulfilment of the contract, there cannot be said to have been a trespass. For these reasons, I am of opinion that the appeal should be dismissed with costs.

Buchanan, J.: I concur. Upon the record there is ample evidence to justify the Magistrate's finding on the facts.

GREEN AND SEA POINT } 1907.  
MUNICIPALITY V. BECKER. } Apr. 24th.  
" 30th.

#### Municipal Acts—Owners' rate—Occupier's liability.

*In Dec., 1905, the plaintiff Municipal Council levied an owners' rate for 1906, payable on Jan. 16th, 1906. On May 1st the defendant became the occupier of certain premises within the Municipality, and on Dec., 1906, the plaintiff demanded from the defendant, who was still the occupier, payment of the owners' rate which had not been paid by the owner.*

*Held, that under the 135th section of Act 45 of 1882, the defendant, as occupier for the time being, was liable.*

*Held further, that the 12th section of Act 41 of 1899 did not relieve the defendant from such liability.*

This was an appeal from a judgment of the Resident Magistrate's Court of the Cape, in an action brought by the Green and Sea Point Municipality against Charles Francis J. Becker, to recover £14 6s. 5d., owners' rate for the year 1906.

The appellants sued respondent for £14 6s. 5d., with interest, being the amount of an owner's rate at 2½d. in the £ on Firmount House, Firmount-road, Sea Point, for the year 1906, due and payable on the 16th January, 1906. The owners of the property, Keyzer Bros., had not paid the rate, and the Municipality sought to recover from the respondent, who had been occupier of the house since the 1st May, 1906.

The Magistrate gave judgment of absolution from the instance, and, in his reasons, said that the action was to recover an unpaid landlord's rate duly assessed for the amount of £14 6s. 5d., due and payable on the 16th January on a property named Firmount, in Sea Point. It was sought to recover the sum from the defendant by reason of his being the occupier of the property since the 1st May, 1906. The defendant did not deny the assessment or other allegations of fact, but demurred to the claim, on the ground that the premises were not occupied by him until the 1st May, 1906, and that, therefore, he was not liable for the rate due on the 16th January of that year. It was admitted that the case had been brought under Act 45,



1882. The provisions of the 128th section did not apply, because of the terms of Act 41, 1899, Section 12. The sections appeared to him (the Magistrate) to refer to the person who was occupier for the time being. He was of opinion that, inasmuch as the occupier's responsibility or liability was fixed as from the 15th January each year, any person who was not proved to be the occupier on that date would not be held liable. He held that the defendant was not liable for the amount claimed.

Mr. Louwrens was for appellants; Mr. Gutsche was for respondent.

Mr. Louwrens (in answer to the Court) said that section 128 of the Act 45, 1882, did not apply to the Sea Point Municipality, section 12, of Act 41, 1899, being substituted. The rate in question was levied for the whole of the year 1906, and became payable on the 16th January. Proceeding, counsel quoted sections 125, 127, 133, and 134, of Act 45, 1882, and submitted that section 135 applied to the present case, and that respondent was liable under that section for the rate.

[De Villiers, C.J.: I suppose you rely upon the words "for the time being"?]

Mr. Louwrens: That is so. The Magistrate has held that these words must apply only to a tenant who has been in occupation for the whole period. Counsel went on to say that recourse was had to the tenant when the rates were three months in arrear, and the tenant had the power to deduct from the rent.

De Villiers, C.J., pointed out that that might operate somewhat unfortunately for a man who took a house for a month at Kalk Bay, for which the rates had not been paid, as the rates due may be a good deal more than the rent.

Mr. Louwrens, in further argument, cited *Human v. Barkly East Municipality* (16 C.T.R., 1,114), and quoted Stroud's Judicial Dictionary for a definition of "for the time being."

Mr. Gutsche said that the difficulty arose in this case, because of the conflict between the words "the occupier for the time being" in the 135th section of Act 45, 1882, and the words "occupier on the 15th January" under the later Act. The case cited by his learned friend was not apropos. Very wide powers were given to Municipalities under the Act, and if there were any question of conflict the Act should be construed rather in favour of the respondent than the Municipality. Counsel cited *Mossel Bay Municipality v. Holloway's Trustee* (3 Juta, 52).

Mr. Louwrens was heard in reply.

Cur. Adv. Vult.

Postea (April 30th).

De Villiers, C.J.: This appeal raises a very important question as to the nature and degree of a tenant's liability to the payment of the owner's municipal rates in failure of the owner to pay the same. The defendant became the occupier on the 1st of May, 1906, of the property known as Firmount House, belonging to Kaiser Brothers, and situated within the jurisdiction of the plaintiff Municipality. In the month of December of the previous year the plaintiff had levied an owner's rate of 2½d. in the pound, payable on the 16th of January, 1906, but when the defendant took occupation Kaiser Brothers had failed in the payment of the rate. On the 18th of December, 1906, the plaintiff demanded from the defendant the amount of the rate, namely, £14 6s. 5d., and upon his refusing to pay the same the present action was brought two months afterwards in the Court of the Resident Magistrate of Cape Town. The Court below held that, as the defendant was not the occupier on the 15th of January, 1906, he was relieved by the 12th section of Act 41 of 1899 from liability for the payment of the rate. In support of its claim, the plaintiff Municipality relies upon the provisions of the 135th section of Act 45 of 1882, which reads as follows: "When the owner of any rateable property has been rated in respect thereof and the rate remains unpaid for three months, the Council, or their collector, may, at any time within twelve months after the making of the rate, demand the amount of such rate or any part thereof from the occupier for the time being of such rateable property, and on non-payment thereof, may, after one month from the date of such demand, recover the same in like manner as rates may be recovered from any occupier liable to be rated. And every such occupier shall be entitled, subject to any agreement to the contrary, to deduct from any rent payable by him to such owner so much as was so paid by or recovered from him." The decision of this case must depend upon the meaning and effect of the words "for the time being" in the section just read. The Magistrate, in his reasons, says: "The section appears to me to deal with the person who is occupier for the time being, that is, throughout the whole period for which the rate is levied," but, however equitable such a construction might be, it would hardly carry out the intention of the Legislature as expressed in the language actually used. The Council may demand the amount of the rate from the occupier for the time being, and this can only mean the occupier at the time of the demand, whether he has been sued for the whole year or for part of the year. If it meant the occupier for the whole period for which



the rate is levied, it would in every case be necessary for the Council to delay making its demand until after that period, for until the expiration of the year for which the rate was levied it could not be known whether he had been an occupier throughout the whole period. In support, however, of his judgment, the Magistrate relied mainly upon the 12th section of Act 41 of 1899, an Act which has admittedly been extended to the plaintiff municipality. That section reads as follows: "Section 128 of Act 45 of 1882 shall not apply to any municipality coming under the operation of this Act, and in lieu thereof the following shall be substituted: The Council shall have power by its officers to require owners of property within its municipality to furnish the names of the tenants at least once a year, and oftener if required, and the person or persons, company or companies, in whom shall be vested the legal title in or the occupier or occupiers of any immovable property on the 15th January of each year shall be liable to the said Council for the rates for the whole year or period for which such rates are levied." The 128th section of Act 45 of 1882 deals only with the owners' rates due by owners, and with the tenants' rates due by the occupiers, and not with the owners' rates, which might, under the 135th section, be demanded from the occupier on failure by the owner to pay. The effect of the fresh enactment is that the person who is the owner on the 15th January of any year is liable for the owners' rates for the period for which they are levied, and the person who is the occupier on the 15th of January is liable for the tenants' rates for that period, but it leaves untouched the nature and degree of the occupier's liability for the owner's rates, which his landlord has failed to pay. For the reasons already stated, I am of opinion that if, in any case, the owner of property fails to pay the owner's rate three months after he has been rated, the Council may lawfully demand the rate from the person who is the occupier at the time of such demand, provided that such demand be made within twelve months after the making of the rate. It does appear to be in the highest degree inequitable that a person who becomes a temporary occupier during the year should take upon himself the liability for the payment of the owner's rate during that year, but that is a matter in which the Legislature and not the Court must be asked for relief. It should be observed that even if the 12th section of the Act of 1899 had the meaning applied to it in the Court below, it would still be most unreasonable that a temporary tenant should take upon himself the liability for the owner's rate for the whole year, merely because such occupier happened to be

in occupation on the 15th of January. In the face of the provisions of the Municipal Acts, the safest course for an intending tenant is not to take occupation of premises unless his landlord is prepared to hold him harmless in respect of any owner's rates which might accrue during his tenancy. It does not appear that such a precaution was taken by the defendant, who could have ascertained before taking occupation that the owner's rate had remained unpaid for more than three months. Whether or not he has been secured by his landlords he is, in my opinion, liable to pay the rate sued for. The appeal must therefore be allowed, and judgment entered for the plaintiff, as prayed, with costs in this Court and in the Court below.

The Chief Justice added that Mr. Justice Buchanan, who heard the case with him, agreed with the judgment.

Mr. Louwrens (for appellants) applied for interest.

The Chief Justice said that the notice asked for interest from April 17, 1906, but, inasmuch as the summons was silent about it, he could not allow interest.

Mr. Louwrens then applied for costs on a higher scale, so far as the Magistrate's Court was concerned. He said that the new rule provided for costs on a higher scale.

The Chief Justice: I know it does, but it is a case of very great hardship upon respondent, I am bound to say.

Mr. Louwrens said that he would not press his application.

The Chief Justice: It is a very hard case. I certainly think the Legislature ought to be approached to amend the law, because if Municipalities are going to take advantage of the 135th section, it would be very difficult for the landlords themselves to find tenants.

[Appellant's Attorneys: Van Zyl and Buissinné; Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLY.]

### PROVISIONAL ROLL.

MARSH V. ESTATE VILLA. { 1907.  
Apr. 24th.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £4,000, with interest and costs, less £64 19s. 6d. paid on account.

Order granted.

STEYTLER AND CO. V. OPLAND.

Mr. Howes moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

GENERAL MOTIONS.

*Ex parte* STEYTLER AND CO.

Mr. Howes moved for the appointment of Mr. H. A. Fagan as trustee in the estate of J. Opland, of Somerset Strand.

Order granted.

*In re* THE ECLIPSE MINERAL WATER COMPANY (IN LIQUIDATION).

Mr. D. Buchanan moved for the confirmation of the receiver's first report.

Order granted.

*Ex parte* ROSENBLATT AND DE BEER.

Mr. Benjamin moved for leave to sue one Venter by edictal citation on certain promissory notes, and to attach certain money in the hands of Wessels and Co., *pendente lite*.

Leave was granted, the citation being made returnable on May 14, personal service to be effected. Leave was also granted to attach the sum of £100 or less in the hands of Wessels and Co., *ad fundandam jurisdictionem*.

*Ex parte* LAWRENCE, LTD.

This was an application for leave to reduce the capital of the petitioning company.

Mr. P. S. T. Jones was for the petitioners.

The application was made under sections 35 and 37 of Act 25 of 1902. The company, who carry on business as manufacturers of confectionery and preserves, was formed in 1902 with a capital of £50,000. It was now sought to reduce the capital to £36,930, in terms of resolutions duly passed by meetings of shareholders. It was stated on affidavit that of that capital of the company, £13,000 had been lost, or was unrepresented by available assets. Only £26,930 of the ordinary shares were subscribed for, while £10,000 preference shares were issued. The memorandum of association of the company provided that reduction of capital might be effected by special resolution.

[Hopley, J.: How are the £10,000 preference shares affected by this?]

Mr. Jones: They are not touched; it is only proposed to reduce the ordinary shares.

Order granted as prayed.

*Ex parte* JANSEN.

Mr. Toms moved for leave to sue by edictal citation for restitution of conjugal rights. The petitioner was the husband, and he alleged desertion on the part of his wife, Sarah Margareta Janson (born Felanda). She was last seen six years ago in Cape Town, and her present whereabouts were unknown.

Hopley, J., said that he was not quite satisfied about this woman suddenly vanishing without anyone knowing anything about her. People who had lived for so many years in a place didn't usually go away without leaving some trace. It was desirable that there should be further inquiry, or that there should be some further proof of diligent inquiry.

Mr. Toms said he understood that a private detective had been employed without avail.

Hopley, J., said that was not before him.

Leave was granted to sue by edictal citation, the Court directing that inquiries be instituted and efforts made to serve the papers personally, failing which a further order might be applied for in Chambers as to substituted service.

*Ex parte* ESTATE CAMPBELL.

Mr. Howes moved for authority to the Registrar of Deeds to register a new bond for £500 on property in the estate of the late Pieter Campbell. Authority was asked in order that a new bond should be raised to pay off the old one.

Order granted.

FINKELSTEIN V. FINKELSTEIN.

This was an application made by the wife for (1) an interdict, and (2) for payment of money to enable applicant to institute an action for a decree of separation.

A rule nisi had previously been issued restraining the respondent from alienating certain property at Oudtshoorn pending action. The wife alleged drunkenness and cruelty on the part of respondent, that he had driven her and their five minor children from home, and that he had failed to support her.

Respondent, in a replying affidavit, denied all these allegations, and alleged that he was assaulted by his wife and eldest son. He had tendered his wife food and provisions. He declared he had no intention of alienating property; on the contrary, he had acquired more recently. If his wife refused to return to him, he was prepared to pay his wife such sum as she was entitled to under the contract entered into under a certain deed.

In the second case, the applicant asked for an order on the respondent for the payment to her of £50 to enable her to institute an action for judicial separation, and for the payment of £15 a month towards the support of herself and minor children during the pendency of the action.

Mr. Benjamin was for the applicant; Mr. Howes was for respondent.

Mr. Benjamin said the parties were before the Court in 1903. That case was reported in 1903 (13 C.T.R., 16). After that case, there was a reconciliation between the parties. It was not admitted by the husband that the parties were legally married.

Hopley, J.: In the applications before the Court, there are two matters to consider. The first is whether the rule nisi granted by me in Chambers at the beginning of this month should be made absolute or should be varied or set aside. In granting the rule on the original petition, I took into consideration the fact that if the respondent were entirely interdicted from dealing with any of his property, he might be deprived of his means of livelihood, and, of course, the petitioner's whole object would then be defeated, because he would not be able to make the money to supply her with alimony or with funds for the prosecution of this suit. I consequently interdicted the immovable property and also the movable property, save only as to that which may be necessary to deal with in the ordinary course of the respondent's business; and it seems to me he is protected by that same clause from any hardship. Nor does he, in his present affidavit, allege that any hardship has arisen or that his business will be hampered. In the absence of any allegation of hardship, I think this is a case in which one must assume that the parties are married, and that the woman has left her husband, not on any frivolous ground, but for good cause, and that she should be protected against possible absconding or chicanery of any kind on her husband's part. On these assumptions, it seems to me that the woman should be protected and that the only way to do this is to make the rule absolute. The other application is one made also by the wife for maintenance for herself and children, and for a certain amount of money from what she alleges to be their common estate for the purpose of instituting an action for separation which she wishes to bring. The amount of £50 asked for seems to me to be rather large, but it is obvious from one of her affidavits that she contemplates, in fixing this amount, the possibility of having to bring witnesses to Cape Town from Oudtshoorn to prove her case. If that were so, £50 would not be too much, but I see no reason why

the case should not be settled at the next Circuit Court at Oudtshoorn. In that event, I think a sum of £30 would be sufficient, and the Court will, therefore order that the respondent pay to the applicant the sum of £30. A further amount may be necessary, if on the advice of counsel, it is essential to prove, on foreign commission, the state of the marriage laws in that part of Russia from which these people came and were married. In that case, when an application for a commission is made, this matter of special costs may be again referred to, and possibly a further amount for the purpose of carrying on this part of the case may then be ordered to be paid. As to the payment of money for the maintenance of the wife and the children pending action, the Court will order that the respondent pay a sum of £10 per month. His Lordship added that he would suggest that the case be tried at the next Circuit Court at Oudtshoorn. Leave would be granted to move for payment of a further amount, if special expenditure were necessary, in order to prove the marriage. Costs of this application would be costs in the cause.

#### COMBRINK V. HASSFORTH.

This was an application for the appointment of a third arbitrator under Act 6 of 1882.

It appeared that the parties live in the Vryburg district, and a dispute had arisen concerning the construction of a sentence in the award as between the properties of the parties. Each of the parties had appointed an arbitrator, and petitioner now desired the Court to appoint either the Resident Magistrate of Vryburg or Mr. William Crosbie, M.L.A., as third arbitrator.

Mr. Benjamin was for the applicant; Mr. Burton was for the respondent.

Mr. Burton said that the parties both agreed to the appointment of the Resident Magistrate. The respondent's contention was that this was agreed to in ample time to have obviated the necessity of coming to the Court. The issue was therefore one of costs.

Mr. Benjamin said that notice of motion was given before the respondent agreed to the appointment.

Affidavits were read embodying the correspondence between the parties on the point. The respondent agreed to the question of the costs up to the notice of motion being left to the arbitrator's judgment, providing that no further proceedings were taken and no further costs incurred in going to Court. Applicant took up the position that there should be a formal signature by respondent to documents agreeing to the appointment of the Resident Magistrate of Vryburg, and agreeing to the costs being left to the arbitrator. Unless this were done, the applicant said he feared that further trouble would ensue.

Mr. Benjamin, in argument, referred to section 3 of Act 30 of 1883, and urged that the respondent's delay in agreeing to accept the Resident Magistrate as the third arbitrator forced the applicant to take these proceedings. It was, he contended, perfectly reasonable for the applicant's attorney to ask the respondent to sign a consent paper, in which event the matter could have been brought formally before the Court and an order obtained for the appointment. It was not until all the papers were down here and were ready to be placed before the Judge in Chambers that the respondent agreed to the appointment. He submitted that in the circumstances the respondent should be ordered to pay the costs of this application.

Without calling upon Mr. Burton,

Hopley, J., said that after the position which was arrived at on the 19th of April, there was no necessity to come to the Court at all in the matter. At that time the parties had agreed upon the appointment of Mr. Roberts, the Resident Magistrate, as a third arbitrator, and they had agreed also that the costs which had been incurred up to that time should be left to the discretion of the arbitrators. There was, therefore, no need to have forced the matter to the point of coming to the Court, but that had been done, and the Court had now to make an order for the appointment of the third arbitrator, and also an order as to costs. The Court would order that Mr. Roberts be appointed the third arbitrator. With regard to the costs, it appeared that up to the 19th April there were negotiations by both sides, and it seemed to him that up to that time each party was equally responsible for not having brought matters to a head. As to the costs up to that period, therefore, he thought each party should pay his own costs. After the 19th April there was no necessity to go any further. If, after that, the position having been arrived at which was arrived at on the 19th April, the arbitrators already appointed had neglected or refused to appoint Mr. Roberts, then there might have been cause for the parties to go to a Judge in Chambers, and ask him to appoint Mr. Roberts. But apparently it was thought better by the applicant to come to the Court. He saw no reason for such application to the Court, and it would therefore be ordered that the applicant pay the costs subsequent to the 19th April.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and a Jury.]

REID AND CO. V. LOGAN. { 1907.  
Apr. 25th.  
" 26th.  
" 29th.

Building contract—Building proprietor's responsibility for "extras"—Quality of work—"Retention money."

This was an action brought by A. B. Reid and Co., of Cape Town, against the Hon. J. D. Logan, M.L.C., to recover £500, being retention money under a certain building contract, and £59 4s. 3d., being the balance of certain extra work.

The plaintiffs' declaration set out that in April, 1905, the plaintiffs and defendant entered into a contract in writing whereby the plaintiff, as contractor, undertook to erect the Masonic Hotel, at Beaufort West, for the defendant as employer for the sum of £8,000, and a copy of the contract was annexed. The defendant agreed to make payments to the plaintiffs from time to time upon the certificate of the architects, Parker and Forsyth, who were engaged for the supervision of the work, and payments were made from time to time upon their certificates, amounting to £6,250. Thereafter, the last of the certificates by the architects was granted on the 7th February, 1906. The defendant, after action was brought against him, paid the amount of the certificate, but, at or about the time of payment, he terminated the engagement of the architects. On the 11th February, 1906, the work was completed, and the premises were handed over to the defendant, and had since been in his occupation for more than four months. In accordance with the contract, the defendant was entitled to retain 5 per cent. on the contract sum, that was £400, until the expiration of four months after completion, and the defendant retained and held, in fact, £500, being the balance of the agreed contract sum of £8,000, after deducting the payments amounting to £7,500, and the defendant was indebted to the plaintiff in the sum of £500. The defendant was also indebted to the plaintiff in the sum of £59 4s. 3d. for extra work done in connection with the contract.

The defendant, in his plea, denied that the contract was in writing, and said that it was verbally made. Long after the contract had been completed,



and when the work was well advanced, plaintiffs, for the first time, submitted for defendant's signature a document as being the contract between the parties, but the defendant refused to sign this. He denied that the annexure to the declaration correctly set forth the terms of the contract. Many of the provisions in the annexure were never discussed between the parties. It was part of the contract that there should be no variations, omissions, or additions made to the specifications without the written authority of the architect, with the approval and consent of the defendant, and he specially denied that it was any part of the contract that there was to be any reference to arbitration. It was part of the contract that the work should be completed by the 31st December, 1905, and that the plaintiffs were to pay the defendant the sum of £10 per week as liquidated damages for all time taken to complete the work after that period. The work was to be done upon the conditions stated, and in accordance with the plans and specifications prepared by the architects, Parker and Forsyth, with a special exception as to the clause in the specifications relative to old materials, which clause was by mutual consent deemed not to be in the specifications. He admitted that it was agreed, and that it was a term and condition precedent of the contract, that all payments should be made upon architects' certificate, and that no payment could be claimed until production of such certificate; and defendant further admitted that Parker and Forsyth were originally engaged by him for the supervision of the work, and that £6,250 was paid upon the certificates of the said architects. It was a term of the agreement that the building should be handed over to him complete on the 31st December, 1905. Prior to the said date defendant and the clerk of the works repeatedly complained of the class of work being done, and of the negligence and delay of the plaintiffs in and about the execution of the contract. Owing to the defendant's reasonable dissatisfaction with the manner in which the architects had discharged their duties in connection with the supervision under the contract, the defendant, on the 25th April, 1906, with the acquiescence of the architects, cancelled their agreement in connection with the contract. Thereupon the defendant forthwith appointed another architect, one A. T. O'Brien, in the place of the said architects, for the purposes of this contract, and gave due notice thereof to plaintiffs. Under the agreement, the plaintiffs had first to proceed with the alteration of certain portion of the old premises, and that after making certain temporary arrangements such portion had to be, and was, handed over to the defendant to

enable him to carry on business therein while plaintiffs proceeded with the main work of the alterations. Prior to action brought, the work under the contract had not been completed, nor had the buildings been handed over, nor had he been in occupation of any portions thereof, save as stated. He denied that he was indebted to plaintiffs in the sum of £500 or any portion thereof. No authority of the defendant and no written authority of the architects had been given to plaintiff in respect of the alleged extras. Defendant did not admit that the plaintiffs called upon him to comply with the provisions of the alleged clause 22 of the contract as pleaded in the declaration, but admitted that a suggestion was made by plaintiffs and refused by defendant relative to the appointment of an architect to settle certain matters in dispute. The defendant further said that he was not in law bound to submit the matters in dispute herein to the decision therein suggested. He had repeatedly, without success, endeavoured to arrange for a joint inspection of the work by plaintiffs, defendant, and an architect with a view to settling the differences. The action was premature, as the condition precedent referred to had not been complied with. The plaintiff had not received the necessary certificate in respect of either of the amounts claimed in the declaration, and no final certificate had been made. The action was premature in that plaintiff had not tendered and did not tender to hand over the premises, and according to the contract the balance now claimed was not due or payable until four months after the completion of the work. Such balance the defendant was entitled to under the contract to hold as retention money, it being an obligation on the plaintiff under the contract to make good and rectify any defects, shrinkage, and faults which should appear during this period. The work was not completed, and such defaults, shrinkage, and defects had appeared during the period since the date when plaintiffs allege the contract was completed, and they had not since been rectified. The defendant was entitled to a reduction of £1,000 from the contract price in respect of materials and work badly done, or omitted, or not done or provided in accordance with the contract, and this amount far exceeded any amount to which plaintiffs might be entitled in this suit. For a claim in reconvention the defendant said it was agreed between the parties under the contract, that in case the work was not completed on or before the 31st December, 1905, the defendants in reconvention should pay or allow to plaintiff in reconvention as and by way of liquidated and agreed damages, the sum of £10 per week until the premises were duly handed over. The plaintiff in reconvention suffered, and is



suffering, damages at the rate of £10 per week, and is entitled to such damages up to the date upon which he shall receive the premises. He claimed: (a) An order requiring the defendants in reconvention to hand over as soon as possible the said buildings and premises duly completed according to contract; (b) payment of £10 per week as and for damages as aforesaid up to the date of such handing over; (c) payment of the balance left after taking from the sum which plaintiff in reconvention is entitled to for deductions (as in paragraph 14 of the plea set forth) such portion of the contract price as defendants in reconvention are (if at all) otherwise entitled to; (d) alternative relief; and (e) costs.

The replication was general.

Mr. Upington (with him Mr. Swift) for plaintiffs. Mr. Close (with him Mr. Bisset) for defendant.

A. B. Reid, of the firm of A. B. Reid and Co., said that he tendered £8,449 for rebuilding the Masonic Hotel, Beaufort West. He reduced this to £8,000 by making a few alterations. Arrangements were made with Parker and Forsyth, not with defendant. The contract with the architect was left with the latter; the terms of the contract were never disclosed to Logan. Eventually defendant refused to pay £1,250 on the last certificate of the architects, and action had to be taken. It was then plaintiff found that Mr. Logan had not signed the contract. No complaints had ever been made about any defective work, delay, or anything of the kind. At length an inspection of the building was made, when Mr. Logan made no complaint with regard to delay in building. A couple of little objections were raised by Mr. Logan, but he said that he was very well satisfied with the appearance of the place. In January a complete inspection was made by witness and Mr. Forsyth. He was quite prepared to have all the matters in dispute referred to any impartial architect or referee to be agreed upon or appointed by the Court. Witness was not prepared to accept any architect whom Mr. Logan wished to appoint. He was never consulted as to the appointment of Mr. O'Brien.

Cross-examined by Mr. Close: The tender was sent in on plans and specifications which he saw at the architects' office. He did not remember any interview with the defendant after he sent in the amended tender. At the interview which he believed was prior to this, he did not remember the date of completion being fixed. The defendant was emphatic that the price should not exceed £8,000. There was no reservation that the contract should be reduced to writing. He was aware that clauses put in by the architects varied very much as to the duty of the builder to have written orders for extras.

X

John Parker, architect, practising with Mr. Forsyth, and who was appointed to superintend the work, stated that Mr. Wilkie was employed some two years before by witness as clerk of works. At the time in question Wilkie was out of employment, and witness recommended to Mr. Logan that Wilkie was a good man—he was a relative of Mr. Logan's—and that he should be sent to Beaufort West to superintend this work, and that witness and Mr. Logan should pay the salary between them. At the interview Mr. Reid agreed to let Mr. Logan have the old material if he took it down himself. If anything else had been discussed at the interview he would have noted it down. Reports were furnished by Mr. Wilkie that the matters which witness required to be adjusted at the beginning of February were done. On the 14th February the work was completed according to contract, and witness was prepared, if he had not been superseded, to certify to that effect. The building was carried out in a very speedy manner indeed. Some of the extras were authorised after instructions from Mr. Logan and some were carried out by Wilkie upon instructions by Mr. Logan on the spot. On the 18th August he wrote to A. B. Reid and Co., ordering certain extras which had been authorised by the defendant. The builder carried out the steel work according to the plan. Generally speaking, the building was a good one for the money.

Cross-examined by Mr. Close: He took up the position that it was his duty to interpret the contract. The defendant refused to sign the contract because there was nothing down in black and white that he would get the old material, although witness offered to insert a clause to that effect.

At this stage, on the question of whom Wilkie represented, Mr. Close asked leave to call the defendant.

Mr. J. D. Logan stated that Wilkie got all his instructions from the architect.

Cross-examined by Mr. Upington: He paid Wilkie because he wanted to see the work carried out. Wilkie was a relative of his, and he tried to assist him. There was a good deal of charity in the matter.

Buchanan, J., held that any communication between Wilkie and Logan was evidence.

Alexander Forsyth, partner with John Parker, also gave evidence on behalf of the plaintiffs.

Walter Harold Leach, master carpenter, stated that from November, 1906, until the middle of February, 1906, he was foreman in the employ of the plaintiffs in charge of the job. Up to the 21st December there was no complaint made

by anyone. On that date certain matters were remedied at the request of Mr. Parker and Mr. Reid. Subsequently other matters were remedied at the request of Mr. Forsyth. On the 14th February witness was the last man to leave the job, and then he handed the key of the front door to the clerk of works. From the early part of October the manager was in occupation of portion of the building. There was some delay in the work, caused by the removal of the bar from the old place to the new. The defendant took a week to take down the old woodwork, which could have been done in a few days.

Cross-examined by Mr. Upington: When Mr. Logan wanted anything altered, or expressed his views on any matter, he expressed them to Mr. Wilkie, and Mr. Wilkie informed witness, and in the cases of the flag pole and the shelves in the sample room witness took instructions alone from Wilkie. He had no idea whether these were communicated to the architect. The key was handed over to Wilkie, as representing the defendant and the architect.

At this stage Mr. Upington closed his case, subject to the right to call rebutting evidence on the claim in reconvention, if his lordship should think necessary.

Hon. J. D. Logan, defendant, stated that the interview referred to between him and Messrs. Parker and Reid took place on the 4th April. At the meeting witness stipulated that the building, which was to cost no more than £8,000, without any extras, was to be finished by the 31st December. A penalty for non-completion was fixed at £10 a week, and witness agreed to pay portions of the £8,000 on the architect's certificate as the work progressed. He could not say whether anything was said about defects showing themselves after the period of completion. At that meeting everything was completed.

At this stage Mr. Upington wished to know what the witness was giving his evidence from.

Witness: Only the dates—my secretary's record of the dates.

May I look at it?—Yes.

Mr. Upington, after glancing at the document, asked his lordship to look at what the witness called a memorandum of dates. Counsel said it was a long statement.

[Buchanan, J.: You are really giving your private secretary's evidence.]

Mr. Upington: I will ask the jury to look at the memorandum of dates.

[Buchanan, J.: Do not show it to the jury. It is a statement by the private secretary.]

Witness: I cannot recollect the dates.

[Buchanan, J.: Refer to your secretary for dates.]

On the 2nd September, witness sent a wire complaining of the delay, to Messrs. Parker and Forsyth. A couple of days later he made a further complaint at the office of the architects. He had said that he was satisfied with the stone-work, but he altered his mind when the weight went on. He had never seen such a wretched job as the cement work. It was a disgrace to any white man. If anyone walked over the stoep the cement crumbled like dust. He expressed his disgust at the way in which the work had been carried out. As to the plastering, the wall in the morning had the appearance of a person with a bad attack of small-pox. The building was not finished yet. Witness notified Messrs. Parker and Forsyth that he was appointing another architect, because they had not inspected the work. He endeavoured to get the plaintiff and the architects to go up to Beaufort West with him when he finally brought Mr. O'Brien. The building was more like a flour mill than a hotel. When he visited the place he found workmen chopping off plaster off the walls in the bedrooms with spades, and putting wedges in each side to prevent the building from falling. The tiles, which were of indifferent material, were badly laid. It would have been absolutely impossible to carry on business there on the 7th May. Wilkie had no authority to receive the keys for him, and he had no communication from the contractor or architects that this was done. Witness had called for tenders for the furnishing, which had to stand over on account of the delay in completing the building.

Cross-examined by Mr. Upington: Witness had not got his back up, he wanted his hotel up. It was not his idea to put the plaintiffs to as much expense as possible. So long as a person was appointed by the court he had no objection to a reference in the matter. He could not recollect whether the period of maintenance was mentioned at the interview. He did not remember any reference to the interest to be paid to the contractors at the interview. He refused to pay on the certificate for £1,250, because in his opinion the building was not going on satisfactorily.

Do you contend that Messrs. Parker and Forsyth acted in bad faith toward you?—I cannot say what the faith was.

Do you say they made an honest mistake?—I say the building has never been finished. It was their duty to see it was finished.

Through whom was the key of the Ceres Hotel handed over to you?—We are not discussing the Ceres Hotel now.

Did you receive the key from Messrs. Parker and Forsyth?—I do not know.

Who keeps the notes?—My secretary.

Oh! the secretary, he keeps the notes?

Witness: I should like to explain that I did everything I could to assist Mr. Reid. I gave him four rooms and a large store, and never charged him a penny for it.

Herbert Kitson, private secretary to the defendant, said he arranged the meeting between Messrs. Parker, Reid, and defendant, to settle the contract. When he entered the room Mr. Logan was explaining that he wanted the old iron and timber for the erection of some native location, and Mr. Reid agreed to this. He heard it stipulated that the job was to be a first-class one, and was to cost £8,000. There were to be no extras. Mr. Logan was very emphatic about this. Witness understood the tender was accepted that morning. On the 2nd September witness and Mr. Logan went to Beaufort West, and the latter, finding the carpenters idle, complained bitterly, and wired to Messrs. Parker and Fersyth. Witness gave evidence as to the defective nature of the work. He had trouble in getting the architects to go up and view the work, and, finally, Mr. O'Brien was appointed. On the 6th November the concrete was worse than before. The front stoep had been relaid, even the new stoep was much cracked. The tiled floor in the front hall was badly laid. From the time of the architects' letter that the work was practically completed, it was not in his opinion satisfactorily completed. The objections, to his mind, were substantial.

Cross-examined by Mr. Upington: About the end of October the defendant moved into the place. In his opinion the hotel was the best one in Beaufort West, but the price was a big one. Nothing had been done to remedy the defects. The hotel business was going on. Witness did not purport to give evidence as to the actual agreement, as he was not present all the time at the interview between the defendant, Mr. Parker, and Mr. Reid. The contract for the Ceres-road Hotel was signed by the contractors, but not by the defendant. Witness could not explain why the defendant did not sign that contract, and he was not very much surprised when the defendant did not sign A. B. Reid's contract. The only extras which Mr. Logan did not authorise were the tanks. The defendant at the interview said the old material was to belong to him, but he said nothing of the date of completion, the penalty, or the period of maintenance. On account of Mr. Parker's refusal to go up to Beaufort West, Mr. O'Brien was brought up with the defendant and witness. All he knew was the cement was cracked.

Re-examined by Mr. Close: Witness had no idea that the contract was to be reduced to writing. The visit was not made to Beaufort West for the express

purpose of finding fault with the building. The tone of the defendant's letters right through was to get representatives of the architects and builder on the spot. Out of twenty-two, seven rooms had to be re-plastered, re-painted, and re-tinted.

Arthur T. O'Brien, architect, of Cape Town, who at the request of the defendant went to Beaufort West to inspect the premises, stated the premises generally were not fitted for an hotel. The concrete and cement work was badly cracked. To put the cement work in a proper state would be a serious interference with the occupation of the hotel. With the exception of upstairs, and in the bath-rooms the tiling seemed to buckle up a good deal. Witness made a report of several defects, and he forwarded a copy of it to the architects and at the same time informed the plaintiff that he had done so. He proceeded to give evidence on the several items he complained of.

Cross-examined by Mr. Upington: In June Mr. Wilkie was the defendant's representative as clerk of works. On the 17th March the defendant instructed Wilkie to remain on the work.

Mr. Truter, J.P., stated when he visited the premises in May he saw workmen taking plaster off the walls with spades. The cement floors were badly cracked, and the stoep was crumbling. Generally speaking, the cement was bad work. The walls shook when a person walked across the floor. There was blistering all over the building. When he re-visited the building in September he noticed the stoep had been re-laid, but it was again crumbling. There was no improvement in the other cement work, and the building was in a general mess.

Cross-examined by Mr. Upington: He did not know of a single visitor being scared away from the hotel through the cracks in the walls.

Mr. G. Ransome, architect, who at the request of the defendant made an examination of the building, stated the cement floors were very much broken and cracked. To fulfil the requirements of the specifications the floors would have to be taken up and re-laid. Witness in detail specified the various defects.

Cross-examined by Mr. Upington: Cement was liable to crack in hot climates.

G. W. Payne, formerly manager at the Masonic Hotel, also gave evidence as to the state of the building.

Mr. Close closed his case.

On the claim in reconvention,

Mr. Upington called,

John Glasgow, painter and decorator, who had been in the service of the plaintiffs since October, 1903, and who was in charge of the painting and decorating of the building. What the clerk of works requested him to do he

did. The clerk of works raised no objection to witness's work.

Counsel having addressed the jury on the facts, and His Lordship summed up.

The jury retired at 4.20 p.m., and returned seven minutes afterwards with a verdict for the plaintiffs in the amount claimed, £559 4s. 3d., with interest and costs.

Judgment was entered accordingly.

[Plaintiff's Attorney: G. Trollip. Defendant's Attorneys: Van Zyl and Buis-sinnie.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

OTTERSTROM V. ESTATE { 1907.  
STEPHAN BROS. { Apr. 25th.

Negligence—Duty of shipowner—  
Injury—Fall of derrick.

*The plaintiff, being coxswain of a lighter into which a cargo was being unloaded from a ship belonging to the defendant, stood underneath a derrick which was being used on the ship to unload the cargo and which fell on his head, causing considerable injury. The strop which attached the derrick to the mast was found to be rotten, and there was sufficient evidence that its bad condition was the cause of the fall of the derrick.*

*Held, that it was the duty of the shipowner to keep the derrick in proper condition, and that as the plaintiff had been lawfully standing on his lighter under the derrick, he was entitled to recover damages for the injury.*

This was an action for damages for injuries alleged to have been sustained by the plaintiff as a result of the defendants' negligence.

The declaration set forth that the plaintiff was a lighterman by occupation, and was formerly a coxswain on a lighter at Port Nolloth, belonging to the Cape Copper Company. On the 10th April, 1905, the plaintiff, while employed to assist in unloading and removing certain cargo from the steamship Aurora, belonging to the defendants, was struck down by a derrick,

which became unfastened and fell down owing to the carelessness and negligence of the defendants or their servants in not having properly secured it to the mast. Plaintiff claimed £1,000 damages.

Defendants, in their plea, alleged that whatever injuries were sustained were due to the plaintiff's own carelessness in standing under the derrick, where he had no right to be. The derrick was properly secured before the work was commenced, and its fall was the result of an accident, and was not due to the negligence of the defendants or their servants. The defendants further pleaded that the plaintiff was, on the occasion referred to, in the employ of the Cape Copper Company, and that even if he sustained any damages, such damages were recoverable, if from anyone, only from his said employers and not from the defendants. It was denied that the plaintiff had suffered any damages for which the defendants were liable.

Dr. Greer (with him Mr. Van der Byl) was for the plaintiff; Mr. Burton (with him Mr. Gardiner) was for the defendants.

Henning Otterstrom, the plaintiff, said he was thirty-one years of age, and lived at Newlands. He was coxswain of a lighter in the employ of the Cape Copper Company at Port Nolloth, and was landing cargo from the defendants' boat, the Aurora, in April, 1905, when the accident occurred. He was rendered unconscious and woke up in hospital, where he spent thirty-one days, and was altogether eighty-four days away from work. The medical fees were £47. Witness was receiving 7s. 6d. a day, and although the Cape Copper Company had given him light work, his wages were now only 6s. a day. His strength was gone, and he had great pains in the back, while his memory had been affected, all as the result of the accident. He was originally a sailor and had been employed at the Pier Head, Cape Town, and on Robben Island.

In cross-examination by Mr. Burton, plaintiff said his capacity for lifting heavy weights had been affected. As far as witness knew he was going back as foreman. He was walking about, unable to work, for a long time subsequent to the accident. He always had a pain in his back.

Mr. Burton: You have always got it?

Witness: Always.

A bad pain?—Yes.

Is your back stiff?—Yes; I have a funny feeling. Sometimes I feel I don't care what happens to me.

In further cross-examination, the witness said the derrick was too short; he could not say by how much it was too short. If the derrick had been long enough, he would not have stood where he did.

Mr. Burton was proceeding to cross-examine the plaintiff as to whether he



did not consider it unsafe to stand where he did—under the derrick.

De Villiers, C.J., said it seemed to him that the main question was whether the derrick was safe or not. Surely counsel was not going to contend that because he stood where he did it was negligence?

Mr. Burton: Well, in view of what your lordship says, I don't feel able to contend that the mere standing there was contributory negligence.

[De Villiers, C.J.: You see, he is on his own lighter, and he is entitled to be on any part he likes. The main question is whether the derrick was in safe condition or not.]

Mr. Burton: The defence was raised in the plea, but in view of your lordship's expression of opinion I don't press it.

In answer to further questions by Mr. Burton, plaintiff said that defendants made him an offer of £125 and costs before coming into court.

[De Villiers, C.J.: You don't tender that in your plea?]

Mr. Burton: No, my lord.

Dr. F. H. Wessels, of Cape Town, deposed to having made an examination of plaintiff. He described the tests made to ascertain the plaintiff's condition, and detailed the results. There was, he said, a danger of an aggravation of the present symptoms. At the present time, the plaintiff, in witness's opinion, had not the brains for hard work. Witness did not think there was much chance of the plaintiff being restored to the condition in which he was prior to the accident.

Dr. Griffin, who examined the plaintiff immediately after the accident, also gave evidence. He said he would be very greatly surprised if the man got right.

Evidence was given bearing out the allegation on behalf of the plaintiff that a wire rope attached to the derrick was unfit for its work, and consequently broke. Defendants ought to have seen that it was serviceable. It should have been examined about every two months.

The plaintiff was given the character by several witnesses of being a first-class workman before the accident, while it was stated in evidence that he could no longer be employed as a lighterman. One of the witnesses described the present condition of the derrick in question as rotten. It must, said the witness, have been also rotten when it broke.

Dr. Groer closed his case.

Carl Kuriending, mate of the Aurora at the time of the accident, was called. He said he was standing under the derrick when it fell. It did not strike him. The gear of the Aurora was overhauled at Table Bay before the accident, and the service of the strop was then all right. A couple of incisions were made in the service, and the metal inside looked

bright and in good order. Witness was satisfied by this examination that the derrick was safe, and that he could stand under it, as he was in the habit of doing. This was about a month before the accident. Witness's theory was that the derrick might have been broken by a jerk. The derrick had decayed with rust since it was taken from the ship.

Mr. Burton said it might save time if he now said that during the interval he had discussed the case with his clients. His lordship would doubtless see the position in which the defendants were placed. They were the executors of an estate, and, of course, they were not in a position simply to accept any claim upon the estate; but they fully recognised that in the circumstances the burden of disproving negligence in the claim rested upon them. They had considered their position, and had come to the conclusion that the wisest course now would be to say they did not propose to contest further the question of liability. It was not, of course, admitted that there was any gross negligence.

Evidence was then led on behalf of the defendants on the question of the amount of damages.

Dr. Eric France gave it as his opinion that the plaintiff's memory was not bad, and that he was an intelligent man. There was no sign of mental weakness. Witness did not think that the plaintiff was voluntarily malingering when he came to see him. At first, plaintiff professed to be unable to stoop, but on witness distracting his attention and telling him suddenly to take off his boots he bent down and did so without difficulty. This did not convey to the witness that the man was deliberately malingering; it might be that the man really believed he was stiff, and that he did this subconsciously. Plaintiff was not so bad as he thought he was, and witness considered he could throw off this belief in his weakness. Witness saw no reason to anticipate permanent injury, nor to think that plaintiff's capacity for the work he had done previously would be permanently impaired. He thought plaintiff could shake off the obsession and gradually become as able-bodied and minded as before.

After having heard counsel in argument.

De Villiers, C.J.: The plaintiff in this case sues the defendant for the sum of £1,000 for damages sustained by reason of injury done to the plaintiff, by the alleged carelessness of the defendant. The accident happened in this way: The plaintiff was coxswain on board a lighter, and the lighter was lying alongside the ship Aurora, of which the defendant was the owner, and while some grain was being unloaded from the Aurora on to the lighter, a strop to which the derrick was attached gave



way, and the derrick fell on the plaintiff's head, causing him to lose consciousness and inflicting, in my opinion, very serious injury upon the plaintiff. The defence raised by the plea was to the effect that whatever damage was suffered by the plaintiff was due to his own carelessness and negligence in standing under the said derrick, where he had no right or duty to be. In the course of the case, I pointed out to learned counsel for the defendant that the plaintiff at all events had a right to stand on the lighter, of which he was the coxswain, and he was justified in assuming that the derrick which was being used on board the *Aurora* for the purpose of unloading the cargo on to the lighter would be sufficiently strong as not to come down upon his head; and it appeared to me a most extraordinary defence to set up that, because this man was under the derrick, which he was entitled to believe was secure, he is not entitled to recover by reason of contributory negligence. And, strangely enough, the very first witness called for the defendant was the mate of the *Aurora*, and one of the first questions asked of him was whether he stood under the derrick; and he said he stood under the derrick, and had done so all along, because he believed it was perfectly safe. Well, counsel saw this defence could not be maintained, and he very properly abandoned it. Then the next question which arose in the case was whether the fall of the derrick was occasioned by the negligence of the defendant. When I speak of the defendant I mean the original defendant. He has died, and it is the executor the Court now has to deal with. Well, the strop itself was produced, and it required no further evidence than the production of the strop to satisfy the Court that there must have been negligence on the part of the defendant to cause the derrick to give way. Expert witnesses have been called who have examined this strop, and they are quite satisfied that, even allowing for the two years' rusting and standing exposed to wind and weather, this strop must have been, two years ago, in a perfectly worthless condition. I am quite convinced that if the defendant had done his duty properly, and examined the strop from time to time, this accident would not have occurred. The mate says he examined it about a month before the accident, but he is not sure of the date, and it may have been considerably more than a month before; and my opinion is that if this strop had been examined within a fortnight before the accident occurred, the defendant would not have continued to use it for the purposes of a derrick which was to hoist great weights. It seems to me that of all parts of the ship this was one of the most important and necessary to keep in order. Continually persons

are exposed to the danger of this derrick falling upon them, and I should think it must be clearly the duty of the ship-owner to see that the derrick and the appliances to which it is fastened are in such condition as to involve no danger to the lives or limbs of persons who have to work in the neighbourhood of the ship. In my opinion, this strop was in an wholly inefficient condition, and it was due to the negligence of the defendant in not keeping the strop in proper condition that the accident happened to the plaintiff. That, also, was admitted by counsel for the defence, after he had heard what an intelligent expert witness for the plaintiff had to say upon the question, and the case ultimately resolved itself into a question of damages. On this question, the evidence of the medical men must of course have considerable weight with the Court. Now, it does not seem to me that there is a very serious difference between the doctors who have been called on behalf of the plaintiff and the doctor who has been called on behalf of the defendant. Dr. France admits that the nervous condition of the plaintiff has been considerably weakened by reason of this accident. He candidly admitted that an accident of this kind, causing concussion of the brain and causing a very serious shock to the nervous system at the time when it happened, might, for a time at all events, considerably weaken the nervous condition of the patient, and might also considerably affect his will-power. Now, if before the accident the man possessed will power, and if, afterwards, he ceased to possess that will power, then I say there is a weakened condition in that man which considerably impairs his physical condition, and which would prevent him thereafter from earning his livelihood as readily as he would have done before. I need not go into the whole of the conflicting evidence given by the doctors, but I am satisfied that the man's condition after the accident is considerably worse than it was before. I do not believe myself there is any organic disease, nor is Dr. Wesels prepared to say there is. He says it is possible further results may follow, but in regard to these possible results one must bear in mind that two years have elapsed since the accident, and if, after two years, those very serious organic troubles have not arisen which might be anticipated, it is fair to conclude that they are not likely to follow now. But at the same time there has been a very great nervous shock to the plaintiff. He has suffered considerable pain; he has not in the interval been able to earn his salary, as before; and it is quite possible in the future he may not be the strong, healthy man he was before. The defendant's counsel takes very great credit to the defendant for

having tendered £125, with costs, but the credit would have been greater if the defendant had tendered the amount in his plea, or if he had applied for leave to amend his plea by inserting the tender. Defendant did not bind himself by this tender, as the plea is to the effect that there is no negligence, and that there is no liability at all. And I cannot lose sight of the fact, because it appears on these papers, that, when this unfortunate plaintiff made application for a commission, every difficulty was thrown in the way to prevent this commission from being appointed. Of course, reasons were given for the opposition, but to my mind they were wholly inadequate reasons. I do not think this is a case for heavy damages, because as I said before, I do not believe there is any organic disease. Now, that this case is settled the plaintiff will have less anxiety, and I think it probable that he will gradually recover, that his nervous condition will improve, and that ultimately he will be able to work. But, at the same time, the plaintiff has suffered considerably, and I think the least the Court should award is £250. Judgment will, therefore, be for the plaintiff for granted to the plaintiff to sue *in forma pauperis*.

£250, with costs.

Dr. Greer mentioned the matter of the costs of an application made by the assumed executor to withdraw the leave.

The Chief Justice said he was not aware of this application. It seemed that when the poor plaintiff sought for redress he found every possible difficulty thrown in his path. An application of that kind did not go very well with the tender of £125. In the circumstances, he would order that the costs of that application be paid by the assumed executor *de bonis propriis*. Plaintiff would be given his costs as a necessary witness.

[Plaintiff's Attorney: E. J. Sydney.  
Defendants' Attorneys: Van der Byl and De Villiers.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

#### ADMISSIONS.

1907.  
Apr. 25th.

Mr. J. E. R. de Villiers moved for the admission of Cecil Romaine Atherstone as an attorney and notary.

Application granted, oaths to be taken before the Registrar of the Eastern Districts Court.

Mr. Benjamin moved for the admission of Charles Keher as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Peter John Hodgson as an attorney and notary.

Application granted and oaths administered.

Mr. Roux moved for the admission of Pieter Jacobus Potgieter as an attorney.

Application granted, oaths to be taken before the Resident Magistrate of Alwal North.

### PROVISIONAL ROLL.

#### HIDDINGH V. COHEN.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,600, with interest at the rate of 6 per cent., from January 1, 1907, bond due by reason of notice having been given in terms thereof; counsel also applied for the property hypothecated to be declared executable, and the rents attached.

Mr. Roux appeared for defendant, and read an affidavit by his client, who said that he raised a bond hypothecating certain property at Simon's Town. He had paid the interest regularly, and plaintiff had now called up the bond. He asked for a postponement so as to enable him to raise a fresh bond, and said that a forced sale of his property in the present state of the market would inflict great hardship upon him.

Mr. Gutsche said that his client did not desire to be hard upon the defendant.

Maasdorp, J.: There is no ground for thinking that the plaintiff is acting unreasonably in this matter, and no ground has been shown why the Court should force any contract upon the plaintiff that he is unwilling to enter into. From what has been said, it would seem that the plaintiff himself is prepared to grant some indulgence when the judgment is given. Under the circumstances of the case, plaintiff is entitled to provisional sentence. Provisional sentence will be granted as prayed, with costs.

#### STEVENS AND ANOTHER V. ESTATE VILLA.

Mr. Pyemont moved for provisional sentence on a mortgage bond for £700, with interest from July 1, 1905, less £19 6s. 9d. paid on account, and for £4 8s. premiums of insurance and interest thereon, paid on behalf of defendants; counsel applied for the property hypothecated to be declared executable, and rents accruing to be attached.

Order granted.

## GENERAL ESTATE AND ORPHAN CHAMBER V. SAFIERDIEN.

Mr. Toms moved for provisional sentence on a mortgage bond for £200, with interest from January 1, 1906, and 14s., insurance premiums, less £1 12s., paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

## ILLIQUID ROLL.

## IMPERIAL COLD STORAGE AND SUPPLY CO. V. ARCHER.

Mr. Roux moved for judgment under Rule 329d for £126 11s., for goods sold and delivered, with interest a tempore morae, and costs.

Order granted.

SHAPIRO V. LEVEN AND BUTLER. { 1907.  
Apr. 25th.  
May 2nd.

## Landlord's lien—Interdict.

*Where a landlord applied for an interdict to restrain certain tenants from removing their goods; the Court, in the absence of any allegation that the tenants were about to remove the goods, refused the interdict, but granted a rule nisi.*

Mr. Douglas Buchanan moved, as a matter of urgency, for an interdict restraining the respondents from alienating, or disposing of, the goods in premises at Huguenot, Paarl, pending an action to be brought by applicant against respondents for £35 12s. 4d., rent owing in respect of the premises.

Maasdorp, J.: The Court cannot grant an interdict seeing that there is no allegation that the respondents are about to remove the goods. A rule nisi will be granted, returnable on Thursday next, rule to operate as an interim interdict, with leave to applicant to telegraph terms of the order.

*Postea* (May 2nd). The rule was made absolute.

## REHABILITATION.

Mr. Gutsche moved, under the 117th section of the Insolvent Ordinance, for the rehabilitation of Petrus Jacobus Jansen van Rensburg.

Granted.

## GENERAL MOTIONS.

KELLY V. R.M., WOODSTOCK. { 1907.  
Apr. 25th.

## Withdrawal of set down—Special counsel.

*The Court allowed a set down of an important appeal to be withdrawn, on the ground that appellant wished the appeal to be argued by a certain counsel now absent in Europe, and respondent had shown no reason for refusing the application.*

This was an application calling upon respondent to show cause why the hearing of the appeal brought by applicant should not be postponed until the return of Mr. Schreiner, K.C., who had been retained as leader by the appellant.

It appeared that applicant had set down for Monday next an appeal from a judgment of Mr. Justice Maasdorp in an application which he had made for an order for admission as an enrolled agent in the Resident Magistrate's Court, Woodstock (17 C.T.R., 48). Mr. Schreiner, K.C., had gone away to Europe on private business, and probably would not return for at least another month. Applicant specially desired that Mr. Schreiner should argue his case before the Appeal Court.

Dr. Greer was for applicant; Mr. Douglas Buchanan was for respondent. Affidavits having been read, and counsel having been heard,

Maasdorp, J.: It seems that this appeal was set down by the applicant for Monday next, and he now wishes to withdraw the setting down and to have the appeal heard on a later date. If any ground had been shown by the respondent upon which he would be prejudiced if the matter was allowed to stand over, then the Court would have required some very good reasons from the applicant for this postponement, but there is absolutely no ground for thinking that there would be any prejudice to the respondent if the matter did not come on on Monday, or if the matter does not come on at all. The law has been set in action by the applicant, and the question is now whether the applicant has given some reason showing that he might suffer some prejudice. I cannot say that the ground given by the applicant is a very strong one, but, at least, it is based upon some slight foundation. The point raised before the Court is of great importance to the applicant, and there is a great deal to be said in support of

the contention that was raised by him when the matter was first heard. He now wishes to have the services of a particular counsel to argue those points before the Court of Appeal. If there had been any reason on the part of the respondent for opposing such a postponement, I would have come to the conclusion that the mere desire to have the services of a special counsel would not be sufficient for a postponement, but, considering that there is some slight ground alleged by the applicant and none at all by the respondent, I think that the wishes of the party who set the law in motion ought to be taken into consideration, and a postponement ought to be allowed.

Mr. Buchanan asked if his Lordship would fix a time within which the matter should be set down?

Maasdorp, J.: I cannot understand what importance it is to the respondent. I can understand that it may be of some importance to certain practitioners. The matter must stand over, and if, according to any Rule, you are entitled to force it on, you can take advantage of that Rule, but from what I understand no such Rule has come into operation yet. It now stands over indefinitely as if it had not been set down at all. The applicant is allowed to withdraw the set-down of the case, question of costs to stand over. If the matter does not come on again, the respondent may move for his costs if he thinks he has any ground.

STEWART V. INSOLVENT { 1907.  
ESTATE HYLAND AND { Apr. 25th.  
ANOTHER. { " 30th.

Last illness—Medical fees—Costs of execution—Preference.

*Plaintiff, a medical practitioner, had attended the late H. in his last illness. H.'s estate was heavily bonded, and there was not sufficient in it to pay off the bonds. The trustee had awarded all the proceeds to the bond-holders and ranked plaintiff merely as a concurrent creditor.*

*Held, that plaintiff's claim was preferent to that of the bond-holders.*

*Plaintiff had attached certain of the property in the estate, and asked that his costs of attachment should have the same preference as his medical fees.*

*Held, that these costs must rank as preferent after prior preferent claims.*

This was an application calling upon Mr. Roos, as trustee in the insolvent estate of the late Henry Thomas Hyland, and also as executor in the estate of William Hiddingh, to show cause why the liquidation and distribution account in the estate Hyland should not be amended by admitting the applicant's claim as preferent.

It appeared that this matter had already been before the Court during the February term (17 C.T.R., 112), and was standing over for argument. Applicant was a medical practitioner who attended the deceased during this last illness, and he claimed a preference in the estate Hyland in respect of his medical fees and of certain costs incurred in taking out a writ of execution against the immovable property. There was also a claim for preference for costs incurred in respect of a writ against the movables. The respondent framed a distribution account in which he brought up the proceeds realised by the sale of immovable property, which was the only asset in the estate, and distributed the proceeds entirely to the bond-holders. The net amount available for distribution was £9,167 11s. 11d., and the trustee awarded the whole amount to the estate Hiddingh in respect of a bond of £8,967 10s. 9d., with interest, leaving a deficiency of about £130 due to the bondholder. The applicant was brought up among the concurrent creditors with regard to a claim of £51 3s. for medical services and costs. The respondent opposed on the ground that the applicant had not annexed a specified account of his charges, that the proof of debt did not state that the deceased died of the same cause of illness for which the applicant had attended him from the beginning, and that applicant, in his proof of debt, did not state that the claim was preferent.

Mr. Benjamin was for applicant, Dr. R. A. Stewart; Mr. Howes was for respondent.

In argument, Mr. Benjamin submitted that the proof of debt was strictly in accordance with the requirements of the 27th section of the Insolvent Ordinance. The 108th section provided that the trustee should decide the question of preference. The applicant claimed a preference and specifically stated that the fees were for professional services during the last illness of the deceased. A writ was issued attaching the movables, the movables had been sold, and the proceeds paid over to applicant. As to the right of applicant to recover costs of the writ of execution against the im-



movable property, counsel quoted Buchanan's "Decisions in Insolvency" as to section 22 of the Ordinance. As to the doctor's fees, which in this case amounted to £44, he submitted that a medical man enjoyed a preference for professional fees for services during the last illness over a bondholder. He cited *In re Wolff* (6 Juta, 127), Burton on Insolvency (pp. 143-9), Van der Kessel, Thesis (418), Burge (vol. 3, p. 211), Voet (11, 7, 15), Van Leeuwen's *Cens. Forensis* (1, 4, 9, 8, and 9), Grotius (2, 48, 14), Schorer (2, 48, 14), Holl. Consult. (6, p. 327), Digest (11, 7, 45), Van der Linden (1, 12, 4), and Bell's *Law of Scotland* (sec. 1,403). It was clear that according to the law of Holland a doctor had a preference over a mortgage bondholder. As to the objection that respondent had not said that these charges referred to the last illness, this was specifically stated in the summons on which judgment was obtained, and again in the judgment. Counsel also cited *McNully v. Estate Wigget* (15 C.T.R., 1,020).

Mr. Howes submitted that there should have been annexed to the proof a specified account of the charges and the several dates and times of applicant's attendance on the deceased. It must be clear that not only was it the last illness, but also the last illness which caused the death of the deceased, in order that the claim should be preferent. The Master classified this as a concurrent claim, and no objection was taken until the present application was made. With regard to costs, he referred to section 8 of the Ordinance. Costs of execution would be costs of administration, and did not fall on the mortgagee but on the other creditors proving. He cited Zuyphé, *Neder. Prac.* (5, p. 255). The whole question seemed to depend upon what sort of priority doctor's expenses had. If the privilege claimed in this case was admitted, it might lead to great abuse. The tendency of the law was to make ordinary mortgages as safe as possible, and do away as far as possible with tacit hypothecs. The last five or six days was the utmost period to which the applicant could have any preference. He had already been paid £8 11s. 10d. by sale on the writ attaching the movables. This amount, which he had appropriated the capital, would amply cover any specially privileged portion of the claim. Respondent did not admit that this preference entitled applicant to be preferred with regard to the property mortgaged to the mortgagee. The debt was proved as a judgment debt; applicant claimed on a judgment debt, and it was a well-known rule of law that a judgment had no preference. Counsel cited on the question of the costs of execution *Van der Byl and Co. v. Langford's Trustee* (7 Juta, 235).

Mr. Benjamin, in reply, submitted that the procedure taken in this matter was correct, and quoted sections 110 and 111 of the Ordinance. The 8th section of the Ordinance mentioned by his learned friend only applied to costs of sequestration, and did not touch the point in this case.

*Cur. Adr. Vult.*

*Postea* (April 30th).

Maasdorp, J.: Upon the liquidation of the insolvent estate of Hyland it was found that the only asset of value consisted of land and buildings situate off Dock-road, Cape Town. This property was mortgaged to the estate of Hiddingh for £8,967, increased by interest and insurance to £9,298, and realised a sum of £9,750, which, after deducting expenses of administration, left £9,167 available for creditors. The amount was awarded to the bondholder. The applicant now moves to have the liquidation and distribution account, upon which the award is made, amended by ranking his claim for medical fees for attendance during the last illness of the insolvent, who is now deceased, as preferent over the debt of the bondholder. It appears that the estate was surrendered by the executrix after the death of Hyland. The applicant states that he attended the deceased during his last illness when he was suffering from eczema, resulting in coma, and causing death. His claim is for fees due for such attendance. It appears that under our law, where the estate of a deceased person happens to be insolvent, the medical fees accruing during the last illness are ranked in order of preference with the funeral expenses. This is laid down in Grotius, 2, 48, 4; Van der Kessel, 418, 466, Schorer 245, and Van Leeuwen 4, 13, 9. Voet (11, 7, 15) points out that this arose from a mistaken interpretation of the passage in the Digest, which took the ointments, used for the preservation of the corpse, to be medicines administered before death. But, he adds, it is too late now to alter the position after the law has been adopted in the Courts and established by a long series of uniform judicial decisions. Medical fees during last illness must therefore be taken to rank with funeral expenses, and the question arises, what preference was accorded to funeral expenses. It is laid down in the Digest (11, 7, 14) that funeral expenses are always deducted from the estate, and in case of insolvency are preferred to all other debts. A great deal of discussion took place among the jurists upon the question, whether it was intended by this passage to prefer the funeral expenses to mortgages. Faber, in his commentary on the passage, enters fully into the argument, where he refers to the hardship upon a mortgagee who, after doing everything he can to secure



himself, finds his security depreciated by a debt of later date. But he thinks a much worse evil would arise if, through want of the necessary means, corpses should remain unburied, to the injury of public health and decency, and he comes to the conclusion that funeral expenses are preferred not only to debts upon liquid documents, but to all hypothecs and mortgages, whether tacit or conventional. Voet (11. 7, 9) is of the same opinion, and he regards the funeral expenses as being in a way costs of administration, which may be deducted before the estate becomes available for the payment of debts. The funeral expenses are treated by Van der Keesel (Thesis 418) as possessing a special privilege under the law, not derived from any tacit hypothec attaching to them, which should take preference in order of time with other tacit and special hypothecs. It may be pointed out, however, that Grotius (2, 4, 11) uses the term tacit hypothec as applicable to these claims for funeral expenses. It follows, therefore, that medical fees during last illness, which rank with funeral expenses, must be preferred to mortgages, and consequently the applicant's claim must rank before that of the estate of Hiddingh. It was contended that the applicant lost his right of preference because he did not allege in his proof of debt that he claimed such preference. In his proof of debt the applicant described his debt as an amount due to him for medical services rendered during the last illness of Hyland. This is a sufficient indication that the debt was proved as a preferent claim; but the applicant says that he intimated as much when he put in his claim. Before the surrender of the estate the applicant sued and got judgment for the amount of his debt, for which the property in question was attached in execution, and he now claims to be preferred for the costs of attachment in execution before the mortgagee. He relies upon the following words in section 22 of the Insolvent Ordinance: "The person holding such judgment (i.e., a judgment for satisfaction of which property has been attached before sequestration) shall on the distribution of the said estate be entitled to be preferred over the proceeds of the property attached for the costs incurred by him in respect of the writ of execution and the execution of the same." It was contended, on behalf of the applicant, that he should be preferred to the bondholder for the costs of execution. Undoubtedly a preference is here given, but it is one which must take rank in order of time with other preferent claims, in conformity with the well-known rule on the subject. All prior mortgages, which also enjoy rights of preference, must rank before the later preferent claim created by

this section as a sort of *pignus praetorium*. The applicant's claim for costs of execution must therefore be postponed to the claim of the mortgagee. There being no free residue in this case out of the proceeds of this property, after the payment of the bond, there is nothing for the applicant's claim to rank upon. It appears from what is said by Voet (20, 4, 28) that the *pignus judiciale* must take rank according to time with other hypothecs and mortgages, whether tacit or special. The preference allowed for costs of execution under section 22, seems to be a relic of the larger right which formerly existed in the shape of a *pignus praetorium*, and which was reduced by the Insolvent Ordinance. A larger right existed under the old Ordinance No. 64, where a creditor who had attached property in execution before the sequestration "was entitled to such preference over the proceeds of the property so attached, as by law is created over such property, in virtue of the legal attachment thereof." Under the present Ordinance he is preferred over the proceeds of the property for the costs of execution, but not for the judgment debt or costs of suit. The larger right of the old Ordinance was clearly the *pignus praetorium*, which ranked after prior special mortgages, and the reduced right of the later Ordinance is in no more favourable position. The applicant must fail on his second claim. An order will be granted directing the trustee to amend the account by awarding to applicant a preference before the claim of the estate of Hiddingh in respect of his medical fees. Respondents are ordered to pay costs.

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

OFFICIAL LIQUIDATORS OF	} 1907. Apr. 26th. " 29th.
THE BUFFALO SUPPLY AND	
COLD STORAGE CO., LTD.	
(IN LIQUIDATION) V. THE	
FEDERAL SUPPLY AND	
COLD STORAGE CO. OF	
SOUTH AFRICA, LTD.	

Award—Rule of Court—Judgment debt—Interest—Execution.

*An award whereby the plaintiff Company was adjudged to pay a sum of money to the defendant Company, which was to be entitled to retain certain*

*shares in the plaintiff Company as security, was made a Rule of the Supreme Court, but nothing was said in the award or in the Judgment of the Court as to the payment of interest. At the time when the judgment was given, the plaintiff Company applied for a stay of execution, which was refused by the Court.*

*Held, that the defendant Company was not entitled thereafter to charge interest on the amount of the judgment debt.*

The plaintiffs' declaration was in the following terms: (1) The plaintiffs are the official liquidators of the Buffalo Supply and Cold Storage Company, Ltd., having been duly appointed as such on the 20th October, 1904, and they sue in their said capacity. The defendant is a company with limited liability, registered in London, where its head office is, but carrying on business in this colony, where its chief office is in Cape Town. (2) On or about the 21st April, 1903, the said Buffalo Supply and Cold Storage Company, Ltd., which was then not yet in liquidation, entered into a certain deed of submission with the defendant company, whereby it was agreed to submit certain differences which had arisen between the said companies to arbitration. (3) In or about May, 1903, the said Buffalo Supply and Cold Storage Company, Ltd., went into voluntary liquidation, and on or about the 14th July, 1904, it was ordered by this Court to be wound up under the provisions of the Companies Act, 1892. (4) During the latter part of 1903 the differences above referred to were submitted to arbitration in accordance with and under the provisions of the said deed, and thereafter, on or about the 21st January, 1904, the arbitrators and umpire appointed under the said deed delivered an award. (5) Under the said award there was declared to be due to the defendant company by the said Buffalo Supply and Cold Storage Company, Ltd., a certain balance of cash amounting to £21,763 17s. 6d. (which sum was thereafter reduced to £19,302 0s. 3d. by certain liquidators of the said Buffalo Supply Ltd., was declared entitled to receive from the defendant company 35,000 fully paid up shares to be delivered to the Supply and Cold Storage Company, credits which were allowed by the defendant company) and the said Buffalo and Cold Storage Company, Ltd., upon payment of the said balance of cash. The defendant company was, under the said award, to pay the taxed costs of the said arbitration. (6) On or about the

29th of February, 1904, the said award was, at the instance of the defendant company, made a rule of this honourable Court, and the plaintiffs crave leave to refer to the terms of the said order. (7) The defendant company did not, however, issue a writ of execution under the said order, but whilst it retained possession of the 35,000 shares above referred to, allowed the matter to remain in abeyance until on or about the 14th of July, 1904, when it applied to this honourable Court to be allowed to issue execution under its said judgment, and failing a sufficient levy, to be allowed to sell and dispose of the said 35,000 shares from time to time in parcels, and to devote the proceeds thereof to the discharge of its said claim and interest. Thereupon the defendant company was authorised by this Honourable Court to sell the said shares in parcels after due notice to the liquidators of the said Buffalo Supply and Cold Storage Company, Limited, until the defendant company's claim and the costs of its said application were liquidated. The plaintiffs crave leave to refer to the records of the said proceedings. (8) Thereafter the defendant company proceeded, after some further delay, to sell certain of the said shares in parcels from time to time, and it has received the proceeds of such sales, as also certain dividends paid out upon the said shares from time to time. On or about the 25th of January, 1906, the defendant company had sold all but 3,010 of the said 35,000 shares, and had realised more than sufficient from such sales, together with the dividends received as aforesaid, to cover the said indebtedness of the said Buffalo Supply and Cold Storage Company, Limited, to the defendant company. The plaintiffs annex hereto copy of an account duly rendered to the defendant company, setting forth details of the moneys received as aforesaid by the defendant company up to the said date, and also of the taxed costs of the said arbitration, and showing a balance after deduction of the said sum of £19,302 0s. 3d., as well as certain charges and costs due by the said Buffalo Supply and Cold Storage Company, Limited, of £1,635 8s. 7d. in its favour. The said balance is slightly inaccurate owing to a clerical error, and should actually be £1,635 9s. 3d., which amount the plaintiffs are entitled to, but which or any part of which the defendant company refuses to pay. (9) The plaintiffs were entitled also after the sale of all but the said balance of 3,010 shares, to receive the said balance of shares, but the defendant company wrongfully and unlawfully retained possession thereof, and thereafter, as the said shares were selling at a fair price, it was arranged between the parties

that the said 3,010 shares should be sold, and they were accordingly sold by the defendant company, which received the proceeds, and which, on or about the 28th of March, 1906, rendered an account of such sale to the plaintiffs, showing the net proceeds of the said shares to be £1,931 7s. 2d. (10) The plaintiffs are entitled to payment of the said sum of £1,931 7s. 2d., which, however, or any part of which, the defendant company refuses to pay. The plaintiffs claim: (a) The said sum of £1,635 9s. 3d., together with interest *a tempore moræ*; (b) the said sum of £1,931 7s. 2d., with interest *a tempore moræ*; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows: (1) Paragraphs 1, 2, 3, 4, 5, and 6 of the declaration are admitted. (2) As to paragraph 7, the defendants admit that they did not issue a writ under the said order, and they say that they filed their petition in the paragraph referred to on 31st May, 1904, though it did not come on for hearing until the 14th July, 1904, and they say that the delay, if any, in taking action was owing to the acts of the plaintiffs and at their instigation and request, and for the benefit and in the interests of the said company in liquidation, and in order to realise the shares in the best interests of both parties. (3) As to paragraph 8 of the declaration, the defendants say that, if there was any delay in the sale of the shares, it was owing to the acts of the plaintiffs, and at their instigation and request, and for the benefit and in the interests of the said company in liquidation, and the defendants exercised a due and proper discretion in placing the shares on the market as quotations from time to time justified, and in order to obtain the best price. The dividends received were credited to account of the plaintiffs. The defendants admit that, on or about the 25th January, 1906, they had sold all but 3,010 of the said shares, but they deny that the proceeds and the dividends were sufficient to cover the indebtedness of the said Buffalo Company to them and they deny the other allegations in the said paragraph contained. The defendants annex a true and correct account of the said indebtedness. The said account shows an item of £4 14s. 7d. which had been credited in error to the said Buffalo Company and paid to them by the defendants in error and under a mistake of fact and which the defendants are entitled to receive payment of from the said Buffalo Company. (4) The defendants deny that the plaintiffs were entitled to receive the said 3,010 shares and that the defendants wrongfully and unlawfully retained possession thereof; they admit that the parties agreed that the said shares should be sold and that

they were sold and realised net £1,931 7s. 2d. Save as above defendants deny paragraphs 9 and 10. (4a) The defendants say that there were no funds belonging to the Buffalo Company out of which their indebtedness could be paid, and that the realisation of the shares was a matter which required time and care, all of which was recognized by the plaintiffs, and that any attempt to sell all the shares together or to force the sales would have been greatly to the prejudice of the said Buffalo Company in liquidation, and the latter would not have had the benefit of the dividends upon the said shares which have gone in reduction of their said indebtedness, and that by virtue of the premises the defendants were and are entitled to the payment of interest upon their said indebtedness while the same remained unpaid and during which time the defendants were realising the said shares to the best advantage of both parties and during which the aforesaid dividends so credited to the plaintiffs, as aforesaid accrued and were paid. (5) There is due and owing to the plaintiffs after deduction of the indebtedness of the Buffalo Company to the defendants, the sum of £1,707 17s. 6d. which the defendants hereby tender with taxed costs to date. Wherefore the defendants pray that, subject to the said tender, the plaintiffs' claim may be dismissed with costs.

The plaintiffs' replication was as follows: (1) As to paragraph 2 of the plea, the plaintiffs admit that the defendants filed their said petition on the 31st May, 1904, and they admit that they requested the defendants to delay in taking action, but they say that the said delay was as much in the interest and for the benefit of the defendants as of themselves. (2) As to paragraph 3, they admit that they requested delay to some extent in the selling of the said shares, and they say that such delay was as much to the advantage of the defendants as of the plaintiffs. Considerable delay was caused by the defendants in connection with the giving of notice to the liquidators of the plaintiff company of the sales of parcels of the said shares. The plaintiffs admit that the said dividends received were credited to their account, and also they admit that the defendants are entitled to be credited with the said sum of £4 14s. 7d. (3) As to paragraph 4a, the plaintiffs say that the plaintiff company did have certain funds, but they admit that such funds were not sufficient to pay the said indebtedness. Save as herein above admitted, they deny the rest of the said paragraph, and they specially deny that the defendants were or are entitled to payment of any interest upon the plaintiffs' said indebtedness. (4) Save as above set forth, and save as to the ad-

missions contained in the plea, the plaintiffs join issue with the defendants thereon. They say that the tender therein made is wholly inadequate, and they pray for judgment as in their declaration, less the sum of £4 14s. 7d., referred to in paragraph 2 of this replication.

Mr. Burton (with him Mr. J. E. R. de Villiers) was for the plaintiffs: Mr. McGregor (with him Mr. P. S. T. Jones) was for the defendants.

Mr. Burton said that in the award nothing was said about interest, nor in the subsequent proceedings was any reference made to it. The question now was as to the effect of the judgment regarding interest.

Mr. McGregor said that his case was that they were entitled to interest from the date of the award.

De Villiers, C.J., remarked that, judging from the statements of counsel, the question was one which could be decided without going into the voluminous correspondence and evidence.

Mr. Burton: There is a commission about a mile long from England—a tremendous thing.

Mr. McGregor said that it was necessary to have the surrounding circumstances stated. He proposed that he should be allowed to call the secretary of the defendant company, and it could then be seen whether it was necessary to go into further evidence and through the correspondence. Mr. McGregor then called

Alfred Johnson, local secretary of the defendant company in Cape Town. He said that after the award, his firm pressed for payment. Mr. Fleming was appointed liquidator in October, 1904. Witness had several interviews with Mr. Fleming. The effect of these interviews was that Mr. Fleming wished to delay the sale of the shares pending some arrangement by the Buffalo Company to raise a loan to take over the shares. At the beginning of 1905, Mr. Fleming told witness that Mr. McGregor was going to England with a power of attorney to raise a loan. The dividends paid to the Buffalo since the award exceeded the interest claimed by over £1,000.

Cross-examined by Mr. Burton: Since January, 1903, the company had been in possession of all of the assets of the Buffalo Company.

Mr. Burton, in argument, said that the matter practically resolved itself into a legal question as to whether on an award like this, followed by a Rule of Court, where no interest was claimed either in the award or the Rule of Court, interest was claimable simply because there had been a delay in the payment of the amount. Here the Federal Company had the benefit of holding the whole of the Buffalo Com-

pany's assets. The crisp question was whether on a judgment which did not give interest, a person was entitled, under our law, to claim interest. Counsel quoted the case of *Kenrick v. Central Diamond Mining Company* (4 H.C., p. 36), and referred to 1 and 2 Viet. ch. 110, sect. 17, to Voet, 1-8-4, Groenewegen on the Code, 7-54, Voet 22-1-10 and 11, and to the case of *Greeff v. Colonial Government* (15 C.T.R., 20).

Mr. McGregor said that in the present case there was insistence throughout by the Buffalo Company that there should be no forced realisation. It was to the advantage of both that there should not be hurried realisation. The defendants held their hand from time to time because of the representations of the liquidators of the Buffalo Company.

[De Villiers, C.J.: They did not stand in the way of your selling.]

Mr. McGregor said his point was that the defendants were working, not perhaps at the mercy of the Buffalo Company, but subject to the co-operation of the Buffalo Company.

After further argument, Mr. McGregor said he would, if necessary, apply for an amendment of the plea, so as to include a claim in reconvention for the interest. Continuing, counsel quoted Van der Keesel, 483, Domat, 1948, 1859, and Van Leeuwen, 1-4, and referred to the case of *Greeff v. Colonial Government* (15 C.T.R., 20).

Mr. Burton having been heard in reply,

*Cur. Adr. Vult.*

*Postea* (April 29th).

De Villiers, C.J.: The plaintiffs, who are the official liquidators of the Buffalo Supply and Cold Storage Company, seek by this action to recover from the Federal Company the sums of £1,635 9s. 3d. and £1,931 7s. 2d., being the balance alleged to be in the hands of the defendants of the proceeds of 35,000 shares in the defendant company. Under an award of arbitrators, made by virtue of a deed of submission between the parties, it had been adjudged that there was due by the Buffalo Company to the defendants the sum of £19,302 0s. 2d., and that the Buffalo Company was entitled to receive the said shares from the defendants, to be delivered upon the payment of the sum owing by the Buffalo Company. The award was silent as to the payment of interest by either party, and in the judgment delivered on February 29, 1904, by which the award was made a Rule of Court, nothing was said about interest. The defendants would have been entitled, after the judgment of the Court, to issue execution for the amount of the judgment, and an application was made by the plaintiffs at the time when the award was made a Rule of Court for a stay of execution, but this application was



refused. At a later date, namely on July 14, 1904, an application was made to the Court by the defendants for an order authorising them to issue execution under their judgment, and failing a levy for a sufficient sum that they be authorised to sell the 35,000 shares from time to time in such parcels as they may deem best, and to devote the proceeds thereof to the discharge of their claims and interest. The Court, by its order, authorised the defendants to sell the shares mentioned in their petition in parcels after due notice to the plaintiffs until the applicants' claim and costs be liquidated. The defendants accordingly proceeded to realise the shares, and to credit the plaintiffs with the proceeds as well as with such dividends as were from time to time received. Before each parcel was sold notice was given to the plaintiffs, and a mass of correspondence in regard to the sales has been put in, which does not offer much assistance in the decision of the present case. In a letter written by the secretary in England of the defendant company to one of the plaintiffs, the latter was informed that the dividend in respect of the 35,000 shares of the Buffalo Company had been credited to the account of the Buffalo Company, the writer adding: "Against this, of course, we have to make an entry for interest on the amount outstanding." There is no evidence whether such an entry was made or to what extent it was acquiesced in, and there is no plea on the record that by agreement between the parties subsequent to the Order of Court the defendants were to be allowed to charge such interest. Although the declaration makes no point of the defendants' delay in realising the shares, the defendants' plea is almost wholly confined to an explanation of the delay in such realisation. The plea alleges that if there was any delay in the sale of the shares it was owing to the acts of the plaintiffs and at their instigation and request and for the benefit and in the interests of the Buffalo Company. The plaintiffs, by their replication admitted that they had requested the defendants to delay in the sales of the shares, but say that such delay was as much in the interest and for the benefit of the defendants as of themselves. Notwithstanding this admission, a mass of evidence was given on behalf of the defendants before the Commissioner appointed by the Court to take evidence in England to prove that the delay was justifiable and in the interest of both parties, I have carefully read that evidence and cannot discover what bearing it has upon the real question at issue between the parties. That question, according to the statements of counsel on both sides, is whether the defendants are entitled to charge the plaintiffs with interest on the amount awarded to the defendants. The defendants' counsel has asked for leave to

amend his plea or to file a claim in reconvention in order to raise the question whether, in consequence of the dealings between the parties after the date of the judgment, the defendants are not entitled to such interest; but it is obvious that such a plea or claim in reconvention would raise an entirely new question, for the consideration of which the plaintiffs are wholly unprepared. It is, in my opinion, too late to raise the question, and the only point to be decided is whether, by our law, the defendants, not having obtained any order as to interest at the time when the award was made a rule of Court are entitled, without obtaining an amendment of the order of Court or a fresh order, to charge interest on the amount awarded to them.

Under the Roman Law a party who was in default for a period of four months after judgment had been given against him for payment of a sum of money became liable to the payment of interest, even if the judgment was silent on the matter of interest. The Dutch law, however, at an early period, departed from this practice and only allowed interest where there was a delay after the judgment had been revived. On the expiration of a year from the date of judgment the party in whose favour the judgment had been given was entitled to have the judgment revived, and, without any fresh order as to the payment of interest, became entitled to interest from the date of such revivor. A decision to that effect of the Supreme Court of Holland and Friesland is reported by Neostand Dec., 38, and cited with approval by Van Leeuwen (Cens. For. 2 1, 33, 5) who, upon a matter of practice in his time, is an unrivalled authority. Groenewegen, in his comments upon the passages of the Code (7, 54), where the Roman Law is laid down also, refers to the departure of the Dutch practice from that of Rome and Voet (22, 1, 11), following these authors lays it down as clear law that, where the judgment is silent on the point, interest does not begin to run from the date of the judgment or from a date four months later, but only when after a delay of execution beyond a year, the party condemned to pay has again been summoned to show cause why a fresh writ of execution should not be issued. Under our practice there exists no necessity for reviving a judgment until the lapse of six years from its delivery, and the practice of summoning the party in default to show cause has wholly fallen into desuetude. The reason given by some of the Dutch authors why interest is not chargeable is because it is competent for the party who has obtained the judgment to proceed forthwith to execution, and if this was a valid reason under the Dutch cumbrous practice, it is at least an equally valid reason under the ex-



pedition practice which exists in this Court for the sale in execution of the personal property of the judgment debtor. In the case of *Kenrick v. Central D.M. Co.* (4 H.C., 36), the High Court gave effect to the Dutch practice as to interest, and I see no reason for departing from it in the present case. It may well be that if the defendants had asked for interest at the time when the award was made a Rule of Court, the Court would have adjudged the payment of interest *a tempore moræ*, but no explanation has been given as to why such interest was not then applied for. The subsequent order, authorising the sale of the shares in payment of the defendants' claim and costs, does not assist the defendants, because although the interest, as well as the claim, was mentioned in the petition, the order, whether intentionally or not, was also silent as to interest. If, instead of applying for an order for the gradual realisation of the shares the defendant had obtained a writ of execution, there would have been no difficulty in realising all the shares at once to satisfy the amount of the judgment. It is quite true that the gradual realisation was effected at the instance of the plaintiffs, but it was done for the advantage of both parties, and there is no evidence whatever that the gradual realisation was substituted for a sale in execution in consideration of the payment by the plaintiffs of interest on the debt owing by the Buffalo Company. The defendants' counsel has referred to a passage in Van der Keessel's Theses (483) in support of the view that interest always becomes payable from the time of *litis contestatio*, but it is clear from that passage and from the passage in Grotius Introd. (3.1.46), on which it comments, that Van der Keessel was here only referring to the interest which can lawfully be claimed in the action for the original debt or demand. Interest, he states, is claimable upon delay in a contract *bonæ fidei*, as distinguished from a contract *stricti juris*, whereas Voet is of opinion that the minute distinctions between contracts *bonæ fidei* and contracts *stricti juris* had not been preserved in the Dutch law, and that in both classes of contracts interest should be allowed after *litis contestatio*, but as a general rule, not by reason of extra-judicial delay. Later on, however, he mentions several exceptions to the general rule, but upon the question now under consideration, there exists no difference between Voet and the passage quoted from Van der Keessel. As I have already remarked, it may well be that the Court would have ordered the payment of interest if such an order had been applied for, but in the absence of such an order the defendants are not entitled, as a matter of right, to charge interest in the amount of the judgment. The result is that there must be judgment for the

plaintiffs for the amounts as prayed (less £4 14s. 7d., which they admit should be deducted), with costs and with interest *a tempore moræ* as prayed.

Hopley, J.: I concur in the judgment which has just been delivered, and which I have had the opportunity of seeing and considering.

[Plaintiffs' Attorneys: Walker and Jacobsohn. Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

SELLAR BROS. V. KERBEL { 1907.  
AND SHER, TRADING AS { Apr. 26th.  
H. D. SHER AND CO.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### ESTATE BADENHORST V. PULA AND SMILE.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £30 and £1 10s., one paying the other to be absolved, with interest from the 27th August, 1903, and costs.

Order granted.

### ESTATE BADENHORST V. SMILE.

Mr. Payne moved for provisional sentence on a mortgage bond for £78 4s., with interest from the 19th February, 1904; counsel also applied for the property hypothecated to be declared executable, except property mentioned in paragraph 1 of the summons, and the rents to be attached.

Order granted.

### ESTATE REID V. SAUNDERS.

Mr. Sutton moved for provisional sentence for £106 16s., being interest due on certain six mortgage bonds, and for £2 odd, premiums of insurance.

Order granted.

### ILLIQUID ROLL.

### DUMINY V. MASTERTON.

Mr. Russell moved for judgment under Rule 329d for £22 10s., for water supplied, with interest *a tempore moræ* and costs.

Order granted.

DUMINY V. IMPERIAL BRICK AND  
TILE CO.

Mr. Russell moved for judgment under Rule 329d for £60 for water supplied, with interest *a tempore moræ* and costs.

Order granted.

GENERAL MOTIONS.

FECHTER V. TRANSVAAL  
MINES LABOUR CO. } 1907.  
TRANSVAAL MINES LABOUR } Apr. 26th.  
CO. V. FECHTER.

Attachment *ad fundandam jurisdictionem*—Procedure—Rules of Court.

*Applicant had brought an action in the Supreme Court against respondents, who were not subject to the jurisdiction. After the pleadings had been closed, he asked for the attachment of certain of respondent's property ad fundandam jurisdictionem, and further that the pleadings might be allowed to stand and that either the original summons or the notice of motion should be taken as edictal citation of the respondents.*

*Held, that as applicant had not followed the process prescribed by the Rules of Court for bringing respondents within the jurisdiction, and as his application was virtually for a summons after pleadings had been closed, the application must be refused.*

The first application was for leave to attach certain books, etc., alleged to belong to defendants *ad fundandam jurisdictionem*.

The second application was for a commission *de bene esse* to take the evidence of Wilson (the defendant) and his witnesses in Johannesburg.

It appeared that Fechter had brought an action against the Transvaal Mines Labour Co. to recover £84 for rations supplied to certain labourers prior to their despatch to the Rand to the company. The defendant had filed a plea in abatement, in which he denied that at any time material to the suit he had been domiciled or resident in this colony, or that he had traded in his own behalf in this colony. He said that he was domiciled and resident in Johan-

nesburg, Transvaal. He had entered into a contract with one Paul Scott to send up labourers from the Cape at so much per head, and he denied any liability for the rations alleged to have been supplied by plaintiff. Defendant further said that the books which the plaintiff proposed to attach did not belong to him, but to the said Paul Scott. It was stated for plaintiff that the books were called the Transvaal Mines Labour Co.'s books.

Mr. Russell was for Fechter; Mr. Roux was for Mr. A. E. Wilson, trading as the Transvaal Mines Labour Company.

Mr. Russell said that the matter came before Mr. Justice Hopley last week, and was ordered to stand over to enable the respondent to file certain replying affidavits. Those affidavits, he understood, had not been put in.

Mr. Roux said that the affidavits had not yet come to hand from Johannesburg. He would ask for a postponement, but he felt that he could not do so in view of the fact that the respondent had been allowed a week in which to file the affidavits.

Mr. Russell said that he could not consent to a further postponement. The applicant asked that the books and other documents now produced in Court should be attached to found jurisdiction against the defendant. Counsel added that the case was brought in this Court because the locus of the contract was in this colony. He cited *Ohlsson's Breweries v. Bradshaw* (22 S.C.R., 251). He asked that, if possible, the pleadings might be allowed to stand, but that the procedure should be altered so that either the original summons or the notice of motion should be allowed to stand as an edict to the defendant, and that the books of the company should be attached. Applicant would be prepared to pay wasted costs.

Mr. Roux submitted that, where there was nothing to attach in the jurisdiction, the Court would not grant leave to sue a *peregrinus*. The Court, before giving leave, must be satisfied that there was a good cause of action. Applicant had not shown that he had a good cause of action against respondent. There was no allegation in the affidavits that Beddowes, who was alleged to have supplied the rations to the labourers, was the agent of the respondent. If the Court thought the applicant had a good cause of action and assumed jurisdiction against respondent, then applicant must pay the respondent's wasted costs, in view of the way in which the proceedings had been brought.

Mr. Russell suggested that the order might be given subject to the withdrawal of the summons. If it lay in his power as counsel, he would withdraw the summons.

Maasdorp, J.: The plaintiff in this case sues the defendant, whom he describes

as a person carrying on business in Cape Town, under the style of the Transvaal Mines Labour Co., for the payment of a certain sum of money for goods supplied to the agent of the defendant. To the declaration the defendant has raised a plea in abatement, alleging that he is domiciled and resident in the Transvaal, that he was never domiciled or resident in this colony, and never carried on business in this country, and he, therefore, takes exception to the jurisdiction of the Court in a matter appertaining to him. The plaintiff, being apprehensive that the defendant might be successful in establishing his plea in abatement, when the matter comes before the Court, seeks to meet the difficulty by at this stage of the proceedings establishing some jurisdiction over the defendant. He seeks to do that by obtaining an order of Court attaching some property of the defendant in this colony. Now, very elaborate procedure is provided by the law of this colony, and by the Rules of Court, which any plaintiff desiring to bring a person domiciled in a foreign country within the jurisdiction of the Court, must make use of. The plaintiff has not availed himself of the machinery provided in that respect, but he now seeks to have all the benefits of it by an order of Court granted after different steps have been taken, which are not available for the purpose of bringing the defendant within the jurisdiction. To meet that difficulty to some extent, he prays that when the order is granted for the attachment of the property, which might establish the jurisdiction of the Court such order might then be regarded as the summons in the suit, and that the further proceedings as they stand upon the order may be allowed to stand. If that were done, the Court would be virtually allowing a summons to be issued now in proceedings which have already reached the stage of a replication on the part of the plaintiff, and not only have the pleadings been completed but the case has actually been set down for hearing. Now, it seems to me that the plaintiff in this case has adopted the wrong course. If he is satisfied now that he has sued in the Supreme Court a person not subject to the jurisdiction, but whom he may bring under the jurisdiction by availing himself of the Rules of Court, he must have recourse to those rules, for the purpose of establishing such jurisdiction. It is said it may be that costs may be unnecessarily incurred in this case, unless the Court grant the indulgence now asked for, but it is impossible for the Court to disregard the rules which govern matters of this kind, and the application must be refused, with costs.

In reference to the application by the Labour Company for leave to take the evidence of Mr. Wilson and his witnesses in Johannesburg, an opportunity was

given Mr. Russell to consult his attorney as to the position in view of the decision of the Court on the first motion.

At a later stage, Mr. Russell informed the Court that he had seen his attorney, who, however, was not at present prepared to withdraw the case, but the case set down for Wednesday next would be withdrawn.

The Labour Company's application was ordered to stand over in the meantime, with leave to the company, when the case comes on for hearing, to mention the costs of the second application.

#### *Ex parte* PRETORIUS.

Mr. Watermeyer moved, on behalf of petitioner, as executor in the joint estate of his deceased wife and himself, for leave to complete the sale of the farm Valschfontein, in the division of Colesberg, in accordance with an agreement entered into between petitioner and one Ed. Parker on the 22nd October last. Petitioner appeared to have thought that he was entitled to dispose of the property, whereas, by the terms of a codicil to the will, he was not vested with such authority. The property was bequeathed to his three sons, who consented to the sale, subject to the bond being paid off and the balance of the proceeds being paid into a trust company in Cape Town, and the interest therefrom being paid to their father during his lifetime. The Master thought that, under all the circumstances, it would be in the interests of the estate to accept the offer, and he recommended that the purchase price, after the bond had been paid off, be deposited with a trust company for administration in terms of the codicil to the will. Mr. Watermeyer mentioned that the youngest daughter, who was still alive, appeared to have an interest in the farm, there being a bequest over to her in case one of the three sons died without issue before the father.

Order granted in terms of Master's report, subject to the consent of the surviving daughter being filed with the Registrar.

#### *Ex parte* ESTATE KELLERMAN.

Mr. Pohl moved, on the petition of the executor dative of the estate of Jacobus Stephanus Kellerman, for leave to raise a loan of £500, and pay off existing bond and debts on security of the landed property in the division of Piquetberg. The Master reported favourably.

Order in term of Master's report.

# SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE.]

(IN CHAMBERS.)

*Ex parte* ESTATE ERLANK. { 1907.  
Apr. 27th.

This was an application by Marius E. Zylstra, senior, of Rouxville, O.R.C., as sole executor testamentary in the estate of Alida Hendrina Margaretha Erlank for leave to surrender the estate as insolvent.

It appeared that some time ago, A. G. Erlank brought an action against his wife to recover a sum of £500 upon an antenuptial contract. Mr. Erlank was residing in the Barkly East district, where his wife formerly lived, but for some time past she had been living at Loskop, Rouxville, Orange River Colony. While the action was pending Mrs. Erlank died, and the case was defended by Mr. Zylstra, who was her executor under the will and who, also, acted as Mrs. Erlank's agent during her lifetime. Mr. Erlank obtained judgment for the amount claimed with interest and costs, and he thereupon issued a writ against the property in the Colony, which consisted of certain sheep and money due under a sheep lease in the division of Aliwal North, and which had been attached prior to the action to found jurisdiction. The sheep had since been sold, and the proceeds were lying in the hands of the Sheriff pending further proceedings. Mr. Zylstra now petitioned the Court for leave to surrender the estate as insolvent, and brought up in the schedule the claim of the plaintiff and also that of Mr. D. Tennant, attorney, Cape Town, who had acted as the Cape Town attorney of defendant in the matter, and who claimed £205 as costs.

Mr. Burton was for petitioner; Mr. Upington (with him Mr. Douglas Buchanan) appeared on behalf of the judgment creditor in A. G. Erlank v. Estate Erlank to show cause against the application.

Mr. Upington took objection that proper notice had not been given in the "Government Gazette" of the intention to surrender the estate. The notice stated that this was a Barkly West estate whereas it was a Barkly East estate. An endeavour had been made to rectify the mistake by putting a slip in some copies of the "Gazette," but not in others. That, he submitted, was not sufficient publication. Counsel went on to argue that there was not sufficient proof before the Court on affidavit that the estate was insolvent and that, as regards the Colonial estate, it would be to the benefit of creditors that it should be sequestrated.

He contended that Mr. Tennant, the Cape Town attorney, should look, not to the estate, but to the local agent at Rouxville, Orange River Colony (Mr. Zylstra), who had instructed him, for his reimbursement. He was not a creditor of the estate, but of the local agent, and he was not entitled to prove against the Colonial assets. If that view were correct then there was no claim against the Colonial assets. Counsel referred to the recent case of *Estate Ross v. Trollip* (17 C.T.R., 153), which was standing over for judgment. In the present case the judgment creditor said that the object of the application was to defeat his claim. He cited Bowstead on Agency, 2nd Ed., p. 170. At p. 105. Bowstead dealt with the relations of country solicitors and their town agents.

Mr. De Kock, of Mr. Tennant's staff (in reply to the Court), said that the figure of £205 which appeared in the schedule as due to Mr. Tennant, was erroneous, £50 having been paid off by Mr. Zylstra, as agent of Mrs. Erlank, in connection with disbursements in the first case.

Mr. Upington said that the evidence as to Mr. Tennant being a creditor was altogether unsatisfactory.

Laurence, J., asked what was the amount of the funds belonging to the estate in the hands of the Sheriff?

Mr. Upington said that the amount was £480.

Mr. Burton submitted that there was *prima facie* evidence that the Colonial estate was insolvent, and that it would be for the benefit of the creditors that it should be surrendered. Various allegations of fraud, etc., were made against the executor, which it would be impossible to decide on affidavit.

Laurence, J., observed that he noticed a most improper expression used in one of the affidavits, viz., that the schedules were "faked." He did not know whether the word "faked" appeared in any English dictionary; it would probably appear in a slang dictionary.

Mr. Upington explained that the affidavit was not drawn in Cape Town, but in Lady Grey.

Laurence, J., refused the application with costs, and costs of the previous motion, and directed the rule interdicting the Sheriff from parting with the proceeds of the sale to be discharged. He said that it seemed to him, in all the circumstances of the case, very difficult to hold that it would be for the benefit of the creditors that the surrender of the estate should be accepted, and on the facts, as they were now presented to the Court, it appeared that Mr. Tennant would not be seriously prejudiced with regard to the small sum of £50, which was the most that he would be able to realise in insolvency proceedings, by being left to pursue other remedies.

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice LAURENCE and the Hon. Mr. Justice HOPLEY.]

PEEL V. NATIONAL BANK { 1907.  
OF S.A. { Apr. 29th.  
{ May 6th.

Letter of credit—Surety—Freight  
Lien—Pledgee.

*The plaintiff made certain advances to W., for the due repayment of which the defendant became surety and co-principal debtor. The Bank held as security for such advances the bills of lading in respect of a cargo of timber consigned to W. at East London, and finding on the arrival of the ship that W. was wholly unable to pay the freight and that demurrage would become payable, the plaintiff Bank paid the freight and other charges and landed the goods. Upon a realization of the timber, the proceeds were found to be insufficient to pay the amount of the advances, and the plaintiff claimed the amount of the deficiency from the defendant as surety. Among the charges made by the plaintiff was the amount paid for freight.*

*Held, that the payment was an expense necessarily incurred which could be properly charged by the plaintiff as the holder of the bills of lading and pledgee of the timber.*

This was an appeal from a judgment of Mr. Justice Maasdorp, sitting as a Divisional Court of the Supreme Court, in an action brought against appellant by respondents to recover £6,601 18s. 5d. upon a guarantee (16 C.T.R., 940).

On the 1st December, 1903, Whitworth and Co., of East London, obtained from plaintiffs a letter of credit in favour of Enhornung and Co., of Sundsvall, Sweden, authorising them to draw on the London office of the bank

up to £10,000 for the purchase of timber to Whitworth's account. Peel signed the letter as surety *in solidum* and joint principal debtor. The ship arrived with a cargo of timber, and it was then found that Whitworths were in financial difficulties and later on went into liquidation. The bank took up the matter, paid the freight and other charges, and realised the cargo. After paying various charges there was a shortfall of £6,601 18s. 5d., which amount the bank claimed with interest and costs. The Divisional Court gave judgment for plaintiffs as prayed with costs.

Mr. Burton (with him Dr. Rainsford) was for appellant; Mr. Searle, K.C. (with him Mr. Louwrens), was for respondents.

Mr. Burton said the first question was as to the exact nature of the contract by which the defendant bound himself to guarantee the letter of credit. As the document of the 1st December stood in itself it was a guarantee for the payment of £10,000, and he put it to the Court that defendant's liability could in no circumstances exceed the amount of £10,000. He guaranteed a letter of credit which made no reference to freight, landing charges, and so on, but only to £10,000 for the purchase of certain timber. His position was that the bank, when it went down to the wharf and released cargo on the ship, acted in excess of its rights and prematurely, and, inasmuch as there had been upon the realisation of the cargo a shortfall amounting, defendant said, to £2,000, the bank, unless it could clearly show that it did everything it possibly could to protect the guarantor, must be held liable for the shortfall. The bank's duty at the time the cargo arrived was to notify the defendant so that he could have gone and dealt with it as a business man. The bank did not do all it might have done to protect the guarantor's interest.

[De Villiers, C.J.: What amount do you say he is liable for?]

Mr. Burton said that defendant should be held liable for the shortfall, less the amount which the evidence showed represented the reduced value owing to the deterioration due to the bank's handling of the timber. If defendant had been given an opportunity by the bank to protect his interests, then, of course, he would have been liable for any loss that accrued, but, apart from the fall in timber, there was clear evidence of depreciation in value owing to negligent stacking. It was clear from the evidence that the manager (Mr. Friend) did not, on behalf of the bank, act under clause 5 of the agreement, and make a demand upon Whitworths. By the admission of the bank manager, there had been no failure up to the 2nd February to fulfil the conditions. At that stage Whitworth could not pay the freight. Friend's



view all along was that the bill did not become due until April. What happened was that Whitworth and Co. were regarded as so sound that it never struck the parties that there would be any bother about the freight. Counsel quoted from the evidence to show neglect in not having protected the timber. The bank acted prematurely, and their duty was to take the greatest possible care of the timber, but instead of that they neglected the most ordinary precautions. On the question of interest, counsel contended that the bank was not entitled to more than the legal rate of interest, viz., 6 per cent., instead of the rate allowed, viz., 7 per cent.

Mr Searle submitted that under the letter of credit it was clear that Whitworths could have been asked to pay the £10,000 when the ship arrived. It was not denied that the money was demanded, and it was notorious, according to the evidence, that Whitworths were in difficulties. Peel interested himself in the matter all through. He recognised his position as a principal debtor, and knew what the bank was doing all along. It was clear that he took an active part in the matter from the outset, recognising that he was really in the same position as Whitworths. Counsel submitted that the learned Judge was justified in coming to the conclusion that, on the evidence, no loss had been proved in the realisation of this cargo. Counsel quoted the case of *Colonial Government v. Smith and Co.*, (18 S.C.R., 380, and submitted that Peel could not be in any better position than Whitworths, and that he himself brought about the whole condition of things at the time. Mr. Searle also referred to Voet, 13-7-10, and Grotius, 3-8-7 and on the matter of the commission, urged that the bank was entitled to claim commission according to the terms of the guarantee. The question of interest was not raised in the plea, and it was quite a new point.

[De Villiers, C.J.: Which condition of the letter of credit do you say there has been a failure to fulfil?]

Mr. Searle: There has been a failure to pay. I submit it is a fair reading of the letter of credit that the bill was to be paid within a reasonable time, and seeing that the ship made a good voyage, it was to be paid on the arrival of the ship. Counsel said that the appellant had himself put the Bank in the position of having to realise the cargo. There was no evidence that the cargo was not realised with due care and despatch. On the question of surety's liability, he cited *Van der Vyver v. De Weyer* (4 Searle, 27), *Colonial Government v. Edenborough* (4 Juta, 290), and *Priest v. Stegmann* (15 C.T.R., 407).

Mr. Burton replied.

Cur. Adr. Vult.

Postea (May 6th).

De Villiers, C.J.: This is an appeal by the defendant against the judgment of a Divisional Court in an action against the defendant as surety for the due fulfilment of an agreement between the plaintiff bank and the firm of Whitworth and Co., of East London. By that agreement the firm, in consideration of the bank issuing a letter of credit in favour of certain merchants in Sweden authorising them to draw on the bank's London offices to the extent of £10,000 for the purchase of timber to be shipped to East London, gave the following undertakings, amongst others, to the bank: "3. We engage that all drafts drawn on and accepted by your London office under the said letter of credit shall be paid to you by us at the latest on such a date as will enable you to place the money in the hands of your said office on the day their acceptances fall due, or at such earlier date as the vessel carrying the shipment may arrive at East London. . . . 5. Failing the fulfilment by us of any of the foregoing conditions, you are authorised and empowered, if you should think fit to do so, but not otherwise, and without prejudice to the rights conferred on you by clause 3, to insure, land, and receive and sell, by public auction or otherwise, as you may deem proper, the entire shipment for our account and risk, and in the event of such sale we engage to allow you a commission of 2½ per cent. on the gross proceeds. . . . and make good any deficiency on demand." After the signature of the firm appears the following: "I, Thomas Peel (the defendant), hereby bind myself as surety in *solidum* and joint principal debtor to the said National Bank for the due fulfilment of the foregoing agreement in respect of this letter of credit, No. 3-1, for £10,000.—T. Peel." The London office made advances of money amounting to £9,978 17s 8d, to the merchants in Sweden, for which amount the latter drew upon the firm by a bill payable after ninety days' sight, which was duly accepted by the firm on 18th January, 1904, but dishonoured at the due date. Four days after such acceptance the ship arrived in East London with the cargo of timber, but the firm was wholly unable to pay the freight, and when demurrage became payable the plaintiff bank, acting in the interest of all parties concerned, paid the freight, demurrage, landing charges, duty, and insurance due in respect of the cargo, and caused the same to be landed at East London, pursuant to the bills of lading, and other documents, of which the bank was the legal holder. Early in February, 1904, communications passed between the bank and the defendant, but as there is a controversy between the parties as to the exact nature of those communications, I shall only refer to

matters as to which there exists no doubt. On the 10th of February the bank, referring to an interview of that day, wrote: "We hold instructions from our head office by which we have to consult you in all matters appertaining to the cargo ex Atbara, and to exercise the greatest care to release no goods without your written sanction unless cash is received by us in exchange for same." From time to time the bank effected sales of part of the timber, and on the 9th of March the bank, with the written consent of the defendant, allowed the firm which was then in liquidation to dispose of some of the timber. On the 7th of April the bank gave notice to the defendant that the draft for £9,798 17s. 8d. had been dishonoured, and fell due on that day. On the following day his attorneys replied that he was quite prepared to pay the amount of the draft in exchange for the necessary papers to enable him to receive delivery of the timber. He was not, however, prepared to repay the amount which the bank had paid for freight demurrage, insurance, etc., in respect of which the bank claimed to hold a lien on the cargo. The bank accordingly continued to realise the rest of the cargo as best it could, and ultimately instituted the present action to recover the deficiency as well as the commission and interest due.

The first defence raised by the plea relies upon a collateral agreement between the defendant and the firm, that the firm were to pay the freight and other charges themselves. The manager of the bank stated that he had not seen the document until it was produced in court, but even if he had been aware of the contents, it does not follow that the bank would have been bound by it, and the learned counsel for the defendant properly abandoned this defence on the hearing in appeal.

The only defence relied on in appeal is that there had not been a failure on the part of the firm of any of the conditions of the agreement in question, and consequently the bank was not entitled to take advantage of the 5th clause of the agreement, that the bank would only claim, as the holder of the bills of lading, to protect itself by dealing with the cargo, but that in so dealing with the cargo it acted with great negligence, causing loss to the extent of about £1,500, that if the 5th clause of the agreement did not apply the bank was not entitled to charge a commission of 2½ per cent. on the gross proceeds, and that in any case the bank was not justified in charging 7 per cent. instead of 6 per cent. as interest. No point was made by counsel of the fact that there is no evidence of any drafts having been drawn on and accepted by the London office of the bank in terms of the first portion of the 3rd clause of the agreement, and it was ad-

mitted that on the arrival of the ship in East London the bank was entitled either to claim immediate payment of the amount of the advances, or to retain the drafts and postpone the claim until the maturity of the draft. There is no sufficient evidence of any demand having been made for payment on the firm, but it is obvious that the firm which was wholly unable to pay the freight was equally unable to pay the amount of the draft. The difficulty, however, in this case, to my mind, arises, not from the fact that no such demand was made, but from the fact that the bank precluded itself from making such a demand by retaining the draft, accepted by the firm, and not payable until the 7th of April. It was not until that date that there was a failure on the part of the firm to fulfil any of the conditions, but from that date, at all events, the bank was fully justified in putting into operation the powers conferred on it by the 5th clause. I quite concur in the view that before that date the bank was justified in protecting the interests of all concerned by landing the cargo and thus preventing a ruinous demurrage from becoming payable. This right the bank possessed as being the holder of the bills of lading as security for the debt owing by the firm. The debtor was wholly unable to pay the freight and it was for his interest as well as for the interest of his surety that the cargo should be landed. It was for the interest of the bank as creditor also, for by landing the goods it would strengthen its security by taking actual possession of the goods. As the pledgee of these goods the bank was entitled to be recouped for all expenses necessarily incurred in regard to the cargo (Voet 13, 7, 10) and, in my opinion, the payment of the freight, etc., for the purpose of obtaining possession of the cargo formed part of such necessary expenses. As pledgees of the goods the bank may not, under the common law, have been entitled to sell them, but seeing that, after the 7th of April, at all events, the bank could, under the 5th article of the agreement, sell the goods, and that the bulk of the cargo was only sold after that date, I consider that the bank is entitled to charge the 2½ per cent. commission. In regard to the claim for a reduction of the bank's claim on account of its negligence, the learned judge in the court below found that the bank had done all in its power to realise the cargo to the best advantage, and that any damage which was suffered was caused by unavoidable circumstances, and I am not prepared to dissent from this finding. The witness William Tickle, who was called for the defendant, admitted that the bank had not failed to do anything it could have done, and he ascribed the great shortfall to a slump in the timber market. The defendant's counsel strenuously con-

tended that if the defendant had been called upon to pay the draft on the arrival of the ship he would have done so, and would have been able to realise the cargo at much greater advantage than was done by the bank. I am not by any means satisfied that the defendant would have paid the draft or that, if he had done so he would have preferred to realise the cargo himself instead of leaving the realisation with the bank. According to the defendant, Tickle was to have been his agent for the sale of the timber under the collateral agreement relied upon in the plea. But Tickle was employed by the bank itself to realise the cargo, and it was in the course of such realization that the shortfall occurred. The only other questions raised on appeal is as to the rate of interest which the plaintiff bank was entitled to charge, but there is no evidence whatever as to the rate actually charged or as to the rate which had been previously charged by the bank in its dealings with the firm. If the defendant had intended to raise the point that the rate of interest charged by the bank was excessive, he should have done it in the Court below, and should have given the requisite evidence to enable that Court to decide the point. With the information before this Court I am wholly unable to say that the proper rate of interest has not been charged. The result is that the appeal must be dismissed with costs.

Hopley, J.: I also am of opinion that the appeal should be dismissed.

De Villiers, C.J.: The order is that the appeal be dismissed, with costs.

Lawrence, J.: I have felt, and still feel, a good deal of difficulty about this case, and regret that, while the opportunities for consultation have been very limited, I have myself, owing to the constant pressure of other work, scarcely been able to consider the matter as fully as I could have wished. The main question turns on the construction of a certain agreement, dated December 1, 1903, between the firm of Whitworths, of East London, the insolvent, and the respondent bank, for the fulfilment of which the appellant bound himself to the respondent as surety *in solidum* and co-principal debtor. In part 2 of his plea he alleges that this obligation was subject to certain conditions, embodied in an undertaking in writing of even date, given by Whitworths to himself with the full knowledge and consent of the plaintiff Bank. This document, after considerable argument, was admitted in evidence at the trial, and Mr. Justice Maasdorp, in his judgment, describes it as "the principal ground of defence." I am not sure that I quite follow the meaning of the learned judge as to the admissibility of that evidence, but I agree in the conclusion at which he

ultimately arrived, that "there is no proof that the bank was a party to this agreement," and on this simple point it appears to me that counsel exercised a wise discretion in not attempting to rely upon it, or the other point as to the insolvency proceedings, in arguing the appeal. By the agreement between the parties, the Bank agreed to issue to Whitworths a letter of credit for £10,000, payable at their London office, for the purchase of certain timber in Sweden, to be shipped thence to East London. By clause 3 of the agreement, Whitworths "engage that all drafts drawn on and accepted by your London office under the said letter of credit shall be paid to you by us at the latest on such a date as will enable you to place the money in the hands of your said office on the day their acceptances fall due, or at such earlier date as the vessel carrying the shipment may arrive at East London . . . all such payments to be made at the then current rate of exchange for bills on London of a currency to admit of their maturing on the day the acceptances fall due." Clause 5 runs as follows: "Failing the fulfilment by us of any of the foregoing conditions, you are authorised and empowered . . . without prejudice to the rights conferred on you under clause 3, to insure, land, receive and sell by auction or otherwise, as you may deem proper, the entire shipment for our account and risk; and in the event of such sale we engage to allow you a commission of 2½ per cent. on the gross proceeds, over and above the aforesaid commission and exchange, and make good any deficiency on demand." That appears to hit only portions of the agreement now mentioned. The plaintiffs say in substance that Whitworths failed to meet their obligations under clause 3, that they then proceeded to exercise their rights under clause 5, and that the result was a net deficiency of the amount claimed by them against the defendant as security and co-principal debtor, and recovered by the judgment under appeal.

The first question appears to be, what was the date when the amount advanced in London under the letter of credit, which was slightly under £10,000, fell due? Provision under clause 3 was to be made for its payment at the due date of certain acceptances which it was then anticipated would be made by the London office of the Bank. The agreement is described in the evidence as being a "printed form," and it appears to have been anticipated, and to have been presumably in the ordinary course in such arrangements, that a bill would be drawn by the consignors in Sweden on the London office, and then accepted by the Bank. But there is no evidence that a bill was ever presented and accepted, or if so, as to what was the due date. The only document put

in is a bill drawn by the Swedish consignors, on December 7, 1903, not on the London bank, but on Whitworths, at East London, payable to their own order at ninety days after sight, and purporting to be "payable in London." That was accepted on January 18, payable at the National Bank at East London, where it was finally presented and dishonoured on April 7, which is described in the letter from the Bank to the appellant as the due date. I do not understand how this was arrived at. April 7, as I calculate, was 121 days after the bill was drawn, and 79 after the acceptance. Possibly, however, it was seen by Whitworths, of East London, on or about January 7. No point, however, has been raised as to the effect of this apparent discrepancy. The bill had been endorsed by the drawers, in their capacity as payees, on December 11, to the London office of the Bank "without recovery," and the inference appears to be that on that date it was discounted by the Bank under the audit which had been cabled. The agreement, however, went on to provide that the amount should be payable not only on the due date, whatever that may have been, of the Bank's acceptances, but on "such earlier date as the vessel carrying the shipment may arrive at East London." The ship in fact arrived on January 22, the bill having been accepted four days previously. Did that acceptance vary the original agreement, so as to postpone the liability to pay till the bill matured, as the defendant pleaded in paragraph 5, or did the liability to pay on the earlier arrival of the vessel still remain, as counsel was understood to admit in argument? On the latter assumption, it is clear that Whitworths did not fulfil, and were quite unable to fulfil, the conditions of their agreement, and the Bank was therefore *prima facie* entitled to exercise, as and when they did exercise, their rights under clause 5. The important matter of the payment of the freight is not expressly mentioned either in this clause or elsewhere in the agreement. From the correspondence with the head office at Pretoria, it would seem, strangely enough, that, in authorising the credit, they had not understood "that the freight and charges would have to be paid at this end," and they assert that "Whitworths misled the Bank in this respect." However, the right to land seems clearly to imply that to pay the freight, if, as I presume would be the ordinary course, it was payable on arrival of the cargo at its destination. The fact seems to be that all the parties were satisfied, when the credit was arranged, that the value of the cargo would afford an ample margin of security to cover both the original advance and all subsequent expenses. The main difficulty I have felt is as to whether it was not the duty of the Bank, before exercising their right

under clause 5, to give Peel, as surety and co-principal debtor, an opportunity of meeting his original liability. That such an opportunity was actually given is indeed imputed, but the evidence, especially with regard to the alleged letter of February 2, which he strenuously denies having received, is somewhat unsatisfactory. Then, had such opportunity been given to him, is it clear that he would not have availed himself of it. Mr. Justice Maasdorp says in his judgment: "The plaintiff was aware that when Friend spoke to him about the freight the ship was commencing to incur demurrage, and he says, 'If I had received a letter on that date that Whitworth was not able to pay the freight, I would have paid it, and taken delivery of the cargo.'" He seemed to forget that there was something more to do than pay the freight and take the cargo, and that was to pay the amount of the bill. The expression quoted was in answer to a question in cross-examination, but the learned judge seems to have overlooked the very explicit assertion on the subject which Peel made in chief, when he said: "I never received a letter on February 2nd. If I had received such a letter, I would have paid up at once, and been glad to do so. I would have been able to pay the amount of the bill at that date, and would have done so, together with the freight charges, if I had received information from Whitworths that they were unable to do so. I would have paid my total of guarantee and taken the freight off Whitworth's hands. I never heard of any dispute about the freight charges till two months afterwards. I had no demand made upon me until I got a letter in April." It is true, then, when the ship arrived, and before the alleged demand of February 2, relying on his agreement with Whitworths, he used the expression that he would rather let the ship rot than pay the freight, and Treble, Whitworth's manager, then assured him, in the presence of Friend, the manager of the Bank, that Whitworths would effect this payment. How far Peel was then aware of Whitworths' real position may be open to doubt. Had he received a specific demand, it seems to me at all events possible that he might have consulted Wakefield, and, on his advice, take up much the same position as on the advice of his then attorneys, he took up when he was called upon in April to pay the amount of the disbursement bill, especially as according to all the estimates made at the time, the cargo showed a clear surplus of value over the amount of the advance, and all the charges which he would have had to repay. It is, however, at least equally possible that, relying on his indemnity for Whitworths, he would have declined to pay the amount unless against delivery of the cargo free of freight



and other charges. Mr. Burton, however, did not ask the Court to hold that the appellant was free from all liability on the ground that he was not called upon to pay the amount due on the arrival of the ship; and there is certainly some evidence that he was not disposed to take over the risk. There is also a good deal to be said for the view that, *stricto jure*, on the failure of Whitworths to pay the amount when due the bank became *ipso facto* entitled to exercise their rights under clause 5, without consulting Peel, and without thereby releasing him from his liability from any ultimate deficiency not exceeding the original guarantee. That the bank was bound, on or within a reasonable time of the arrival of the vessel, before exercising their rights under clause 5, formally to call on the appellants to pay the amount due under clause 3, that as a matter of fact no such demand was made, and that, had it been made, he would have been both willing and able to take such steps as would have obviated or diminished the net loss on the venture, a proposition which, when taken separately, and still more when taken collectively, I feel unable, in the evidence before us, confidently to answer in the affirmative. The next question is, whether there was any obligation at all at this period, or whether the course taken with regard to the bill did not amount to something in the nature of a novation, by which the right to payment was postponed till the maturity of the instrument. A novation, however, is not to be presumed unless it is either expressed or clearly intended by the parties, and on the whole I think that, in the first place, it could scarcely have been the intention of the bank, whose methods seem to have been wanting in more than one respect in business-like precision, to relieve the parties from their liability to repay the advance on the arrival of the goods; and in the second place, if this was intended, they must be regarded, holding as they did the shipping documents, as being substantially in the position of pledgees, and as therefore in duty bound to protect the subject of the pledge from depreciation or loss. Had they deferred taking any steps till the bill fell due, there would have been crushing charges for demurrage, while the value of the cargo, in a falling market and with falling freights, might have been seriously reduced. All that is now in substance contended on behalf of the appellant is that had the bank taken better care and more precautions against deterioration, the timber might have been realised to greater advantage. As to this the learned Judge says: "I am of opinion that the Bank did all in their power to realise it to the best advantage, and that any damage that was suffered was from unavoidable circumstances." I will content myself with

saying on this branch of the case, that there appears on the whole to be sufficient evidence to support this finding. The Bank having been justified in acting under clause 5, the charge for commission or sales, expressly stipulated for therein, does not seem disputable. As to the rate of interest charged, if that was to be challenged, the question should have been raised specifically either in the pleadings, or at the trial. I find nothing in the plea on the subject except a general denial of liability in para. 9, and there is no indication either in the evidence, the judgment, or in the report of the argument, that the question was argued in the Court below. On the whole, therefore, though not without some hesitation, I concur in thinking that sufficient ground has not been shown for disturbing the decision of the Divisional Court.

[Applicant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorneys: Van Zyl and Buissinne.]

#### GAGELA V. GANCA.

*Res judicata*—Party to a Crown prosecution.

This was an appeal from a judgment of the Circuit Court sitting at Cala.

From the record it appeared that on the 29th September, 1904, an assault was committed by appellant upon respondent. Appellant was tried in October, 1904, under the provisions of section 150 of the Transkeian Penal Code (No. 24, 1886), and fined £6, and the Magistrate awarded the respondent half the fine as compensation in terms of section 17 of the Act. At the hearing complainant was represented by an attorney, although the prosecution was by the Crown. Two years afterwards an action was brought in the Circuit Court by the present respondent for £100 damages for this same assault, and a plea of *res judicata* was set up. Mr. Justice Shiel, before whom the action was heard, awarded Ganca £25 damage, less £3 paid under order of the Magistrate, and Magistrate's Court costs. Against that judgment the present appeal was brought.

Mr. Gardiner was for appellant: respondent did not appear.

Counsel submitted that the matter was *res judicata*, seeing that Ganca had made himself a party to the criminal case and had accepted the amount awarded by the Magistrate. The Magistrate gave Ganca's attorney leave to watch the criminal proceedings, and the attorney cross-examined a witness. The claim was, counsel contended, submitted to the Magistrate under section 17 of the Act. He cited *Bertram v. Wood* (10 Juta, 177), *Fetter v. Beale* (1 Raymond, 339), *Umhlongo v. Nmgondo* (6



E.D.C., 211), *Van der Westhuizen v. Raubenheimer* (1875 Buchanan, 37), *Russouw v. Sturt* (1 Menzies, 378), *Eaton v. Moller* (2 Roscoe, 85), *Fischer v. Geurichs* (4 Juta, 31), *De Villiers on Injuries* (pp. 250-1), and *Voot* (47, 10, 24).

De Villiers, C.J.: According to the record, the defendant was prosecuted in the Court of the Resident Magistrate of Cala for contravening section 150 of Act 24, 1886, in that he did wrongfully and unlawfully assault the complainant by striking him with a stick with intent to do him harm. The case is headed "*The King v. John Gagela*." It then appeared, in the course of the proceedings, that Attorney Turvey was given leave to watch the case for complainant. Complainant was not on that account a party to the suit. Defendant was sentenced to pay a fine of £6, or, in default, imprisonment with hard labour for six weeks; half the fine, if paid, was awarded to complainant as compensation for his injuries. It does not appear that the money was asked for, nor can I see that, if it were asked for, it would make any difference in the case. Subsequently, the present action was brought before the Circuit Court for £100 damages, and the learned Judge was satisfied that the £3 which had been paid to the complainant was not a sufficient compensation for the serious assault which had been committed upon him, and then awarded £25, less £3, which had already been received under the Magistrate's order. Now, in appeal, the learned counsel for the appellant relies mainly upon the words of the 17th section of the Act 24, 1886, which says that "any Court empowered to pass sentence under the provisions of this code may . . . in passing sentence include therein, under the punishment of fine, a sufficient amount to cover reasonable compensation for loss, costs, damages, or injury caused by the offence for which the offender shall have been convicted." Well, that is reasonable compensation, in the opinion of the Magistrate or the Judge who awards that compensation, but if the plaintiff was not a party to that suit it cannot be held to have been reasonable compensation as against him. He is not a party to the suit, and therefore there is no *res judicata* as against him. The authorities are perfectly clear that there can be no *res judicata* except as against one of the parties to the suit, and if the plaintiff was not a party to the suit, there can be no *res judicata* as against him. But, then, it is contended that he did not protest at the time, and that, by accepting the amount awarded by the Magistrate, he had practically become a party to the suit. Now, it would be unheard of to give an acceptance of this kind a retroactive effect, and to hold that an

acceptance of this kind makes him a party. In my opinion, there is no authority for such a view, nor am I prepared to establish a precedent such as is contended for. If the complainant had refused to accept the £3 awarded by the Magistrate, that portion of the fine would have gone to the Crown. In my opinion, therefore, there was no such privity between plaintiff and defendant as to establish a contract by which plaintiff is debarred afterwards from suing the defendant for the amount of compensation which the Court which gives its full mind to it should hold to be the amount which he has suffered in damages. For these simple reasons, I am of opinion that the learned Judge has properly held that it was not a case of *res judicata*, and, as he was satisfied that the plaintiff had, in fact, sustained more damages than the £3 awarded to him, he is quite justified in holding a different view from the Magistrate who tried the criminal case, and awarding sufficient damages as would, in his opinion, do justice in the case.

Laurence, J.: I concur.

Hopley, J.: I concur. It does not follow that the Judge held a different view from the Magistrate, because I do not think the Magistrate necessarily had before him the full consideration of the amount of actual injuries sustained by the then complainant, and if he had had to determine that particular question, it does not follow that he would not have come to the same conclusion as the Circuit Judge. What the Magistrate was really considering was the criminal case, and any heat of blood and aggravation that there might have been in connection with the assault.

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## SUPREME COURT

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[Before the Hon. Mr. Justice HOPLEY.]

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ESTATE ROSS V. TROLLIP. { 1907.  
Feb. 21st.  
Apr. 30th.

Town attorney acting as agent  
for country agent—Liability  
of town agent to client—  
Insolvency of country agent.

W., a country enrolled agent,  
instructed defendant, a town  
attorney, to recover certain  
moneys due to the estate of the

late R. Defendant did so, and, after deducting his own fees, handed over the balance to W., who, unknown to him, was insolvent. Plaintiff had signed a power of attorney, authorizing defendant to draw the money on his behalf.

Held, that defendant should have paid over the money, less his own fees, direct to plaintiff, and was responsible to him for the same.

Held further, that plaintiff was not estopped from claiming the money from defendant by the fact that plaintiff's attorneys had already endeavoured to recover it from W.

Held further, that this money paid over to W. formed no part of his estate.

Martin v. Robertson (17, C.T.R., 216) followed.

This was an action brought by James Henry Ross, in his capacity as executor dative in the estate of the late Edward Ross, against Gustavus Trollip, attorney, Cape Town, to recover the balance of proceeds of a certain life insurance policy.

Plaintiff, in his declaration, said that the late Edward Ross was insured with the South African Mutual Life Assurance Society, and that at his death a sum of £206 5s. became payable under the policy, with bonuses. On or about the 25th July, plaintiff, in his capacity of executor dative, executed a power of attorney authorising defendant or one J. B. Cleghorn to receive the money from the society, and on the 17th August the said Cleghorn, a clerk in defendant's employ, received the money from the society. Thereupon it became and was the duty of defendant to pay over the said sum to the plaintiff or some person duly and specially authorised by him to receive the said amount, but, neglecting his duty in that behalf, defendant on the 17th August wrongfully and unlawfully through one J. C. Winterbach, a law agent, paid over to plaintiff a sum of £100 and no more, plaintiff not being then aware that the said Winterbach was insolvent. The said Winterbach was an uncertificated insolvent, his estate having been provisionally sequestrated on the 17th July and finally adjudicated on the 16th August, 1906. The said sum of £100 was paid to and by the said insolvent without the latter being authorised by him to act as mandatory in

terms of section 49 of the Insolvent Ordinance (No. 6, 1843). Defendant acted wrongfully and unlawfully and contrary to the provisions of section 49 of the Insolvent Ordinance in handing over to the said insolvent such sum for payment by him, having had notice of the said insolvency. Plaintiff was now entitled to be paid by defendant the balance of the sum of £206 5s., less defendant's charges for professional work done and the disbursements expended for plaintiff in his said capacity. Plaintiff, for a further claim, said that he was entitled to claim from defendant an indemnity against any claim or pretension that might be made against him by the insolvent estate in respect of the aforesaid sum of £100. The plaintiff's claim was for: (1) Judgment for £206 5s. 9d., less £100 and less the proper charges referred to in paragraph 6; and (2) an order that defendant do in writing indemnify plaintiff against any claim that might be made against him by the insolvent estate in respect of the said sum of £100.

Defendant, in his plea, said that Winterbach was a law agent practising at Worcester, where plaintiff also resided. In March, 1906, Winterbach instructed the defendant as his Cape Town attorney to act in various matters in connection with the estate of the late E. Ross. In July, 1906, the said Winterbach obtained from plaintiff a power of attorney, and forwarded same to the defendant, but the defendant had not then, nor at any other time, in connection with the said estate, received instructions from or communicated with the plaintiff or any other person than Winterbach. On the 16th August Winterbach, being in Cape Town in connection with a Supreme Court action, instructed defendant to press on the matter of the insurance money in order to avoid an execution sale under a judgment debt against plaintiff. On the 17th August last the insurance money referred to in paragraph 2 of the declaration was paid to defendant, who, forthwith, after deducting, as he was duly entitled to do, £17 7s. as costs, paid over to Winterbach the balance, to wit £188 12s. 4d. Winterbach paid to plaintiff £100 on the 17th August, and thereby a sale in execution was averted. He (defendant) admitted that he was aware, and said that plaintiff was also aware, prior to the said payment that Winterbach was in embarrassed circumstances, but he denied the relevancy of such allegation in this suit. He admitted having had notice of the insolvency, and that Winterbach had no authority in writing from plaintiff, but he said that he was in law entitled to make the payment to Winterbach, and that he had duly accounted to the proper person, to whom he had in law to account, to wit Winterbach, for any moneys he received. He specially denied that he had

acted wrongfully or unlawfully in the matter, or that section 49 of the Ordinance, No. 6 of 1843, applied to this case, or that such section bore the construction put upon it by plaintiff, and he said that plaintiff was in any case estopped from making the claim, and that he had accepted and taken considerable benefits effected by the payment by Winterbach, and that by his conduct he had ratified, so far as the law may require, the action of the defendant in paying the moneys to Winterbach as aforesaid. He therefore prayed that the claim may be dismissed with costs.

Mr. McGregor was for plaintiff; Mr. Close was for respondent.

Mr. McGregor submitted that the onus was upon defendant to show why he had not paid the balance of the money owing to plaintiff.

Hopley, J., however, ruled that plaintiff must open the case.

James Henry Ross (the plaintiff) said that he was a harness-maker, living at Worcester. He was executor dative in the estate of his late brother, Edward Ross. On the 23rd July last he signed a power of attorney authorising payment of the proceeds of the policy of insurance to Mr. Trollip or Mr. Cleg-horn. On the 4th August last his goods were attached under a writ issued out of the Magistrate's Court. A law agent named Winterbach, who was at his place at the time, suggested that he should go and see Mr. Lindenberg, who was the Deputy Sheriff, and that he (Winterbach) should also communicate with Mr. Trollip as to the proceeds of the insurance policy. Mr. Lindenberg was seen by Winterbach, who reported to witness that he had agreed to stop the sale pending the receipt of the insurance money. Winterbach told him that a letter would come to him (Winterbach) from Cape Town, and that the cheque would be made payable to witness. Witness, on the 18th August, received a draft for £100 by telegraph from Winterbach, and his goods were released. Winterbach asked him for a loan of £40 to enable him to carry on Miss Loubser's case against Botha's estate. Witness gave Winterbach £25, his idea being that this money was owing in order to pay Mr. Trollip's costs. He first heard of Winterbach's insolvency on the 20th August. He had never given any instructions that Winterbach was to receive the money on his behalf.

Cross-examined: The matter of the insurance money took a good deal of settling. His late brother was drowned at Hoetjes Bay on the 30th January last. Witness claimed the money by virtue of a cession. He had not given instructions at the outset to Mr. Winterbach to draw the money on his behalf. He did not remember having

given a form of receipt to Mr. Winterbach. He had only signed papers in favour of Mr. Trollip. He had not communicated directly with Mr. Trollip at any stage of the matter.

[Hopley, J.: Why didn't you have Winterbach arrested if, as you say, he had received £190 from Mr. Trollip, and only accounted to you for £100?]

Witness: I left everything in the hands of my attorney.

[Hopley, J.: They take no steps against Winterbach to make him disgorge the money, and now you want to get it a second time out of Mr. Trollip. Where is Winterbach now?]

Witness: He is at present at Worcester.

Margaretha Ross (plaintiff's wife), James C. Hoole, cashier in the S.A. Mutual Society's employ, and Alex. Mann, of the Telegraph Department, also gave evidence.

Mr. Hoole stated that the society had received documents from Winterbach in connection with the policy.

Mr. McGregor closed his case.

James Bruce Cleghorn, attorney, employed by the defendant, said that the Mutual, when Mr. Trollip came into the matter, returned all the documents in their hands. There was a power from plaintiff in favour of Mr. Winterbach. Witness described the steps which had to be taken to produce proof of death, and have an executor dative appointed in the late E. W. Ross's estate. All through they had not known the plaintiff in the matter; all their correspondence had been through Winterbach. Winterbach subsequently called at Mr. Trollip's office about the insurance money. A cheque was received from the S.A. Mutual, and cash was handed over to Winterbach.

Cross-examined: On the 17th August, when they paid over to Winterbach, the latter did not produce any authority from the plaintiff or from the Master. They knew that they had to be very careful in their transactions with Winterbach, and they had demanded from him a deposit preparatory to the trial of *Loubser v. Estate Botha*.

By the Court: They knew at that time that Winterbach was hard up, but they did not know that he was dishonest. They had no idea that Winterbach was going to appropriate the funds to his own purposes. They just treated him as an ordinary country correspondent. Witness was aware that Winterbach's estate had been adjudicated insolvent. He paid cash to Winterbach at the latter's request.

Further cross-examined: Witness did not know whether Miss Loubser herself brought in the funds towards carrying on her action.

Mr. Close closed his case.

Mr. McGregor said that the point really was, whether Winterbach was an agent to receive money. It was admit-

ted that the power of attorney was given to Trollip, that Winterbach was an insolvent, and that the £100 was paid to the insolvent. Defendant said that he was entitled to pay Winterbach, but he based that on an interesting narrative of facts which could not be reduced to a head-note. On the high degree of diligence required from a professional man, he would refer to Voet (17, 1, 9), to Van Leeuwen Cens. For. (4, 24, 8 and 10), and to *Thomas v. Benning* (8 B, 16). The duty of the agent was to account to his principal. He quoted Voet (46, 3, 3). Payment could not be made to a man merely appointed *ad litem* or to sell a thing. Apart from the general rule, that an agent had to have specific authority to receive money, there was here the point that any authority was revoked by the insolvency of the agent. He cited Story on Agency (section 486), Story on Bailments (section 211), Kent's Commentaries on American Law (vol. ii., p. 645), Robson (7 ed., p. 684a), and Voet (17, 1, 17). Section 49 of Ordinance 6 of 1843 was our local Legislative enactment; it recognised that after the insolvency the creditors had some say in the matter, and fenced it in with precautions. There had to be a power in writing for the insolvent to receive the money, and in the interest of the creditors, the permission of the person in whom, for the time being, the estate was vested. It was clear that the payment was made in forgetfulness of the Ordinance. As to the defence of estoppel, there had to be some representation on the part of the man estopped. He cited *Freeman v. Cook* (2 Ex., 654), *Van Blommestein v. Holliday* (21, S.C.), and *Ford v. Williams* (Foord's Rep.). The doctrine of estoppel was not quite so dead as that of *constitutum possessorium*, but one only relied on it in times of stress. As to ratification he cited Story on Agency (sections 239 and 242). The plaintiff had no knowledge of the facts; he did not know how earnestly Winterbach was put to it to get the deposit demanded by Mr. Trollip in connection with Loubser's case. Story said that ratification had to be made deliberately and with knowledge of all the circumstances.

Mr. Close said that on the facts it did not matter whether Winterbach was an agent or a principal. Trollip was accountable to Winterbach only, from whom all the instructions were received. If he were a principal then *cadit questio*, because the matter after the insolvency would be one for the trustee, and if he was acting as agent for plaintiff at Worcester, then the instructions coming only through Winterbach, Trollip would only be guided by those instructions. Trollip was a sub-agent, and on that there were several English cases, in which was discussed the position of a London attorney towards his country attorney and country client. He re-

ferred to Blackwood Wringht on Principal and Agent (Ed. 2, p. 170). Bowstead (p. 107), *Robins v. Fennell* (11 Q.B., 254), and *Cobb v. Beck* (6 Q.B.). Trollip in this case could not have looked to the plaintiff for any reward. There was no privity of contract between the town attorney and the country client whose work came through a country agent. Trollip could not know what the state of accounts between Ross and Winterbach was. Whatever lack of authority there might have been was cured when plaintiff knew that the £100 had come through Winterbach, and took no steps against defendant. He cited Bowstead (p. 55). It was not necessary that the ratification should be in writing. Plaintiff had not to this day repudiated the payment of the £100 through Winterbach; he followed up the receipt of the £100 by a demand for the balance. As to bankruptcy terminating the agency, Voet and Story used about the same phraseology, but they did not state clearly that bankruptcy terminated agency. Story said "it is said," and Voet "it seems to be laid down." Here the revocation was cancelled by the ratification. Section 49 of the Insolvent Ordinance was really for the protection of the trustee; all the incapacities were as against the man in whom the insolvent estate was vested up to the proviso. Insolvency did not incapacitate the agent in the case of a trustee in insolvency (section 52 of the Ordinance), or in the case of an executor (*Maasdorp's Inst.*, Vol. I., p. 225), and trustees and executors were the highest kind of agents known. On section 49 of the Insolvent Ordinance, he cited *De Wilde v. New Transvaal Co., Ltd.* (1902, T.S. 56), as the Transvaal section was even more stringent than ours.

Mr. McGregor in reply, said that he did not intend to follow his learned friend into the analogies made use of by him, as that was a fanciful, though dangerous, mode of reasoning. Voet, when he said that bankruptcy terminated mandate, cited Pothier *contrat de mandat*, who was a great authority in our courts. The "it is said" of Story was strengthened by Robson. Pothier, Voet, Story, and Robson were on one side, and on the other nothing but a strenuous and interesting argument. Executors and trustees in insolvency were in peculiar positions, and under the supervision of the Master. The proviso to section 49 had to be construed *ut magis valeat quam pereat*. Of course, Trollip could have sued Ross on the power of attorney.

*Cur. Adv. Vult.*

*Postea* (April 30th).

Hopley, J.: The plaintiff sues in his capacity as the executor of the estate of his late brother, Edward William Ross, and the defendant is an attorney of this Court. Edward Ross, in



June, 1903, insured his life in the South African Mutual Society for the sum of £200, and ceded the policy to his brother, the plaintiff, but no notification of the cession was made to the said insurance society. Thereafter, in January, 1906, Edward Ross was accidentally drowned at Saldanha Bay. There was some difficulty in proving his death, as his body was never found. There was also difficulty in recovering the amount of the policy by the plaintiff, in his capacity as cessionary thereof, owing to the absence of notification to the society of the cession. In consequence of these complications, the plaintiff, who is an illiterate man in poor circumstances, resident at Worcester, was obliged to obtain professional assistance, and he accordingly employed one Winterbach, a law agent practising at Worcester. Winterbach seems to have done a considerable amount of work, and to have taken some trouble to obtain the money for Ross, but for a long time was unsuccessful, owing to the complications above set forth. For the work which it was necessary to do in Cape Town, the defendant was engaged through Winterbach. Eventually the difficulties were overcome by obtaining an order of Court on July 5, 1906, to presume the death of Edward Ross, and to appoint the plaintiff executor dative of the deceased, in whose estate the said life policy was practically the sole asset. This removal of the impediments to a settlement between the plaintiff and the insurance company had been brought about by the efforts of the defendant, aided by Winterbach, who was also at the time interesting himself on behalf of Ross in getting a pressing creditor, who had recovered judgment against him in the Magistrate's Court, at Worcester, to stay his hand pending a settlement of his client's claim on the policy. When matters in connection with the policy had reached the stage that payment would be made to the executor, it became necessary to produce to the insurance company a power of attorney to receive payment on behalf of the executor, and a power was for that purpose prepared in the defendant's office authorising him or Mr. Cleghorn (an attorney of this Court, in the employ of the defendant) to receive the money from the company, to give valid receipts therefor, and, if necessary, to endorse any cheque made payable to the plaintiff in his capacity as executor. This power was sent by Cleghorn, who had charge of the matter, to Winterbach, to obtain the signature of the plaintiff, and on July 25, 1906, the plaintiff duly signed the document, which was thereupon posted by Winterbach to the defendant. At this time the plaintiff, in his individual capacity, was very much pressed for a settlement by his creditor, who, however, was staying his hand on promises of a

speedy settlement. At this time, too, Winterbach was on the verge of insolvency. He was in want of funds, especially in connection with a suit in *forma pauperis* which the defendant, instructed by him, was carrying on in the Supreme Court on behalf of a Miss Loubser against the executor of the estate of one Botha. By August 17 he was actually an insolvent, and this fact was known to Mr. Cleghorn, though apparently the plaintiff did not know of the insolvency until August 20. On August 17, 1906, Mr. Cleghorn, under the power of attorney, signed by the plaintiff, as executor of his late brother, received from the Insurance Society the sum of £206 5s. 9d. Winterbach was at that date in Cape Town in connection with the case of Miss Loubser, and at his request Mr. Cleghorn, after deducting the amount due to the defendant from the plaintiff on account of work done in connection with obtaining the amount of the policy, handed over the balance of £189 odd to Winterbach. Of this sum, Winterbach sent £100 by telegraph to Worcester to the plaintiff, and appropriated the balance to his own use. The sum of £100 was sent by Winterbach in his own name, and was naturally thankfully received by the plaintiff, who was in want of ready money. There was, however, no account sent with the money, nor any explanation of how Winterbach had come to have the handling of it. The plaintiff apparently consulted an attorney at Worcester on the 18th, who must have written to the plaintiff's attorneys of record, Messrs. Walker and Jacobsohn, as they wrote on August 20 to Winterbach, then in Cape Town, addressing their letter to the care of the defendant. That letter is annexed to the defendant's plea, and in it the writers, on behalf of the plaintiff, demand the balance of the money received by him from the defendant, who is described as Winterbach's "Cape Town representative." To this letter Winterbach replied on the following day, setting forth his grounds for retaining the money, and promising to account to plaintiff on his return to Worcester. The plaintiff had, however, on the previous day, heard of Winterbach's insolvency, and on August 21 he came to Cape Town, where he first saw the nature of the two letters just referred to. He then left the matter in the hands of his Cape Town attorneys, who, on August 28, made a *la finie* demand on the defendant for the balance of the £206 5s. 9d. received by him, or his representative, Mr. Cleghorn. The defendant denied liability, and the present action is brought by the plaintiff to establish his claim. The defendant pleads that he was throughout the matter in which he acted for the plaintiff about the recovery of the insurance money instructed by Winter-



tach, and that he was consequently entitled to make the payment to Winterbach, who was the proper person for him to account to. The defendant further pleads that the plaintiff by accepting the £100 from Winterbach and by subsequently demanding the balance from him, ratified the defendant's action in paying over to Winterbach. With regard to the first of those defences, it appears to me that though Winterbach was undoubtedly the means of getting this work into the hands of the defendant, and though a considerable amount of correspondence took place between him and the defendant, still the defendant knew perfectly well all along for whom he was in reality acting, and that before the money for obtaining which he had worked could be received, it was actually necessary to get a direct authority from the plaintiff to himself. That authority established an immediate and direct privity between him and the plaintiff. It was plain and explicit in its terms, authorising the defendant to receive on behalf of the plaintiff the sum of money due from the Society. There was nothing in that mandate which justified the payment over of the money to any third person, and Mr. Cleghorn seems to have been betrayed into an act of confidence in Winterbach, which was, it is perhaps not too much to say, somewhat surprising, in view of his knowledge of Winterbach's insolvency, and of his pressing want of money for purposes not connected with the plaintiff. The fact that Winterbach asked for the money in cash was also a matter of significance which might have aroused suspicion. It was argued, however, that on the authority or analogy of cases in the English Courts the defendant was justified in law in paying over to the country practitioner, for whom he had been acting as town agent. I have not found any authority even in the English cases which would justify a payment to a country attorney where there was a direct privity with and a direct mandate from the client himself. In such case the mandatory must settle with his principal and with no one else. That, at all events, I conceive to be the law in this country—which I should be sorry to see disturbed by any custom or alleged custom between attorneys and their country correspondents. There was no proof of any such custom in this country as was relied upon in argument on behalf of the defendant, nor do I know of anything in our law which would justify an attorney practising in the superior Courts of this country in applying moneys recovered by him on behalf of a country client to a settlement of accounts between himself and the country practitioner, through whom the matter had been placed in his hands. In the recent case of *Martin v. Robertson* (17 C.T.R., 216), Maasdorp,

J., said upon the same point: "If any custom did exist in this colony as between country attorneys and those practising in the seats of the Higher Courts, it would have to be established by evidence, or judicial decision," and I entirely concur in that view. Of course, if there were any justification for thinking that the plaintiff had authorised Winterbach to receive payment from the defendant, then the action of Mr. Cleghorn might be upheld. But I can find nothing in the evidence to support the idea that the plaintiff had ever authorised Winterbach to receive the money from defendant, and the defendant if he was deceived by Winterbach has only his own overconfidence in that individual to blame. As to the second line of defence it was strenuously argued on behalf of defendant that plaintiff was estopped from claiming the money from defendant because his attorneys had in the first instance written endeavouring to recover it from Winterbach, and that by their so doing plaintiff had ratified the payment to Winterbach and acknowledged his agency. I cannot see how the action of the plaintiff or his attorneys can bear such a construction. It seems to me only to amount to an attempt to reclaim as soon as possible the moneys from the wrong hands into which they had been paid. Nor can I see that because the defendant is in the attorney's letter described as "your" (i.e., Winterbach's) "Cape Town representative," he is thereby released from his duty of accounting to his principal for the execution of the duty entrusted to him. It is clear also that the defendant has not made out that his position was made any worse by the slight delay which ensued, and I do not think that the plaintiff should be debarred from his rights by reason of anything which happened, as far as the evidence in the case discloses the facts. The plaintiff, in his declaration, further claims an indemnity as against Winterbach's trustee in insolvency for any claim for a refund of the £100 paid over by Winterbach during his insolvency to the plaintiff. It is, however, clear that the money never was Winterbach's, and that he must be regarded simply as a conduit-pipe to convey the money from the defendant to the plaintiff. The money never formed part of his estate, and the trustee would have no right to demand it. There is, therefore, no necessity for such an indemnity. The defendant received on behalf of the plaintiff £206 5s. 9d., and there were fees due to him from the plaintiff amounting to £17 3s. 5d. He deducted this amount from the amount received, and a balance remains of £189 2s. 4d., for which he is accountable to the plaintiff. The person to whom defendant entrusted the money has accounted for £100, and there remains a balance due

to the plaintiff of £89 2s. 4d., for which sum there must be judgment in his favour, with costs of suit, together with interest thereon from August 18, 1906.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorney: G. Trollip.]

INSOLVENT ESTATE STEVENS ( 1907.  
V. GILCHRIST AND POWELL. ( Apr. 30th.

This was an action brought by the trustee in the insolvent estate of Charles Henry Stevens for the restoration of certain scrip for 45,000 shares in the concern known as "Sacco Limited," as the property of the insolvent prior to his insolvency.

The declaration was as follows: (1) The plaintiff is the trustee in the insolvent estate of one Charles Henry Stevens, and sues in his said capacity. The defendants are a limited liability company, duly incorporated under the Companies' Act of 1892, and carrying on business as advertising agents and contractors in Cape Town and elsewhere in South Africa. (2) The said insolvent was, up to the 1st of November, 1905, the sole proprietor of a business for the manufacture and sale of a patent alleged remedy for consumption, known as "Sacco." (3) On the 1st of November, 1905, a company was formed and registered with limited liability for the purpose of taking over and carrying on the said business of manufacturing and selling "Sacco," and the said company was registered under the name of "Sacco, Ltd." with a capital of £100,000 divided into 100,000 shares of £1 each, whereof 30,000 shares were held in reserve. The said insolvent held 70,000 fully paid-up shares in the said company. (4) On or about the 19th of January, 1906, while the said insolvent was being detained in gaol under writs of arrest, executed against him by sundry creditors of his for debts then due to them, the defendants or their agents, wrongfully and unlawfully obtained possession from the "Sacco Limited" of scrip, representing 45,000 shares in the said company, standing in the name of the said Stevens, without giving any just or valuable consideration to the said Stevens therefor. (5) If the said scrip was so obtained, as aforesaid, with the consent or by the authority of the said insolvent, then the plaintiff says that the transaction in question constituted an alienation of the said scrip, made by the said insolvent at a time when his liabilities, fairly calculated, exceeded his assets fairly valued, and that such delivery was not made *bona fide* or upon just and valuable consideration, and is therefore null and void under the provisions of section 83 of Ordinance 6 of 1843. (6) Alternatively to plaintiff says that, if the scrip was ob-

tained with the consent of the insolvent, the said transaction was in fraud of the creditors of the insolvent and is null and void. (7) The estate of the said insolvent was provisionally sequestrated on the 22nd of January, 1906, and a final order of adjudication thereof was granted on the 1st of February, 1906. The plaintiff was duly appointed trustee in the said estate on the 22nd of February, 1906. (8) The defendants still retain possession of the said scrip and refuse to restore the same to the plaintiff, who is entitled thereto.

The plaintiff claims: (a) If this Honourable Court should find that the said scrip was obtained by the defendants with the consent of the insolvent, an order declaring the delivery of the said scrip to be null and void under paragraph 5 or paragraph 6 of this declaration. (b) In any event, the restoration to him of the said scrip, or in default of such restoration, payment of the sum of £45,000, the value of the said shares. (c) Interest *a tempore morae*. (d) Alternative relief. (e) Double costs of suit.

The defendants' plea was as follows: (1) Defendants admit the allegation in paragraphs (1) and (2) of the declaration; (2) defendants admit paragraph (3), save that they say—(a) None of the 30,000 reserve shares were issued to the public, (b) 70,000 fully paid up shares were issued to C. H. Stevens as vendors' shares in consideration of the sale to the company of all his right, title, and interest in the business referred to in paragraph (2) of the declaration, (c) of the vendors' shares, 10,000, or the greater portion of this number, were given by the said Stevens to certain gentlemen (his nominees), in order to induce them to become signatories of the company's memorandum of association, and to qualify them as co-directors of the said company with the said Stevens, (d) it was agreed between the said Stevens and the company, or the directors thereof, that he would not, without their concurrence, alienate or deal with his remaining 60,000 vendors' shares; (3) the said company, "Sacco, Ltd.," had no working capital, and soon after its incorporation was unable to pay its debts, or to obtain credit, while its shares had no appreciable value; (4) negotiations were then opened by the said Stevens with the defendants with a view to their acquiring 45,000 of the 60,000 shares held by him in consideration of defendants paying the then existing debts of the company, and thereby enabling the company to continue to carry on business by obtaining fresh credit, and otherwise, and by this means also to make the remaining 15,000 shares of the said Stevens obtain an appreciable value; (5) thereafter on or about January 19, 1906, the said Stevens and the defendants entered into an agreement to the above-stated effect, and in compliance therewith the said

Stevens ceded, and caused to be delivered, to defendants 45,000 of the said shares, with the concurrence of the said company, and defendants have since paid debts of the company to the extent of £1,045, and have moreover contributed about £600 to the current expenses of the company; (6) save as above, and that they admit that on January 19 the said Stevens was being detained in gaol under writ of arrest, executed against him by sundry creditors of his for certain inconsiderable debts then due to them, defendants deny all and singular the allegations in paragraphs (4) (5), and (6) of the declaration; (7) defendants admit paragraphs (7) and (8), save that they deny that plaintiff is entitled to the said shares.

Wherefore defendants pray that the claim of plaintiff be dismissed, with costs.

Mr. D. Buchanan for plaintiff. Mr. W. P. Buchanan (with him Mr. Gutsche) for defendant.

Evidence having been heard,

His Lordship said, in the view he took of the case, it was not necessary to hear Mr. Buchanan, and granted absolute from the instance, with costs.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. § 1907.  
(Apr. 20th.

Mr. Benjamin moved for the admission of Petrus Johannes du Plessis as an attorney and notary.

Application granted, and oaths administered.

Mr. Sutton moved for the admission of Alexander Peter Dallas as a conveyancer.

Application granted, oaths to be taken before the Resident Magistrate of East London.

### REHABILITATIONS.

Mr. Howes moved for the discharge from insolvency of Daniel Christian Luyt.

Granted.

### MARCUS V. MARCUS.

This was an action brought by Lena Marcus, of Cape Town, against her husband, Wolfe Marcus, whose present ad-

dress is unknown, for a decree of divorce on the ground of defendant's adultery with some woman or women unknown.

Mr. Lewis was for plaintiff; defendant, who was sued by edictal citation, did not appear. Substituted service had been made.

Plaintiff said she was married to defendant in Russia in January, 1897. They lived together in Russia, and defendant left for South Africa in 1899. Witness came out to Cape Town to join him in 1903. In 1905 defendant went to Johannesburg. Witness desired to have the custody of the child of the marriage.

J. Goldstein, a bill poster, living at William-street, Cape Town, said that one night in April last year he saw defendant in Loveday-street, Johannesburg. Defendant was in a brothel in company with a woman of ill-fame.

By the Court: Witness had seen the plaintiff and defendant together in Cape Town. He was quite sure of the identity of the man.

Decree granted, with costs, plaintiff to have custody of the child.

### ESTERHUIZEN V. ESTERHUIZEN.

This was an action brought by Maria Elizabeth W. Esterhuizen, of Cape Town, against her husband, Samuel Jacobus Esterhuizen, formerly of Carnarvon, and subsequently of Fordsburg, Transvaal, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Toms was for plaintiff; defendant did not appear. Substituted service had been given.

De Villiers, C.J., pointed out that there was an irregularity in the publication in the "Gazette." Rule 273 said that there must be publication in the "Gazette" at least one calendar month before the day fixed for the appearance of the defendant. The citation was published on the 26th March for appearance on the 16th April.

Mr. Toms said that, under the circumstances, he should have to apply for an extension of the return day, but he asked the Court to allow the publication to stand.

[De Villiers, C.J.: No final order can be made, until there has been a default on the part of the defendant. Care should be taken in the further service that every Rule of Court is strictly complied with. You may proceed with the case.]

Wm. Thomas Birch, clerk in charge of the marriage register, Colonial Secretary's Office, gave evidence as to registration of the marriage.

Plaintiff said she was married to defendant in community of property at Carnarvon on the 6th January, 1896. Afterwards they lived at Victoria West. Subsequently her husband went to the Transvaal, and for some years he had

not contributed to her support. She did not know where defendant was now. Defendant fought in the war, but witness did not know whether he survived.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 30th September, failing which rule to issue calling upon defendant to show cause on the 15th October why a decree of divorce should not be granted and plaintiff declared entitled to custody of the child, rule to be served in the same manner as directed in regard to the intendit.

De Villiers, C.J., said that inquiries must be made as to the whereabouts of the defendant and the possibility of his having been killed during the war. Information on the point should be given when the rule was made returnable.

#### CROZIER V. CROZIER.

This was an action brought by Johanna Wilhelmina Crozier against her husband, James Crozier, formerly of Woodstock, for restitution of conjugal rights, failing which a decree of divorce.

Dr. Greer was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Dr. Greer explained that defendant was sued by edictal citation and substituted service was allowed to be made in the "Scotsman," but Mr. Anderson, a friend of the defendant's, had given information that the defendant had gone to Montreal, Canada, and that it was very unlikely that the citation would come under his notice. Instructions had accordingly been sent to an attorney in Canada to serve defendant, but no paper had so far been received from him.

W. T. Birch, clerk in charge of the marriage register, Colonial Office, gave evidence as to registration of the marriage.

Plaintiff said that she was married to defendant at the Presbyterian Church, Woodstock, on the 16th April, 1900. They lived happily for four years, but afterwards their relationships changed, because of defendant's temper and violence and intemperate habits. There were two children of the marriage. One night last year he turned her out of doors in her nightdress. She went to her mother's and defendant refused to have her back. In July last he said that he was going to leave this country and would disappear. Mr. James Anderson had made payments towards the support of the children. There had been an interval in the payments.

By the Court: Witness did not know what Mr. Anderson meant when he gave up the payment because of her conduct.

Anderson appeared, and said that the misbehaviour he had to complain of was that plaintiff went to balls and dances with another man while her husband had gone away to Scotland on a holiday. Witness stopped the payments for

a while from the money left by defendant to assist the children. The plaintiff had been of intemperate habits and witness had repeatedly had to pay debts she had contracted in consequence. He had never seen defendant the worse for liquor, though he was somewhat hot-tempered.

Plaintiff said she was not aware that she had been intemperate.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 30th September, failing which rule to issue calling upon defendant to show cause on the 15th October why a divorce shall not be granted, with custody to plaintiff of the children of the marriage, personal service of the rule to be effected.

At a later stage, Dr. Greer informed the Court that word had been received by the mail that the citation had been served personally on defendant.

#### PROVISIONAL ROLL.

WILPUTTE V. FAGAN. } 1907.  
( Apr. 30th.

This was an application for provisional sentence on a contract of sale for £350, with interest at the rate of 6 per cent. from the 1st January, 1907, plaintiff tendering transfer of the property, which is situate in the Market-square, Somerset Strand.

Mr. Benjamin was for applicant; Mr. Uppington was for respondent.

Affidavits having been read and counsel having been heard in argument on the facts,

The Court granted provisional sentence, with costs of this action and the expenses of transfer, including surveyor's charges in connection with framing of second diagram attached to his affidavit, upon the plaintiff giving transfer to defendant in accordance with such diagram. If the defendant should desire to defend the action in the principal case the plaintiff will be at liberty to issue execution for the sum of £350 and costs on giving due security *de restitucendo*.

#### CRUYWAGEN V. BRAND.

Mr. Sutton moved for provisional sentence on a promissory note for £750, with interest from the 9th October, 1906.

Order granted.

#### MARAI V. DREYER AND ANOTHER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1.150, with interest from the 1st January, 1906, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.



W. AND G. SCOTT, LTD. V. IMPERIAL  
BRICK AND TILE CO., LTD.

Mr. Watermeyer moved for provisional sentence on a promissory note for £771 14s. 5d. with interest and costs.

Order granted.

BRUMELL V. WHEELER.

Mr. Benjamin moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £37 10s., less £30 paid on account, leaving a balance owing of £7 10s., on the judgment and costs taxed at £70.

Defendant said that he was without means to meet the claim. He had a house, but it was mortgaged beyond its present market value. He was engaged on a tramway project from Salt River to Bellville, and was without any funds, owing to the expenses of promoting a Bill in Parliament. Owing to the depressed times one and another member of the syndicate had backed out.

No order, but leave granted to plaintiff to apply again upon giving proof that defendant had property to pay the debt or any part thereof.

ILLIQUID ROLL.

CROWTHER AND BOZZETT { 1907.  
V. ELKON. } Apr. 30th.

Mr. Lewis moved for judgment, under Rule 329d, for £37 0s. 1d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

KUHN V. KUHN.

This was an action to have respondent declared of unsound mind, and a curator appointed of her person and property.

Mr. Howes was for plaintiff; Mr. Louwrens appeared as *curator ad litem*.

Dr. Black, acting medical superintendent at Valkenburg Asylum, gave evidence as to the respondent's condition. She suffered from *melancholia* and delusions.

The respondent appeared under the care of a nurse, and answered a number of questions put by the Court. She said her sister had treated her kindly. She wished to leave the asylum.

The nurse said that respondent had delusions both by night and day. She imagined that her brother was visiting her, and was continually getting ready to receive him.

[De Villiers, C.J. (to Mr. Louwrens): I am afraid that she had better remain where she is.]

Order granted, declaring respondent of unsound mind, and appointing Pieter Gysbert Kuhn, of Worcester, as curator of her person and property, with power to remove her from the asylum, costs to come out of the estate.

De Villiers, C.J., said that if Mr. Kuhn could make arrangements to remove respondent to a private asylum or keep her in a private house, he might do so.

GENERAL MOTIONS.

*Ex parte* ROODEBLOEM { 1907.  
ESTATES, LTD. } Apr. 30th.

Mr. De Waal moved for a certain rule nisi, under the Derelict Lands Act, to be made absolute.

Eleanor Ohlsson and another lady appeared to oppose the application.

The former lady said that it was proposed to acquire title to land which was set apart as the family burial ground.

Mr. Roberts, surveyor, said there were no graves on the land in question. There was a burial ground, about 40 ft. square, some little distance away.

De Villiers, C.J. (to the ladies): The Court has already heard your case in a former action. For more than 80 years this property has been out of your family. There has been an Act of Parliament giving the property away to others, and now you cannot come and claim it by virtue of being descended from the other people. You had better give up your claim now, and turn your hand to something better.

Rule absolute.

*In re* "EAST LONDON DAILY NEWS"  
PRINTING AND PUBLISHING CO., LTD.  
(IN LIQUIDATION).

Dr. Greer presented the second report of the official liquidators, and applied for the usual order as to lying for inspection and publication.

Ordered to lie for 14 days, publication as before in the "Cape Times," "South African News," and "East London Dispatch."

*Ex parte* WILLIAMS.

Mr. Sutton moved for leave to petitioner to sue his wife *in forma pauperis* for divorce. In 1905 petitioner was given leave to sue his wife, but afterwards condoned her misconduct, and resumed cohabitation. His wife, he said, had again left him, and was living in adultery.

De Villiers, C.J., said that the applicant had already had leave granted, and had taken his wife back again. He



must now proceed in the ordinary way. He was an able-bodied man, he was able to work, and he must earn money to pay the necessary fees, etc. There would be no order upon this application.

*Ex parte* LEVING.

Dr. Greer moved for an extension of the return day of citation in certain divorce proceedings between petitioner and his wife.

Extended until the 30th July.

BLAINE AND CO. V. KRUGER.

Mr. P. S. T. Jones moved for leave to sue the respondent, formerly of Vryburg, but now resident in the Transvaal, by edictal citation and for the attachment of certain farm property *ad fundandam jurisdictionem*.

De Villiers, C.J., suggested that the petitioner should write to respondent asking him to pay the debt, which only amounted to £11 14s. 6d. He would postpone the attachment so as to give the defendant an opportunity of paying.

Leave to sue by edict granted, citation returnable on the 15th June, and farm to be attached *ad fundandam jurisdictionem*, attachment to be postponed for three weeks from this date, to enable petitioner's attorneys to inform defendant of these proceedings and apply for payment of the account.

*Ex parte* GUNTHER.

Mr. P. S. T. Jones moved for an order authorising the amendment of petitioner's name in a certain deed of transfer, etc.

Order granted as prayed.

*Ex parte* URQUHART.

Dr. Greer moved under section 110 of Ordinance 104 for an extension of time within which petitioner may file account as trustee of an insolvent estate for a further period of four months from this date.

The application was unopposed.

Order granted as prayed.

*Ex parte* ESTATE WATCHAM.

Mr. Douglas Buchanan moved for leave to petitioners to enter into a certain lease of property in which minors were interested. The Master reported favourably.

Order in terms of Master's report.

AJAM V. TALBODIEN AND OTHERS.

This was an application to have certain proceedings set aside. The matter concerned the Moslem Cemetery Board.

Mr. Gardiner (with him Dr. Greer) was for applicant; Mr. McGregor (with him Mr. P. S. T. Jones) was for respondents.

Mr. Gardiner suggested that the Court should follow the course adopted in *Du Toit and Others v. Domingo* (14 Jura, 126) and appoint an advocate to take a vote of the Moslems concerned.

Mr. McGregor said that he acquiesced in the suggestion, but he should like his clients to have some assurance that their costs would be paid. Voluminous affidavits had been filed. He understood that the applicant was the secretary of the Board.

Mr. Gardiner: We are the Board.

Order granted, appointing Mr. W. Porter Buchanan, or failing him Mr. Russell, to be presiding officer, to preside over a meeting to receive nominations for members of the Moslem Cemetery Board; such meeting to be held at such time and place as he may appoint; that before accepting any nomination he shall satisfy himself from the book called by the respondents the registration book, or from the books styled by the applicants the "Imams' Books," or from such other proof as may be laid before him, that the person so nominated is entitled to be registered as a registered Moslem in terms of the conditions annexed to the deed of transfer from C. D. G. Mostert and G. van R. Mostert to the trustees of the Moslem Cemetery Board (dated the 18th May, 1886), in that he has paid a subscription towards the purchase price of the ground transferred under the said deed, or is the descendant of a subscriber; the said presiding officer shall further appoint a time and place at which he shall take the votes of Moslems for the election of a Cemetery Board from among the persons whose nominations he has accepted. In ascertaining who are entitled to vote, he shall proceed in the like manner as hereinbefore provided in the case of nominations; the presiding officer shall give due notice by means of publication in the "Cape Times," "Cape Argus," and "South African News," of the time and place appointed by him for receiving nominations, and in like manner of the time and place appointed for taking votes. The presiding officer shall report to the Court the nominations he has accepted, and the votes given for the election of the Cemetery Board. Further order on the application to stand over until such report has been made. Costs of the application, the fees of the presiding officer, and costs connected with accepting the nominations and taking of votes reserved. Leave given to the attorneys on both sides to attend the meetings.

LAW SOCIETY V. JONES. { 1907  
Apr. 30th.  
May 4th.  
17th.

Attorney — Unprofessional conduct—Suspension from practice.

*The respondent, an attorney of the Supreme Court, having received £375 on behalf of a client, paid him only £250, and did not inform him that more had been received. The respondent having also received £5 on behalf of another client, gave him a cheque for the amount, but upon presentation at the Bank, there were found to be no funds.*

*Held, that it was the duty of the respondent to deposit trust funds to a separate account in the Bank, and, at all events, to take care that there shall be funds to meet the claims of his clients; and that he had been guilty of such improper conduct as to require his suspension from practice for a period.*

This was an application to have respondent's name removed from the roll of attorneys.

Mr. Howes was for applicant; Mr. Upington was for respondent.

It appeared that the case could not be heard at present.

Mr. Upington, however, applied for definite particulars to be given of the second ground of the application, which now reads: "That while practising the said profession, you were charged with the crime of theft and committed for trial by the A.R.M. of Cape Town." Counsel said that the ground was so vague that respondent did not know what charges he was expected to meet.

The Court ordered the matter to stand over until Saturday next, the Law Society in the meantime to furnish particulars of the grounds of complaint in connection with the second charge.

*Postea* (May 4th).

The applicants, in response to a direction by the Court for more particulars under the second count, had filed the following: "(1) Respondent's unlawful and wrongful conduct in his dealings with the moneys collected on behalf of and received by him for William Gerecke; (2) respondent's conduct in his dealings with moneys handed to him by the said Gerecke for investment; (3) respondent's unlawful conduct in his monetary dealings with one Jacques Hau."

When the matter was last before the Court, counsel's argument had not been concluded, and

De Villiers, C.J., asked Mr. Howes whether he thought there had been a sufficient compliance with the direction of the Court.

Mr. Howes submitted that there had been. He then proceeded to read the affidavit of Mr. Sanderson, which stated the grounds of complaint against the respondent.

The other affidavits were not read, having already been perused by the Court.

Mr. Howes contended that on the affidavits the probabilities were that the alleged partnership between respondent and one Collins did actually exist. Respondent in the case of *Rex v. Collins* admitted that he had entered into an arrangement with Collins that the latter should receive 50 per cent. of the net profits of the business.

[De Villiers, C.J.: The respondent's case is that Collins was to receive 50 per cent. only on such business as he introduced.]

Mr. Howes said that that was the case now set up by respondent. He understood that it was a fairly general custom for attorneys to allow a commission to unqualified persons. He had a case in which an attorney had been struck off for sharing fees in a case with an unqualified person.

[De Villiers, C.J.: I am afraid if that were generally carried out, we should have to strike off a good many attorneys.]

Mr. Howes quoted *Law Society v. De Jong* (1904, 19 T.S., 286).

Proceeding, counsel said there were other facts which went to show there really was a partnership between these two persons. Jones left the office on the 24th December and never went back again. At the same time he had an articled clerk, and this clerk continued to go to the office, and carried on the business in exactly the same way. Surely Jones should have disqualified this clerk. On the question of partnership, counsel cited Van der Kessel (p. 599). As to whether a partnership of this sort was misconduct, there were several cases in the Transvaal (Transvaal Official Reports, 1894, p. 202), (1902), T.S. (p. 11). If the charge of partnership had been the only one, counsel might not have pressed for a severe sentence from the Court, but there were two other charges arising out of a criminal procedure. Certain terms had not been settled until Jones had been placed under arrest, and on this point counsel referred his lordship to the case against Cairncross (Buch., 1877, p. 122). Counsel submitted the offences were just the same whether the matters had been settled or not.

Mr. Upington said the reason that the original agreement was not produced was that while his client was in gaol

Collins removed all the papers, and it would be seen by the evidence before the Magistrate that his client only got a large portion of the papers after he had obtained a search warrant, and a large number were missing. It was interesting to note that Collins in his defence, when on trial for a criminal charge in respect of misappropriation of money, did not set up the defence there was a partnership—a very good line of defence. In the matter of Coulton's case, his lordship, Mr. Justice Hopley, took judicial notice of what everyone knew, that attorneys did make allowance to unqualified persons all over the place. He felt that it was rather a hard thing to single out one man and bring him before the Court and apply to have him struck off the roll because he made an allowance to an unqualified person. He would not contend that a partnership could be entered into with an unqualified person to carry on business. Before bringing his client into court, it would have been better to administer some caution not to do such a thing, or to the profession generally that the Law Society regarded such conduct as unprofessional conduct.

*Postea* (May 17th).

Mr. Upington contended that the conduct of his client only deserved the smallest penalty and nothing like the heavy punishment which the applicants asked the Court to inflict.

De Villiers, C.J.: There are several charges made against the respondent, but I shall only deal with two of the more serious charges. The first of these is that the respondent, as attorney, employed by William Gerecke, recovered money from Mr. Stack, he received £370, and had paid over only £250. Now, what happened appears to me to be this: Money to the amount of £375 was received, and only £250 was paid over. In my opinion, it was clearly the duty of the respondent, when he received this money, to inform Gerecke exactly how much he had received, and I am satisfied that he left the Gereckes under the impression that he had received less than he actually received. At all events, he did not inform the Gereckes that he was retaining £125, which he had received for the purpose of meeting any costs that might be incurred in the three actions which he had instituted on behalf of Gerecke against Stack. When these costs were scrutinised, it was found that only £60 of costs were due, so that, according to his own statement, there was really retained by him to meet costs £65 more than he was justified in retaining. It appears to me that it was wholly improper conduct on the part of the respondent not to have informed the Gereckes of the exact amount which he had received, and not to have informed the Gereckes that he was retaining the sum of £125 for the

purpose of meeting his fees, an amount wholly exceeding what an attorney in such circumstances would have been justified in retaining. The other serious charge is that relating to the respondent's dealing with Hau. The amount is small, but it is the principle adopted by the respondent that is bad. He had received an amount of £7—at all events, he had received £5 on behalf of Hau. There seems to have been due £7, but the remaining £2 probably was not for money professionally received on behalf of Hau, but the £5 at all events was received on behalf of Hau. Well, having received that money, it was his duty to have paid it into the bank, and kept a separate account of it as trust money. The Court has repeatedly said that that is the duty of an attorney, or any one who has trust moneys in his possession. If he deposits the money in the bank, he must keep a separate account, and he must take care that there are always sufficient funds to meet the trust debts, owing by him. It is not money of his; it is money belonging to his clients, and he must see that that money is set aside in the bank to meet the claim of his client, and it is breach of trust on his part if he deposits the money to his own account, then gives a cheque, and when the cheque is presented for payment it is found that there are no funds to meet the cheque. That in itself is also unprofessional conduct. The amount is small here, and I believe that there was a great deal of carelessness in the matter, and, seeing that there has been no conviction, I shall not visit the respondent with such a penalty as I otherwise would. But, at the same time, I think he should be suspended from practice for some period for these acts. The Court will order that the respondent be suspended from practice for twelve months, and that he pay the costs of this application.

[Applicants' Attorneys: Van Zyl and Buissinné. Respondent's Attorney: C. Brady.]

# SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

FRYER V. ESTATE LOUW, { 1907.  
May 1st.

Mr. Roux was for the plaintiff, and there was no appearance for the defendants. Counsel moved for judgment in terms of the declaration, which claimed an order compelling the defendants to pass transfer to the plaintiff of certain land in the Calvinia district. The defence, he said, was vexatious in order to gain time, and he asked for costs as between attorney and client. There was really no defence disclosed.

His Lordship said there would be judgment in terms of prayers (a) and (c) of the declaration. There was no evidence to show vexatious conduct, consequently the Court would not go beyond the ordinary rule. There would be no order as to costs as between attorney and client against the defendant.

COLONIAL GOVERNMENT V. AMALINDA VILLAGE MANAGEMENT BOARD AND ANOTHER.

Commonage — Village Management Board—Lease of commonage.

*The Government had granted the use of a certain piece of land to the Village Management Board of A. for the purpose of a common, but the land had never been transferred to the Board. The Board had leased a plot of this land to R., and had allowed him to erect buildings thereon.*

*Held, that the Board had acted ultra vires. That plaintiff was entitled to an order declaring the lease null and void and ejecting R., but that R. could claim compensation for his improvements.*

This was an action brought by the plaintiffs for a declaration of rights, to have a certain lease declared invalid, which was entered into between the defendants, for the ejectment of the second defendant, and for the removal of certain buildings.

The declaration was as follows:

1. The plaintiff is Arthur John Fuller, who sues in his capacity as Secretary for Agriculture and as such representing the Colonial Government. The first-named defendant is the Board of Management of Amalinda, in the district of East London, and is constituted under the provisions of Act No. 29 of 1881. The second-named defendant resides in East London.

2. On the 16th April, 1903, the defendants mutually entered into a certain written agreement whereby the first-named defendant agreed to let, and the second-named defendant agreed to hire, for a period of five years, ending on the 31st March, 1908, a certain piece of land, situate at Green Point, in the Amalinda village area, and shown as marked in red on a plan annexed to the agreement.

3. The piece of land leased as aforesaid was at the date of the agreement and still is the property of the Colonial Government. The first-named defendant had no authority to enter into the agreement aforesaid or to let the land, and the Government at no time gave its consent thereto, and the plaintiff complains of the agreement that it was and is invalid and bad in law.

4. Notwithstanding the premises the second-named defendant has, under and by virtue of the agreement entered into occupation of the said land and erected certain buildings thereon, and occupies the same by himself, his servants, and agents.

5. The first-named defendant has been duly requested by the plaintiff to cause the agreement to be cancelled, and the second-named defendant has been duly requested to vacate the said land, and both defendants have been called upon to remove the buildings referred to, but the defendants decline, and refuse to comply with the said requests.

Wherefore the plaintiff prays for: (a) A declaration that the said agreement is invalid and of no legal force and effect; (b) an order for the immediate ejectment from the said lands of the second-named defendant, his agents, and servants; (c) an order to the defendants to remove forthwith the buildings erected upon the said land; (d) such other alternative relief as to this honourable Court may seem meet; (e) costs of suit.

The plea of the first defendant was as follows:

1. It admits paragraphs 1 and 2 of the declaration, and refers to clause 4 of the agreement whereby it is provided that the second defendant is bound and obliged to keep the ground in clean and proper order, and the use of the ground is strictly limited to the sale of refreshments, etc.; it says that the use of the ground is limited to the performance of matters conducive to the better enjoyment by the public of that portion of the Commonage; the said Commonage is within the local limits of the jurisdiction of the first defendant.



2. As to paragraph 3 thereof it does not admit that the land belongs to the Colonial Government as alleged. It says that having control of the Commonage, it (the first defendant) had a right to enter into the agreement so as to allow the said land to be used for the purposes therein mentioned, that the plaintiff and the Colonial Government raised no objection to the use thereof until on or about December 7, 1905, at which date the land had been so used for a number of years (since about the year 1901); that buildings had at that date been erected thereon and were in use as the plaintiff and the Government well knew; and that the granting of permission to occupy the site was a great public convenience, that a revenue to the first defendant was thereby derived, and that the defendant acted within the powers of general management and control vested in it (the first defendant), under the Act No. 29 of 1881 and the regulations thereunder.

3. It admits paragraph 4 thereof, but as to paragraph 5 it denies that it has been requested to cancel the agreement save in so far as the plaintiff suggested in the month of September, 1904, that the agreement should lapse, and in December, 1905, that the permissions granted to the second defendant should be withdrawn. That at the said date substantial buildings of considerable value had been erected, and the second defendant had been for a considerable time in possession, as the plaintiff well knew, in as much as a general dealer's licence in respect of the site, had been granted to him by the said Government since March, 1904: save as above, it denies the allegations in the declaration.

4 The defendant craves leave to refer to sections 19 and 23 of the Act No. 29 of 1891, and to the terms of regulation No. 16 of the defendant Board, which have been duly approved.

Wherefore it prays that plaintiff's claim may be dismissed, with costs.

The second defendant's plea was as follows:

1. The defendant, Nicholas Alfred Ries, admits the allegations in paragraphs 1 and 2 of the declaration, and begs to refer to the terms of the agreement therein referred to.

2. As to paragraph 3, he denies that the said agreement is invalid and bad in law, and he does not admit the other allegations therein contained, especially the allegation that the Government at no time gave its consent to the agreement.

3. He says that under and by virtue of the agreement he duly received possession, entered into occupation of the land, and at great expense erected certain buildings thereon, and occupied the same by himself, his servants and agents for the purposes of the agreement, and more especially as duly licensed pro-

mises for the sale of liquor and other refreshments, of all which the Colonial Government and the plaintiff was aware, and in all which the Colonial Government and the plaintiff acquiesced, and he says specially that the Colonial Government and the plaintiff by such knowledge acquiesced, ratified, and consented to the said agreement in so far as such ratification or consent was necessary (which the said defendant does not admit).

4. He admits that thereafter he refused and still refuses, at the request of the plaintiff, to vacate the said land and the buildings thereon, whereof by virtue of the premises he is lawfully in possession, and is not liable to ejectment at the suit or instance of the plaintiff.

5. Save as aforesaid he denies the allegations in paragraphs 4 and 5 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed, with costs.

Mr. H. Jones (with him Mr. Nightingale) for plaintiff. Mr. Searle, K.C. (with him Mr. Gutsche) for the first defendant. Mr. Burton (with him Mr. Roux) for the second defendant.

Mr. Jones said that most of the evidence had been taken on commission.

Mr. Cornish Bowden produced a plan from his office showing the village of Cambridge and Amalinda. The land in question was Crown land, it had never been alienated, and the Government had never given consent to any alienation.

Arthur John Fuller, Secretary for Agriculture, stated he had no recollection of a conversation with Mr. J. Ries, who represented the second defendant, to the effect that he (witness) was ignorant of any objection, and the matter was then discussed. If there was a conversation there certainly was no consent.

This closed the evidence for the plaintiff.

Mr. Jones said the question was not whether there was a possibility of the Village Management Board having any use for this land. The Government had a right to object to Village Management Boards going beyond their powers and prerogatives. The correspondence would show that the Government, after writing many letters to the Board, were told by them that upon advice they (the Board) were not the persons to take action. Counsel cited sections 2, 3, and 29 of Act 29 of 1881. He could see nothing in any of the replications or the Act itself which authorised them to grant the lease for any period whatever.

Mr. Searle said that in the regulations which the Government had approved, the Board was empowered to enter into leases. The assignment of this commonage was in effect nothing more nor less than practically giving it over subject to a kind of servitude in favour of the in-



habitants, which would not justify the Village Board in disposing of it or in interfering in any way with the *dominium* of the property. The question then arose whether anything had been done which affected the *dominium*, or whether there had been anything done to injure the property. Here, the evidence was that what had been done was for the benefit of the place. He contended that whatever was done on the area was in the right of the defendant's general control and management. On the question of the period of lease, which constitutes, in law, an alienation, counsel quoted the cases of *Green v. Griffiths* (4 Juta, 346), and *Indwe Municipality* (16 C.T.R., 279).

Mr. Burton said it might be said that the second defendant's position was that of the lessor, but it was not altogether so in this case. Until the defendant erected his buildings, he never had notice of any objection. There was no doubt as to the *bona fides* of Rics. It was really a curious position for people to come to court to demand an order to eject a person whom they licensed to stay there.

Maasdorp, J., said it did not appear to him how this land became a commonage of the village of Amalinda, but it must be accepted upon the admissions made by the parties that this commonage did now exist, and then the position would be this, that there was Government land within the Amalinda area which was subject to a commonage, that was to say there was land still vested in the Government with a servitude over it for the benefit of the inhabitants of Amalinda. Taking the servitude in its widest sense it was land to which there is a common user in favour of all the inhabitants for the purpose of commonage. The Government discovered that the Village Management Board had entered into a lease with the second defendant, in which they had given a right to the second defendant to erect buildings on that land. Now, it is quite clear that the servitude of commonage could not possibly include in it the right to erect buildings upon land which is granted by the owner of it for the purposes of commonage. He was not at all satisfied that the quarrying referred to in the Act was a right which could be applied to land described as commonage or common pasturage. It specially referred to common lands, and by common lands he thought was intended lands that in common were actually vested as a matter of property in the inhabitants through the proper authority that represented them. He therefore came to the conclusion that the Village Management Board itself would have no right to use this land for the purposes of building, and they had got no power to give such right to any other person. His Lordship said

he did not think that the defence that there was acquiescence or consent on the part of the Government to the action of the Village Management Board and of the second defendant had been proved. The plaintiff was therefore entitled to have this lease of his own property, which was arranged without his consent, declared null and void, and he was also entitled to an order of ejectment against the second defendant. The question might have been raised by the second defendant as to his rights to retain possession until he was compensated for the improvements he has made, but that defence has not been set up. The only ground against the order for ejectment which is raised by him is the alleged fact that the Government had consented to this lease going through. It appears, from the authorities cited by Mr. Burton, that a possessor who has improved property can either retain possession until he is compensated, or he can give up possession and claim compensation afterwards. It must be taken he has adopted the second course, because he has not claimed that he should be allowed to retain possession until compensation is paid. Whatever right he may have to compensation, he may raise hereafter. The agreement will be declared to be of no force or effect against the Government, and orders will be granted in terms of prayers B and C, the order in terms of prayer C to be suspended for six months, the defendants to pay costs.

[Attorneys for plaintiff: Reid and Nephew. For first defendants: Wahl, Fuller and De Klerk. For second defendant: Dold and Van Breda.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

### ILLIQUID ROLL.

LAWRENCE AND CO. V. { 1907.  
POWELL, TRADING AS { May 1st.  
UNION COLD STORES.

Mr. Gutsche moved for judgment under rule 329d for £53 6s. 7d., balance of account for goods sold, with interest *a tempore morae* and costs.

Order granted.

### HARVEY V. HARVEY.

This was an action brought by Violet Emily B. Harvey, of Cape Town, against her husband, Alfred Bridges Harvey, of

London, England, for restitution of conjugal rights, failing which a decree of divorce.

The plaintiff's declaration alleged that the parties were married at Sea Point on the 31st January, 1894, without community of property. There were three children of the marriage, aged respectively 8, 7, and 2 years. In March, 1903, defendant deserted plaintiff, wherefore she claimed a decree of restitution, failing which a decree of divorce, with custody of the children and a declaration that defendant had forfeited any benefits under a certain marriage settlement.

Mr. Inchbold was for plaintiff; defendant did not appear.

W. T. Birch, officer in charge of the marriage register, Colonial Secretary's Office, gave evidence as to registration of the marriage.

The plaintiff said that she was married to defendant on the 31st January, 1894. After living together for fifteen months at Woodstock and Cape Town, they removed to Wellington. They had disagreements on account of defendant getting drunk and ill-treating her. In 1899 she left defendant and went to England, where she remained 2½ years. Her husband had been employed as a bank clerk up to about six years ago. Defendant visited her while she was in England. He returned to this country, and they again lived together at Calvinia, but a separation took place on account of his intemperate habits. In May, 1903, they again lived together until July, when she went to stay with friends in Cape Town. At this time defendant was employed on the railway. In 1904 they lived together again, but witness left him about the end of March on account of his intemperance and ill-treatment. She afterwards saw him at her registry office, but he had not visited her since 1904. She had received no support from him since that year.

By the Court: In June, 1905, she asked him to restore conjugal rights to her, and offered to make another home for him, but he said that he would not join her. Defendant was now in London. He had inherited some money, and had received about £200. He had gone Home to make arrangements about receiving the inheritance. She believed he would have an income of £200 or £300 a year. There was only one of the children with witness, the other two being with her people in England.

[Hopley, J.: Do you want this man back?]

Witness: No.

[But are you asking that he should come back. Supposing he comes back?]

I suppose I must put up with it.

[Hopley, J.: Pis aller.]

A copy of the marriage settlement was produced, and formally proved.

Mr. Inchbold (in answer to the Court) said that the settlement was drawn in England, and was not registered in this colony, but he submitted that it was binding as between plaintiff and defendant.

Hopley, J., pointed out that the ground upon which plaintiff was proceeding in this colony would not have been a ground for divorce in England, and he had some doubt as to the effect of the present case, so far as the marriage settlement was concerned. That, however, was a point which could be raised on the application to make the rule absolute.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 1st September, failing which to show cause on the 15th October why a decree of divorce should not be granted, plaintiff to have custody of the children of the marriage, and an order declaring that defendant had forfeited all rights under the marriage settlement.

#### GENERAL MOTIONS.

*Ex parte* VENTER. { 1907.  
May 1st.

Mr. Benjamin moved for leave to petitioner to appeal in *forma pauperis* from a judgment of the R.M. of Tarkastad, by which petitioner had been adjudged to pay £2 0s. 9d. to the insolvent estate of S. M. D. Hammard.

The matter was referred to counsel for inquiry and certificate.

*Ex parte* COETZER.

Mr. Louwrens moved for an order authorising the raising of a mortgage of £800 upon the farm Kempt, in the district of Victoria East, to enable petitioner and his six sons to pay the purchase price of the other heir's share of inheritance under the mutual will of petitioner and his late wife. The seventh son had become insolvent, and his share had been sold by public auction to petitioner and the other sons.

Order granted as prayed.

*Ex parte* COETZER.

Mr. Louwrens moved for an order authorising petitioner to transfer to the School Board of Victoria East a portion of the farm Kempt, in the estate of petitioner and his late wife.

Order granted as prayed.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

AFRICAN BANKING CORPORATION, LTD. V. OFFICIAL LIQUIDATOR OF THE GRAND JUNCTION RAILWAYS, LTD. } 1907.  
May 2nd.  
" 6th.

Debentures — Negotiable instruments—*Bona-fide* holder.

*The plaintiff Bank advanced moneys to a certain partnership, receiving as security certain debentures of the G. Company. The debentures, which had been issued under Act 43 of 1895, were payable at a certain date to the bearer or registered holder, and purported to be upon the security of a first bond, a copy of which was printed on the back of the debentures. The Bank, when it received the debentures knew, as the fact was, that before their issue the chief assets of the Company had been ceded to, and its liabilities taken over by certain persons, including the partnership, on condition that no further debentures should be issued without their consent. The Company was subsequently ordered to be wound up.*

*Held, that the debentures were negotiable instruments, and that the Bank was a bona-fide holder thereof, notwithstanding its knowledge of the cession, and was consequently entitled to prove for the amount of the debentures in the winding up of the Company.*

This was an action brought by the African Banking Corporation against Edward Ridge Syfret, in his capacity as official liquidator of the Grand Junction Railways, Ltd., for an order declaring the plaintiffs entitled to prove and rank in the liquidation of the company in respect of certain debentures.

The plaintiff's declaration was as follows:

1. Plaintiff is a duly incorporated company, carrying on business as bankers at London, Cape Town, and elsewhere; defendant is the official liquidator of the Grand Junction Railways, Limited (hereinafter called the company), which was placed under the operation of the winding-up provisions of "The Companies Act, 1892," on or about the 15th day of July, 1902.

2. At divers times prior to the aforesaid date, plaintiff advanced sums of money to a certain partnership known as The Grand Junction Railways, in security whereof the said partnership pledged and delivered to the plaintiff certain debentures issued by the company, which debentures are each for the sum of £100, together with interest, are payable to bearer, were signed by two directors and the secretary of the company, were sealed with the company's seal and were issued and registered in terms of the "The Company Debenture Act, 1895." (A specimen copy of one of the debentures was annexed to the declaration.)

3. The indebtedness of the said partnership to plaintiff has been admitted and ranked at the sum of £59,853 11s. 6d. by the duly appointed receivers of the said partnership, and in security thereof plaintiff holds 785 of the said debentures pledged and delivered to it as aforesaid.

4. Plaintiff is entitled to prove and to rank in the liquidation of the company in respect of the whole of the said 785 debentures, but defendant wrongfully and unlawfully refuses to recognise or rank more than 292 thereof.

Wherefore plaintiff prays: (a) An order declaring that it is entitled to prove and rank in respect of the whole of the said 785 debentures for the capital and the interest due thereon. (b) Such further and other relief as may seem meet. (c) Costs of suit.

The defendant's plea and claim in reconvention were as follows:

1. The defendant admits paragraph 1 of the declaration.

2. He admits paragraphs 2 and 3, subject to the matters hereinafter set forth.

3. The Grand Junction Railways, Limited (hereinafter styled "the company") was incorporated for the purpose of constructing certain lines of railway in this colony, and thereafter entered into certain contracts with the Colonial Government and obtained certain powers by Acts of Parliament for such construction, to which defendant craves leave to refer at the trial.

4. On or about the 20th July, 1898, the company ceded and assigned all its right, title, and interest in and to the said contracts to the Thames Ironworks and Shipbuilding Company (hereinafter styled the Thames Company), whereof one Arnold Frank Hills was managing

director, and the said Hills; the defendant craves leave to refer to the said document of cession when produced at the trial; the said Thames Company acted in the said matter for and on behalf of a partnership known as the Grand Junction Railways (hereinafter styled the partnership, and) consisting of (a) the said Hills and (b) John Walker, John Walker (junior), and Thomas Mouat Cameron Walker, trading as John Walker and Sons.

5. On the same date, to wit July 20, 1898, and in consideration of the aforesaid cession, the Thames Company, the said Hills, and the said firm of John Walker and Sons, agreed with the company in writing to pay all its debts, including the debentures theretofore issued by the company, and took over all the liabilities and engagements of the company, on condition that no debentures or shares should be issued after the said date without the sanction in writing of the Thames Company, the said Hills, and the said firm of John Walker and Sons; the defendant craves leave to refer to the said agreement when produced at the trial.

6. At the said date, July 20, 1898, work upon the said railways had been executed under a contract between the company and the said firm of John Walker and Sons as sub-contractors, which entitled the company, in terms of clause 1 of the debenture bond, annexed to the declaration, to issue debentures for the sum of £170,700, and no more, being in respect of the equivalent number of completed miles of railway under the aforesaid railway contracts; the company craves leave to refer to the said contract when produced at the trial; the company had no other assets save as above referred to, neither did the company thereafter do any work in connection with the said railway contracts or otherwise, or acquire any further assets.

7. Prior to the said date, July 20, 1898, the company had issued 1,700 debentures in all, of £100 each, whereby it had pledged its property and assets to the extent of £170,000.

8. Subsequent to the said date, July 20, 1898, the company issued further debentures of £100 each, numbering in all 1,000, whereof 500 have, since the liquidation of the company, been surrendered by the holders to the receivers of the partnership, and the other 500 are held by the plaintiff in pledge.

9. Of the said 1,000 debentures seven only were lawfully issued, representing £700, the balance of the aforesaid £170,700, and the remainder were, by reason of the premises, unlawfully issued, and are not binding on the defendant.

10. Of the 785 debentures held by the plaintiff in pledge, 285 were issued prior to the said date, July 20, 1898, being

portion of the 1,700 as aforesaid, and 500 were issued thereafter, including the seven in paragraph 9 referred to.

11. At the same time the said 500 debentures were received in pledge by the plaintiff, the plaintiff had knowledge of the cession and agreement referred to in paragraphs 4 and 5 hereof, and of the terms of the aforesaid debenture bond, and of the fact that the company had on July 20, 1898, no assets save its right, title, and interest in, and to the said contracts which it ceded on that day, and the plaintiff, when it subsequently received the debentures issued, after that date took the same subject to any and all illegalities affecting them.

12. The defendant has been declared entitled by judgment of this Honourable Court to prove on the assets of the partnership in respect of the 1,700 debentures, and the seven debentures aforesaid, and no more; the defendant craves leave to refer to the proceedings in the said action and the judgment therein when produced at the trial.

13. As to paragraph 4 of the declaration, the defendant says that he has always been ready and willing, and before action brought, tendered, and hereby again tenders to admit to proof by the plaintiff 292 debentures, being the 285 and the seven aforesaid, and he admits that he refuses to recognise or to rank more than the said 292, save as above he denies the allegations in paragraph 4 thereof.

Wherefore, subject to the said tender, he prays that the plaintiff's claim may be dismissed with costs. And for a claim in reconvention the defendant (now plaintiff in reconvention) says: (1) He craves leave to refer to the matters above pleaded, and by reason thereof submits that he is entitled to have it declared that the said debentures issued after July 20, 1898, and which are now held by the defendant in reconvention, were illegally issued, save in respect of seven thereof, and are not binding upon the plaintiff in reconvention, and are not entitled to proof in competition with debentures lawfully issued, and other debts lawfully incurred.

Wherefore the plaintiff in reconvention prays: (a) That it be declared that the said 493 debentures are not legal and binding upon him, and cannot be proved in the liquidation; (b) alternative relief; (c) costs of suit.

Mr. Benjamin (with him Mr. W. P. Buchanan) for plaintiffs. Mr. Searle, K.C. (with him Mr. Gardiner) for defendants.

Mr. Searle called

Edward Ridge Syfret, who said he was the liquidator, and was also one of the receivers of the Grand Junction Railway, together with Mr. Close. He had prepared a statement showing what the effect would be if the bank were allowed to prove for the full value



of the debentures against the liquidator. The company had no assets at the date of liquidation, except a claim against the partnership. Thereafter the liquidator and the receivers were unable to agree as to what debentures were properly issued, and an action was brought last October (16 C.T.R., 865). There were a number of creditors of the partnership who were not interested in the company, and they took no debentures, and these people had proved against the estate of the partnership. There were creditors to the receivers of the partnership estate, who held certain debentures, such as the London and Westminster Company and the plaintiff company. All these creditors held debentures of the original issue, excepting the African Banking Corporation. The remaining debentures of this original issue were surrendered to the receivers by the holders. The receivers now were actually holders of these to the extent of £500 on the same principle as the African Banking Corporation held theirs. The receivers now would be in the same position as the African Banking Corporation; if the claims were proved the receivers might also have a claim. They had recovered for the company by judgment of the Court a certain amount which they had got in hand for distribution. The liquidators' last report and account would show the whole amount had not been received. By an arrangement between the liquidator and the receivers, the liquidator had only received enough to pay the creditors, and under an order of Court he had authority to pay these. The liquidator only received from the receivers sufficient to cover these claims.

Cross-examined: A dividend of 11s. had been provided for in the partnership estate. The receivers would probably be able to pay more, but only 11s. had been provided for. Certain persons had been paid out on that basis. He believed nearly 2s. more might be recoverable.

Mr. Benjamin, in argument, submitted that the plaintiffs were entitled to prove against the liquidator for the full number of debentures which they held, viz., 785. The contract having been made in England, the holding of the debentures was to be construed according to the English law, though there was no substantial difference between the English law and our law. The authorities which he would quote showed it had been held in England that this debenture scrip payable to bearer was negotiable security. Counsel quoted the cases of the *Bechuanaland Exploration Company* and the *London Trading Company* (1898, 2 Queen's Bench Division, 658), and *Fidelsstein v. Schuler* (1902, 2 King's Bench Division, 144).

De Villiers, C.J., said he did not know whether the other side would

deny that these were negotiable securities, but, assuming that they were negotiable securities, the important point was whether the knowledge of the bank of the circumstances under which they were issued would not foreclose the bank from recovering.

Mr. Benjamin said the bank took the debentures without knowledge that no consideration had been given for them, and therefore the bank took them free from any blemish which might attach to them. The condition (1) in the bond did not, he contended, apply to the issue of the £500,000, but applied only to any subsequent issue—to the remaining £500,000. Even if the first provision in the mortgage bond applied to the whole of the debentures, he contended that the company had full authority to issue debentures to the extent of £750,000. Then, supposing they did not have such authority, he submitted there was clear authority in the English law, which would apply in our law also, that it was not incumbent upon persons taking a debenture bond to inquire whether the bond had been validly issued by the company, provided that the issue of the bond by the company was *intra vires* of the power of the company. If it were within the power of the company to issue, and they did issue, then what were called domestic irregularities did not entitle the company to take up the position that they were not liable for these bonds. If a debenture issued by the company was, on the face of it, in order, then the company could not take up the position against the debentureholder that there had been some irregularity in the issue of it which would estop the debenture-holder from claiming. Counsel cited *Lindley*, p. 218, *Royal British Bank v. Twickenham* (5 Ellis and Blackburn, 248, and 6 Ellis and Blackburn, 222 and 237), *Orrer v. Gurney and Co.* (4 Chancery Appeals, 460), *Duff v. Tower Galvanising Company* (Law Reports, 1901, 2, King's Bench Division, 314). There was not a tittle of evidence, counsel urged, to show that the bank knew that the company had parted with all their assets. The onus lay strictly upon the defendant, even if it affected the case of showing that the plaintiffs at the time had express knowledge. Whatever knowledge the manager in Cape Town may have had, it could not, he contended, affect the transaction between the branch in London and J. Walker and Co. In other words, he contended that in these circumstances the knowledge of the agent could not bind the principal. Upon this point he quoted *Wright on the Law of Principal and Agent*, p. 352.

Mr. Searle said that the main defence in the case was that the bank proving now against the company were not *bona fide* holders for value of these debentures at all, and from the record



he would argue that it was abundantly clear that they knew that these debentures were not really payable by the company at all, but were practically in the position of accommodation papers as between the company and the partnership, that the company was merely a nominal thing at the time, and that they were looking to the partnership, and not to the company, in these circumstances. This was the main defence, but he must not be taken to admit that English law applied in this case, or that these debentures were negotiable instruments. On that point he quoted 1 Lindley, 1902, pp. 85 and 300, *Venables v. Baring* (3, Chancery Division, 1892, p. 527), and *Van Blommestein v. Halliday* (21 Supreme Court Reports, p. 11). In the present case, however, the liquidator relied on the bank's knowledge, so it was hardly necessary to the case to deal with the points mentioned. The defence the defendant took up was this: that this scrip was illegally issued. At that time not only had the assets been taken over by the partnership, but the obligations had also been taken over by the partnership to the knowledge of the bank. The company had then practically ceased to exist, and the debentures were really in the nature of accommodation notes.

[De Villiers, C.J.: Supposing the partnership had acquired the right to the debentures while the company was a going concern, but that the debentures had not been issued before it ceased to be a going concern?]

Mr. Searle: That would raise another point. It is not suggested that that is the case.

[De Villiers, C.J.: But couldn't they issue debentures in respect of claims which existed before?]

Mr. Searle: No; I submit not.

[De Villiers, C.J.: The partnership had a claim for the issue of debentures, and if the company had ceased to be a going concern, surely they could say: "We insist on the issue of the debentures"? Is it your case that the Bank knew everything?]

Mr. Searle: Yes, that the Bank knew everything. Mr. Littlejohn, the manager of the bank here, knew everything, and I contend that Mr. Littlejohn's knowledge is the knowledge of the Bank in England.

De Villiers, C.J., said that unless fraud were alleged and proved he could see no illegality. If the defendant relied on fraud, then the plea must be altered.

Mr. Searle submitted that it was not necessary to plead fraud. Supposing it were a fictitious arrangement?

[De Villiers, C.J.: Then it would be fraudulent.]

Mr. Searle urged it was sufficient to prove that the Bank had knowledge of all the circumstances. The Bank having

proved against the partnership, with whom the transaction really was, could not now claim against the company.

De Villiers, C.J., said he could not see that anything short of fraud could relieve the defendant.

Mr. Searle, in further argument, referred to *African Banking Corporation v. Hills and Another* (20 S.C.R., 599), *London and Westminster Bank v. Receivers Grand Junction Railways* (21 S.C.R., 404), *Mouatt v. Castle Steel and Ironworks Company* (34, Chancery Division, 58), *Rogers v. Ingham* (3 Chancery Division, 355).

Mr. Benjamin having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (May 6th).

De Villiers, C.J.: The plaintiff bank, as the lawful holder of 785 debentures issued by the Grand Junction Railways, Limited, prays by this action for an order that the bank is entitled to prove and rank against the company, which is being wound up, in respect of the whole of the debentures for the capital and interest due thereon. Each of the debentures certifies that the bearer or the registered holder is entitled to receive the sum of £100, with interest at the rate of 4 per cent. per annum, from the company, upon the security, and in terms of the first mortgage bond, of which a copy is printed on the back of the debenture. Under the bond the company acknowledges that it is indebted to certain trustees for the debenture-holders in the sum of £500,000, being part of the debentures to be issued for £1,000,000, and one of the conditions is that the company may create a further issue of preference capital not exceeding, I take it, the sum of £1,000,000, to rank concurrently with the issue of £500,000, provided that the total issue of debentures shall, in no case, amount to a total sum exceeding £2,500 per mile of railway contracted for, after due notice to and with the consent of the trustees, for the debenture-holders. The plea admits that as to 292 of the debentures the bank is entitled to rank concurrently with other debenture-holders, but, as to the remaining 493 debentures, the plea denies their legality for the following reasons: The company had, on the 20th July, 1898, ceded all its right and title to and interest in the contracts, which it had made with the Government for the construction of certain lines of railway to another company, which, for briefness sake, may be called the Thames Company, and in consideration of such cession the Thames Company, one Hills, and the firm of John Walker and Co., had agreed with the company in writing to pay all its debts, including 1,700 debentures, which had been issued, and

to undertake all the liabilities and engagements of the company, on the condition that no debentures or shares were issued after that date without their sanction in writing. Subsequently these contracts were ceded to a certain partnership, which pledged to the plaintiff bank 785 debentures in the company as security for advances, and the plaintiff now alleges that at the date of the cession of 20th July, 1898, the company had no assets, save its right and interest in and to the contracts, which it ceded on that day, that up to that date 1,707 debentures had been lawfully issued by the company, that thereafter 1,000 debentures were unlawfully issued, and that as the plaintiff bank had knowledge of the cession and agreement of 20th July, 1898, and of the terms of the bond, and of the fact that the company had on the 20th July, 1898, no assets save its interests in the ceded contracts, the bank was not entitled to prove in respect of such debentures pledged to it by the partnership as formed part of the issue after that date. The plea does not allege, nor is there any proof that any of the debentures had been issued in excess of the powers of the company. It was decided by this Court in an action instituted by the present defendant against the receivers of the partnership that the state of the accounts between the company and the partnership was such that there was not legally claimable in respect of debentures lawfully issued more than the amount of 1,707 debentures, but there is no proof whatever that the plaintiff bank was aware of the state of accounts between the company and the partnership. The advances made by the bank, for the security of which the debentures now in question were pledged, were made by the London office of the bank, and there is evidence that Mr. Littlejohn the Cape Town manager of the bank was aware of the cession of the contracts, and that he did not have any high opinion of the value of the debentures as security, but it is by no means clear that the London office, which dealt directly with the company, shared in the opinion held by the local manager here. For the purpose of my decision in the present case, however, I am prepared to assume that all the information possessed by Littlejohn was known to the London office. The question still remains whether the plaintiff bank, as the holder of the debentures, is debarred by reason of such knowledge from succeeding in the present case. The plaintiff's contention is that the debentures in question are negotiable instruments and if it be necessary for the decision of the present case to decide the point I am prepared to hold that the contention is right. In the case of *Van Blommestein v. Halliday* (21 S.C.C., 11), I

stated that I was not prepared to lay down as a rule of law that share certificates endorsed in blank by the registered owner are negotiable instruments. I pointed out that the original transferer, who is entered as owner in the certificate and register, continues to be the only shareholder recognised by the company until the transferee or holder for the time being obtains registration in his own name. The holder of a share warrant payable to bearer stands on a different footing. For, under the 64th section of Act 25 of 1892, such a share warrant entitles the bearer to the shares specified in it, and such shares may be transferred by the delivery of the share warrant, but the question whether a share warrant is negotiable does not now arise. The debentures now in question entitle the bearer or registered holder to receive, at its due date, the amount thereof and interest due thereon. They were issued under the provisions of Act 45 of 1895, the 6th section of which entitles the holder of a debenture covered by a bond, as those in question were, to enforce his rights under the debenture, and dispenses with the necessity of giving notice to the debtor of the cession of any debenture as would be required in the case of an ordinary cession of debt in order to protect the cessionary against the payment of the debt by the debtor to the original creditor. The company is bound to pay the amount when due to the holder, and as against him the company could not plead in compensation a debt due by a former holder, or claim the benefit of a payment made to such former holder. Of course, if the company had issued the debentures without authority, it would not be bound to pay, but if, while acting within the powers conferred on it by its memorandum of association, it had been over-reached by those who induced it to issue the debentures in favour of the original holders, a subsequent bona fide holder is entitled to claim the amount due on the face of the debenture. Having regard to commercial practice in England as evidenced by recent cases, such as that of *Edelstein v. Schuler* (87 L.T.R., 204), to the terms of the Act under which the debentures were issued, to the reasons for the judgment given in *Van Blommestein v. Halliday*, and to the commercial practice in this colony, so far as I am entitled to take judicial cognisance of it, I am of opinion that the debentures may be regarded as negotiable instruments. This Court cannot alter or modify the law, but must apply existing principles of the law to the decision of fresh cases as they arise which are not specifically provided for. The Act 43 of 1895 does not in terms declare that debentures payable to bearer issued thereunder shall be deemed to be negotiable in-

struments, but it endows them with some of the qualities which are peculiar to negotiable instruments. The third section provides that debentures may be executed in duplicate, and when so executed shall be produced for registration to the Registrar of Deeds, who shall effect registration in accordance with the regulations. Under the 4th section debentures may be executed singly but specially described in a bond in favour of persons in trust for the debenture holders, but the 6th section specially enacts that every holder of a debenture covered by a bond shall be entitled to enforce his rights under such debenture precisely as though such debenture had been issued under section 3. The debentures now in question were covered by a bond and were not registered under section 3, but the bank, as holder, is entitled to enforce its rights precisely as though they had been duly registered under section 3. They are payable to bearer, and every reason which originally existed for attaching the quality of negotiability to the recognised negotiable instruments would equally apply to the debentures would equally apply to the debentures in question.

Coming next to the knowledge which the bank had of the previous dealings between the company and the partnership. I am of opinion that the bank was a *bona fide* holder of the debentures. Such notice as it had could not possibly affect it with knowledge that the company had improperly issued any of the debentures. The very document, dated July 20, 1898, which is relied upon by the defendant as showing that the company had no right to issue further debentures, reserves the right to issue such debentures provided that the sanction of the signatories was given in writing. It has been contended by Mr. Scarle, on behalf of the defendant, that as the bank knew that, after the date of that document, the company was no longer a going concern, inasmuch as all its assets were thereby ceded, and all its liabilities taken over, it must be taken to have had notice that the subsequent debentures were improperly issued. But although its concessions from the Government were ceded it might, for aught the bank knew, have had other assets, and in any case the company did not go into liquidation until much later. It is not suggested that the sanction of the signatories to the document was not given to the issue of the fresh debentures, or that the bank knew that John Walker, one of the signatories, had misled the company into making such issue for more than was actually due. It may well be that the bank is not entitled to claim from the partnership the full amount of the debentures pledged to the bank, but that is a matter between the bank and the partner-

ship. As between the plaintiff and the defendant, the bank is, in my opinion, the lawful and *bona fide* holder of the debentures in question, and, as such, is entitled to prove in respect thereof, and the judgment must, therefore, be for the plaintiff bank, with costs.

[Plaintiff's attorneys: Findlay and Tait. Defendants': Moore and Son.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

	1907.
ENGELBRECHT AND ANOTHER V. ROSSOUW, SEN. AND OTHERS.	May 2nd.
ENGELBRECHT V. ROSSOUW, JUN. AND ANOTHER.	" 3rd.
	" 6th.
	" 7th.
	" 8th.
	" 10th.

The hearing of these actions was consolidated. The first action was for a declaration of rights with respect to a boundary line on a farm in Namaqualand, and £500 damages for trespass against Rossouw, and in the second action plaintiff claimed £1,000 damages for assault.

The declaration was as follows:

1. The plaintiffs are Andries Francois Engelbrecht and Jacobus Adriaan Engelbrecht, farmers in the division of Namaqualand. The defendants are Gideon Joshua Rossouw, Johannes Jacobus Petrus Beukes, Meyer Kaplan, and Dirk Jacobus Kotze, farmers in the division of Namaqualand.

2. The plaintiffs are respectively owners of one-fourth and one-sixteenth undivided shares in the remaining extent of the farm Ezelsfontein. The first defendant is the owner of the adjoining farm now called Rheebofsfontein, formerly a part of the farm Ezelsfontein. The defendants Beukes, Kaplan, and Kotze are respectively owners of one-third, one-sixth, and one twelfth undivided shares in the remaining extent of the farm Ezelsfontein.

3. Prior to 1877 Ezelsfontein, together with certain other properties, were owned in undivided shares by defendant Rossouw, Andries Francois Engelbrecht, sen., the father of the plaintiffs, and one Hermanus Albertus Rossouw.

4. On or about 1877 the said owners agreed to sub-divide the properties, and in accordance with the agreement the farm now called Rheebofsfontein, part of the farm of Ezelsfontein, was allotted to the defendant Rossouw, and the remaining extent of the farm Ezelsfontein was allotted to Andries Francois Engelbrecht, sen.

5. Andries Francois Engelbrecht, sen., has since the sub-division from time to time transferred the remaining extent of the farm Ezelsfontein in undivided shares to the plaintiffs and to defendants Beukes, Kaplan, and Kotze.

7. One of the terms of the agreement of sub-division in or about 1877 was, that the boundary line between the farms Rheebofsfontein and the remaining extent of Ezelsfontein was to run in a straight line from the north-western corner of the said farm Ezelsfontein, marked "G" on the said plan, to a point marked "F" on the said plan, and a sub-divisional survey was accordingly made and a beacon erected at the point "F."

8. The boundary line "G F" was recognised and accepted as the boundary between Rheebofsfontein and the remaining extent of Ezelsfontein by the respective owners of the farm and their successors from the date of the sub-division until 1904, and Andries Francois Engelbrecht, sen., and plaintiffs did continuously and peaceably occupy and cultivate their lands right up to the boundary line without protest or let or hindrance whatsoever until the year 1904.

9. On 23rd November, 1904, defendant Rossouw wrongfully and unlawfully trespassed on the remaining extent of the farm Ezelsfontein, and caused a troop of about fifty horses and donkeys to be driven across the boundary line "G F" on to the plaintiffs' cultivated lands, and about November, 1905, defendant Rossouw by himself or his servants again crossed the boundary line "G F" and trespassed on the remaining extent of the farm Ezelsfontein and spanned a wire fence over a portion thereof.

10. By reason of the trespasses the plaintiffs' crops on the lands were destroyed, and the plaintiffs have been kept out of the use of the cultivated lands, and have suffered damage to the extent of £500.

11. The line "G F" is the true and proper boundary between the said farms, but the defendant Rossouw claims that the line "G Z" marked on the said plan, and not the line "G F," is the true boundary.

12. The defendants Beukes Kaplan, and Kotze are joined in this suit in order that all parties interested may be before the Court, but no costs are claimed against any of these defendants who do not dispute the plaintiffs' claim.

Wherefore the plaintiffs claim: (a) A declaration of rights; (b) a declaration that the straight line "G F" is the true and proper boundary line between the farm Rheebofsfontein and the remaining extent of the farm Ezelsfontein; (c) £500 as damages for the trespasses against the defendant Rossouw; (d) an interdict restraining the defendant Ros-

souw from trespassing upon the plaintiffs' said property; (e) alternative relief; (f) costs of suit.

The defendants' plea was as follows: In 1875 an agreement to sub-divide the properties was come to between the owners according to which Rossouw was to get 3,000 morgen of Ezelsfontein, the remainder being allotted to A. Engelbrecht, sen. The surveyor employed did not cut off 3,000 morgen as agreed upon, but cut off only 2,641 morgen per diagram framed by him, but in order to save costs of a further survey the defendant in 1877, accepted transfer of the 2,641 morgen, as per the diagram. Defendants admit the remaining extent of Ezelsfontein is held in undivided shares by the plaintiffs and the defendants, Beukes, Kaplan, and Kotze, but they deny the correctness of the plan attached to the declaration and the rest of the paragraph. They attached a correct plan, and in reconvention to have "A X" on their plan declared to be the proper boundary line between the farms and £500 damages for trespass.

Plaintiffs filed a replication and a plea to the claim in reconvention.

The plaintiff's declaration in the second case was as follows:

1. The plaintiff is Andries Francois Engelbrecht, a farmer and part-owner of the farm Ezelsfontein, in the division of Namaqualand. The defendants are Gideon Joshua Russouw and Hermias Albertus Russouw, farmers residing on the farm of Wilgenhoutsrivier, which adjoins the farm of Ezelsfontein.

2. On or about the 2nd November, 1904, the defendants wrongfully and unlawfully entered and trespassed upon that portion of the said farm of Ezelsfontein in the occupation of the plaintiff, and drove a flock of sheep and goats on to certain cultivated lands thereon belonging to the plaintiff, thereby doing considerable damage to plaintiff's lands and crops.

3. On or about the 23rd November, 1904, the defendants again wrongfully and unlawfully entered upon the said farm Ezelsfontein and drove a number of horses and mules on to the said cultivated lands belonging to the plaintiff, thereby doing considerable damage to the plaintiff's land and crops.

4. The plaintiff attempted to drive the said horses and mules out of the said lands, whereupon the defendants set upon the plaintiff and violently assaulted him.

5. By reason of the said assault the plaintiff was seriously injured, and has suffered great pain and damage.

Wherefore the plaintiff claims: (a) £1,000 as damages sustained by reason of the said trespass and the said assault; (b) alternative relief; and (c) costs of suit.

The defendants' plea was as follows:

1. As to paragraph 1, the defendants say that the plaintiff is the registered



proprietor in undivided shares with certain five others of the remaining extent of the said farm of Ezelsfontein by certain two deeds of transfer dated respectively the 5th day of October, 1899, and the 7th day of December, 1903.

2. On or about the said dates the defendants, acting lawfully and with the authority of the registered proprietor of the said farm of Wilgenhoutarivier, one Gideon Joshua Rossouw, entered upon certain portion of the said farm and pastured certain sheep and goats and drove certain horses and mules thereupon. On or about the 23rd day of November, 1904, the plaintiff wrongfully and unlawfully interfered with the defendants in their said lawful acts, trespassed upon the said farm and attempted to drive the said horses and mules out of the said land, and the defendants, acting lawfully, resisted the plaintiff in his said wrongful and unlawful interference and endeavoured to prevent him from so driving out the said horses and mules.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

Mr. Burton (with him Mr. Watermeyer) for plaintiff. Mr. Upington (with him Mr. J. E. R. de Villiers) for defendants.

A clerk from the Deeds Office produced the title deeds, and stated that the four farms were sub-divided in 1877. Certain documents were put in containing two diagrams together with the transfer deeds.

Arthur C. G. Oakes, of the Surveyor-General's Office, produced the original grants to Hermanus Albertus Engelbrecht of the four farms, the first two in 1843 and the others in 1844.

Garwood Alston, Government Land Surveyor, who has been practising for some forty-two years, stated he knew Namaqualand for the last thirteen years. In April, 1905, he went up to make a survey of the property in dispute at the request of the two plaintiffs. He went into the history of the matter, and traced the property Ezelsfontein from the original grant, and made a compilation plan showing the sub-division made between the three owners of the four farms in 1877. The plan showed the relative position of the four farms when the sub-division was made in 1877. The material he worked upon was the diagram attached to the original grant. Witness gave evidence at some length on the plan he prepared.

Re-examined: Since 1876 the Surveyor-General's Office adopted the principle of the red line data, enabling a surveyor to know where the actual and proper line was.

Dr. Cowan, District Surgeon of Namaqualand, gave evidence on the question of assault. The defendant described to him the nature of the assault, and his condition bore out his statement.

Six months after the examination witness found the defendant in a bad state of health. Recently he had been examined in Cape Town, and witness found him in a better state of health than ever; there was no permanent injury, although the defendant still complained of a pain in the back.

*Postea* (May 10th.). The voluminous evidence having been concluded, and counsel heard in argument on the facts,

Maasdorp, J., gave judgment for the plaintiffs on the first claim in the declaration, £20 damages in respect of the second, and £5 damages to the plaintiff in the second action, the defendants to pay costs.

[Plaintiff's Attorney: D. Tennant. Defendant's Attorneys: Walker and Jacobsohn.]

## GENERAL MOTIONS.

*Ex parte* ESTATE MARSH. } 1907.  
May 2nd.

Mr. Inchbold moved on the petition of the executor of estate Marsh for leave to sue one Susannah Jackson by edictal citation for provisional sentence on a certain mortgage bond for £500, and to attach the property hypothecated *ad fundandam jurisdictionem*. Defendant was stated to be now resident at Ilford, Essex, England. The bond had become due by reason of non-payment of interest as stipulated.

Leave to sue by edict granted, and property attached, citation returnable on the 2nd August, 1907, to be served personally on defendant and her agents in this colony.

*In re* RECREATION SYNDICATE, LTD.

Mr. Gutsche moved for confirmation of the third and final report of the liquidators. He stated that all the assets had been distributed, with the exception of £11 2s. 5d., reserved to cover the expenses of this application. The liquidator also applied for an order for dissolution of the company and destruction of the books.

The Court ordered that the report be confirmed, that the company be dissolved, and that the liquidator be granted permission to destroy the books.

*Ex parte* DANEMAN BROS.

Mr. Pyemont moved on the petition of Daneman Bros., as creditors in the insolvent estate of A. P. Esterhuyzen, farmer, of Ceres, for the appointment of a new trustee, to take the place of Mr. Henry Carson, deceased.

Order granted, authorising the Master to call a meeting of creditors to elect a fresh trustee.



*Ex parte* SMIT.

Mr. M. Bisset moved for an interdict restraining one Wilfred Frewen, of Venterstad, as executor testamentary of the estate of the late Heinrich F. J. Stucke, from parting with the proceeds of certain insurance policies. Petitioner stated that on the 9th April he was appointed provisional trustee of Stucke's estate, which was surrendered as insolvent by respondent as executor testamentary. Frewen had obtained the proceeds of certain three policies of assurance effected on the life of Stucke, and in surrendering the estate he made a note on the schedule to the effect that the proceeds of certain life policies were not brought up, the same having to be dealt with under Act 13, 1891. Petitioner believed that Stucke was insolvent many years before his death, and that he used to pay the premiums of the said insurance policies at a time when his estate was insolvent, and the said payments were therefore made in fraud of the creditors. In terms of section 22 of Act 13, 1891, petitioner had a right of action against the executor in respect of the said policies. Shortly before his death Stucke promised in writing to cede one or more of the policies to his chief creditors (Blaine and Co.) as collateral security for the amount due to them, and petitioner verily believed that correspondence which has passed between deceased and his said creditors would constitute a valid cession, although such cession was not endorsed on the policy. After the third meeting of creditors, petitioner intended, if authorised by the creditors, to institute an action against Frewen to recover the proceeds, but he apprehended that unless interdicted, Frewen would in the meantime part with the said proceeds to the heirs, before petitioner was able to institute an action to have it declared that the policies formed part of the assets of the insolvent estate.

Rule nisi granted, to operate as an interim interdict, restraining respondent from parting with the moneys pending an action to be instituted, leave reserved to respondent, if so advised, to move to discharge the rule, action to be instituted before the 15th June next, otherwise the rule stands discharged.

THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

BERNING V. KUSWAYE. { 1907.  
May 2nd.

Mr. Roux moved for provisional sentence on a mortgage bond for £30, with interest from the 1st July, 1905, bond due by reason of non-payment of inter-

st; counsel applied for the property specially hypothecated to be declared executable. Defendant was sued by edictal citation, and had been served personally.

Order granted.

JOOSTE V. JOOSTE

{ 1907.  
May 2nd.  
" 6th.  
" 13th.

Restitution of conjugal rights—

Divorce—Malicious desertion

—Sentence of imprisonment for life.

*The defendant had been convicted of murder and sentenced to death, which sentence was lawfully commuted to imprisonment for life.*

*Held, that his wife, the plaintiff, was entitled to a decree of divorce.*

*Report of Corbeau v. Corbeau in 2 C.T.R., 208, corrected.*

This was an action brought by Demona Anna Jooste, of Worcester, against her husband, Hendrik E. Jooste, for a decree of divorce by reason of his having been sentenced to imprisonment for life.

Mr. Russell was for plaintiff; defendant appeared under the charge of a warder.

Mr. Pohl said that he should like to appear on behalf of defendant, although the latter had been barred, to raise the question as to whether this was a good ground of divorce. He submitted that imprisonment for life did not necessarily mean that defendant would be kept in prison for life.

Buchanan, J., said that Mr. Pohl would be given leave to raise the legal defence, although defendant had been barred.

The declaration set out that the parties were married on the 28th December, 1903, at Cape Town, under ante-nuptial contract, and that the said marriage still subsisted. There was issue of the marriage one child, aged two years. After the marriage plaintiff and defendant lived together at Worcester until about September, 1905, when defendant left for a temporary purpose for German South-West Africa, and returned in September, 1906, and similarly again left for German South-West Africa in October, 1906. Thereafter, on or about the 20th February, 1907, defendant was tried, found guilty, and convicted of the crime of murder by the High Court of Griqualand, and duly and lawfully sentenced to death by the said Court.

The said sentence was thereafter, on or about the 13th March, 1907, lawfully commuted by His Excellency the Governor of this colony to imprisonment for life, with hard labour. Plaintiff prayed for a decree of divorce, with custody and maintenance of the child, and costs.

W. T. Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, gave formal evidence of registration of the marriage.

Plaintiff said that she was married to defendant on the 28th December, 1903. Afterwards they lived together at Worcester, but not on happy terms. In September, 1905, defendant went to German South-West Africa. She had letters from him while he was away. He returned about a year afterwards, and remained in Worcester about one month, at the end of which time he went back again. Witness knew that he was going away. She received four letters from him while he was away. Subsequently she had a letter from him while he was incarcerated in Upington Gaol. In this letter he spoke about the Ferreira raid. She also had letters from him after his conviction in Kimberley. Neither witness nor defendant had any property.

By the Court: The man in court (pointing to defendant) was her husband.

Defendant (in reply to the Court) said that he was convicted along with the Ferreira gang, and was afterwards reprieved.

Plaintiff (in answer to Mr. Pohl) said that she did not take any steps in connection with the petition for a reprieve of the defendant. No one in Worcester had been to consult her in the matter.

George C. S. Foster, superintendent of the Breakwater Convict Station, produced the warrant under which defendant had been sent to the Breakwater.

By Mr. Pohl: Witness had had no trouble with the defendant. The time that a life-sentence prisoner spent in gaol varied a good deal. The longest term he had known was 20 years and a few days, while the shortest was one year and two months. He had known several cases in which life-sentence prisoners had been imprisoned for two, three, or five years.

[Buchanan, J. (to Mr. Pohl): That does not affect the legal question one bit.]

By the Court: Witness had known prisoners die in gaol while undergoing a life sentence. They took the life sentence for purposes of classification as a term of 20 years.

This concluded the evidence.

Buchanan, J.: This is a matter of considerable importance, and I think it would be desirable, on first impression, to have it argued before a full Bench. There are a good many authorities on the legal question. The

further hearing of the case will be postponed, and leave will be given to set it down for hearing before a full Bench in the First Division on Monday next. This is a matter in which the Crown is materially interested, and I think the Crown should be heard as *amicus curiae*.

*Postea* (May 6th).

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

Mr. Russell in argument, quoted Schorer's Note on Grotius, 1-5-18, Voet 24-2-13, and Gaill, 1-1-44.

De Villiers, C.J., said he supposed that in Holland perpetual imprisonment meant perpetual imprisonment. Was that so in this case?

Mr. Russell said he would submit that the Court really could not go into these points.

[Hopley, J.: You say it is because there is no possibility of marriage obligations being carried out for 20 years that she is entitled to a divorce?]

Mr. Russell: I don't know twenty years at all in this matter, my lord. It is a sentence of imprisonment for life. Counsel quoted Leyser, vol. 5, p. 266. Merula 4-2-9-8, Van der Keesel, Thesis 89, Van der Lindens Institutes (Juta's Translation 27), 1-3-9, Gewysden, 1-32-247, Van Zyl's Judicial Practice, 495, Maasdorp's Institutes, vol. 1, p. 81, and referred to the case of *Neffler v. Neffler*, heard in the High Court at Bloemfontein on July 25, 1906.

Mr. Pohl quoted from Van der Linden's Institutes, 31, and said that in the times when the Courts of Holland decreed that imprisonment for life was a ground for divorce, the sentence really meant imprisonment for life, and he knew of no instance where there had been release.

Hopley, J., said that one had read of men sentenced to imprisonment for life under one sovereign being released and honoured upon another sovereign coming to the throne.

Mr. Pohl said that the prison records here did not disclose a case in which a person had been kept in imprisonment for over 20 years.

Mr. Russell, in reply, said that the rule was that the person sentenced to imprisonment for life died in prison, and it was, therefore, the exception for such a person to be released. He would not contend that the plaintiff was entitled to a divorce if a pardon and release were granted before action was brought.

*Cur. Adv. Vult.*

*Postea* (May 13th).

De Villiers, C.J.: The facts of this case are not in dispute. The plaintiff and defendant were married in Cape Town, with ante-nuptial contract, on the 28th of December, 1903. On the 20th of January, 1907, the defendant was convicted of the crime of murder, and sentenced to death by a competent Court, and thereafter the sentence was commuted by His Excellency the Governor to one of imprisonment for life, with hard labour. The defendant is now undergoing imprisonment, and the plaintiff claims that the existence of a sentence of imprisonment for life entitles her to obtain a decree of divorce against her husband, and the custody of the minor child of the marriage.

Before the end of the 18th century it was firmly established in the Netherlands that there are two grounds of divorce, and two grounds only, namely, adultery (including, according to some writers, sodomy) and malicious desertion, and I am not aware of any decision of this Court recognising any other ground of divorce as distinguished from a decree of nullity of marriage. As to malicious desertion the invariable practice of this Court long before I became Chief Justice was not to grant a decree of divorce unless there had been a previous disobedience of an order of the Court ordering the deserting spouse to return to or receive the plaintiff for the purpose of cohabitation. Another practice was not to grant such a decree of restitution of conjugal rights where the plaintiff deliberately declared, in an action for such restitution, that he or she would not take back or live with the deserting spouse should she or he obey the Order of Court. The only change made after I joined the Bench was that in 1885 a Rule of Court was framed dispensing with the necessity of two separate actions for restitution, and for divorce. Accordingly the practice now is that on granting a decree of restitution of conjugal rights a rule is made calling on the defendant to show cause why, failing compliance with the decree, a decree of divorce shall not be granted. It was considered at the time when the Rule of Court was framed that it was part of the substantive law of the land that no decree of divorce can be granted for malicious desertion unless there has been a disobedience of a prior judicial decree of restitution of conjugal rights, and that any alteration of the law in this respect, if desirable, should be made by the Legislature and not by Rule of Court. It appears from a note in the "South African Law Journal," of February, 1907, that at one time a different practice was allowed in the Transvaal, and that in Natal, at the present time, where the defendant had been guilty of cruelty to the plaintiff before the act of desertion the prior order of restitution is dispensed with. It does

not appear from the note whether this alteration was made by Rule of Court or by Statute. In the case of *Krantz v. Krantz* (T. Rep.), according to the same note, the defendant in a suit for judicial separation asked in reconvention for a decree of divorce on the ground of the plaintiff's malicious desertion, but the Transvaal Supreme Court directed an amendment of the claim in reconvention so as to include a prayer for restitution with an alternative prayer for divorce in default of compliance. The Court thus reverted to the practice of this Court, but upon the other point of practice to which I have referred, it is not quite clear whether the Court intended to depart from our practice. The plaintiff in reconvention said in answer to the Court, that he had no desire to live with his wife again, and could not bring himself to do so. These words are somewhat indefinite, but certainly if the Court intended to lay down that a distinct notice given by the plaintiff that he would not give effect to the order which he himself prayed for should not debar him from relief, I fear that this Court, however desirous to assist in securing uniformity of practice, cannot accept the case as a precedent. The learned Chief Justice (Juncos) is reported in the "Star" report to have said: "In *Corbeau v. Corbeau* (2 C.T.R., 208) the plaintiff said that if the Court made the order for restitution he would still not be inclined to take his wife back. The Chief Justice is reported to have said that that answer disposed of the matter, and that the order must be refused." On reference, however, to the record itself I find, in the handwriting of my brother Buchanan, that what was actually said by the plaintiff was: "If she will come, I will not receive her." That, of course, is a very different matter from merely expressing a disinclination to receive her. In refusing to grant the order I was supported by Buchanan, J., who had taken part in the case of *Gibbon v. Gibbon*, to which I shall presently refer, and by Upington, J., and our judgment proceeded not on the ground that the Court had a right to inquire into the mental attitude of the plaintiff, but on the ground that the Court should not knowingly allow its procedure to be completely stultified. In England, no doubt, it has been held in *Scott v. Scott* (34 L.J.P. and M., p. 23) that a decree of restitution should not be refused on the ground that the suit was instituted not that he might regain the society of his wife but for some collateral object, but there is nothing in the judgment of the Judge Ordinary from which it could be inferred that the decree would have been granted even if the petitioner had informed the Court that he would not perform his part in giving effect to the decree which he

himself prayed for. So also in the case of *Gibbon v. Gibbon* (2 E.D.C., 280) it was held by the Eastern Districts Court that it is not a ground for refusing restitution that the suit is instituted for the ulterior object of obtaining a divorce. It is true that Shippard, J., in his judgment, says "the plaintiff's open avowal in court that the suit he is instituting for conjugal rights is a sham and that he would not under any circumstances receive his wife or return to cohabitation with her, ought not to be regarded as prejudicing his legal right to the formal decree which he now seeks." The other judges (Barry, J.-P., and Buchanan, J.) were more guarded in their utterances, and confined themselves to the case which they had actually to deal with. According to the report itself the plaintiff had admitted, in answer to the Court, that the proceedings were instituted for the purpose of obtaining a divorce, and that he did not wish his wife to return to him, but that is far from saying that "he would not, under any circumstances, receive his wife or return to cohabitation." I confess that the remarks of Bristowe, J., in *Venter v. Venter* (1903, T.H.C., 381) seem to me more in accordance with sound practice. The plaintiff in that case stated that she would not take her husband back even if he were willing to come, and the learned judge refused her relief, saying that "it would be turning the administration of justice into a farce to make an order which the person who asks for it openly states that he will not permit to be obeyed." Upon this remark the learned Chief Justice of the Transvaal made the following comment in *Krantz v. Krantz*: "The true position, with great respect, seems to me to be that an order for restitution does not command the plaintiff to do anything at all; it directs the defendant to restore conjugal rights, and the plaintiff cannot prevent the order being obeyed." It is quite true that the order does not command the plaintiff to do anything, but the plaintiff, by asking for a decree of restitution of conjugal rights impliedly undertakes, without any formal tender, that, whatever his own wishes or inclinations may be, he will in fact perform his part in making the order operative. Surely the direction to the defendant "to restore conjugal rights" cannot be carried out if the plaintiff himself actively prevents such restoration, and in that sense, Bristowe, J., seems to have been substantially correct in speaking of the plaintiff preventing the order from being obeyed. If instead of the word "obeyed" he had used the expression "made operative," his remark would have been literally, as well as substantially, correct. I quite agree in the view that in the great majority of cases the order for a restitution of conjugal rights is asked for

with the object of obtaining a divorce, and that the mental attitude of the plaintiff cannot affect his or her right to relief. Cases have frequently occurred in this Court in which the plaintiff has candidly stated that she or he would rather not have the defendant return, but such a statement has never been taken to imply that if the defendant does return the plaintiff would not live with him or her. In the course of his daily duties every one has often to perform acts which he would rather not perform, but which as a matter of duty he does perform. But where a plaintiff, in asking this Court for relief, informs the Court at the same time that he will not avail himself of such relief if granted, but will, on the contrary, prevent the order for his relief from being carried into effect, it has hitherto been considered that there was but one course open to the Court, and that is to refuse such relief. Sooner than grant the relief under such circumstances I would prefer that the preliminary decree of restitution should be dispensed with altogether.

The question then arises whether, in the present case, where no such preliminary decree is asked for, the Court can grant a decree of divorce. Clearly, if the action were founded on malicious desertion such a previous decree would be necessary, but the action is founded on the defendant's condemnation to imprisonment for life as a separate and substantial ground of relief. Under the Roman law in Justinian's time, banishment for life did not put an end to the marriage, and Groenewegen in his *Comment on the novel treating of this subject* (Nov. 22, 13) does not mention this rule as having been abrogated in his time. Merula in his "*Manier van Proceden*" (4, 2, 9, 8) says that as a person who is sentenced to perpetual imprisonment thereby undergoes a civil death, a woman whose husband has been so sentenced is considered in law to be a widow, but if this doctrine be strictly correct, there would be no necessity whatever for a decree of divorce. Yet we find that continual applications were made, with varying success, to the Legislature by women whose husbands had been sentenced to life-long imprisonment for what we would now term a private act releasing them from the bonds of marriage. The Dutch writers continued to lay it down as undoubted law that there were only two grounds of divorce, namely, adultery and malicious desertion. In the year 1800, however, we find Van der Kessel referring with evident approval to a decision of the Supreme Court of Holland and Vriesland to the effect that a wife whose husband has been sentenced to lifelong imprisonment for a criminal offence is entitled to a decree of divorce. In his *Dictata* the same writer mentions several cases in



which successful applications had previously been made to the States of Holland for divorce on the ground of imprisonment of the husband, but the case of *Kalkman v. Kalkman*, which he refers to as a celebrated case, was the first in which a judicial decree was granted on the ground of such imprisonment. It would appear from the report of the case in Van der Linden's "Collection of Remarkable Decisions" (No. 32) that the plaintiff first applied for relief to the States of Holland and West Vriesland, but they referred the matter to the ordinary jurisdiction. Thereupon she brought an action in the Court of Holland, which held that she was not entitled to a decree of divorce. On appeal, however, to the Supreme Court, she succeeded, on the 12th of November, 1793, in obtaining a decree of divorce, with leave to marry again. The grounds of the judgment are not stated, but Van der Linden supports the judgment mainly on the ground that the husband had by his own act deprived himself of the power to perform his marital duties, and that the Court, while not adhering to the strict letter of the law, gave effect to its true spirit by granting the decree. Whether this reasoning be good or bad, the case seems to have been accepted by him also as conclusive in regard to the state of the law in his time. In his Institutes (1, 3, 9) he mentions perpetual imprisonment as one of the legal grounds of divorce. The question has not arisen in this Court for decision, but on the 25th of July, 1906, a Full Court in the Orange River Colony, in the case of *Nefter v. Nefter*, granted a decree of divorce to the plaintiff, whose husband had been sentenced to lifelong imprisonment for a brutal assault which he had committed on her. The newspaper report does not state the grounds of the judgment, but as the only authorities cited were founded upon the case in the Supreme Court of Holland, I take it that the Court accepted it as establishing the later law of the Netherlands. The real difficulty, to my mind, in the present case, arises from the circumstance that a sentence of imprisonment for life is not in practice carried out in this colony to the letter where the prisoner survives the sentence for twenty years. Where, moreover, as in the present case, the crime partakes of a semi-political nature, the tendency always is considerably to curtail the period of imprisonment. After full consideration, however, I am of opinion that the humaner treatment which prisoners receive in modern times should not weigh with the Court in the decision of the present case. A wife who is truly attached to her husband would probably be strengthened in her attachment by misfortunes, which overtake him, even by his own fault, and would be content to remain his wife in the

hope that the clemency of the Crown may still enable them to live together as husband and wife. If, however, she has lost her affection for him, it is too much to expect of her that she will continue to be the wife of a man sentenced to imprisonment for life in the vague belief that the clemency of the Crown may some day restore to her the society of the husband whom she has no desire to live with. In view, therefore, of the authorities which have been cited, I am quite prepared to follow the precedent established by the Supreme Court of the Orange River Colony. The Court will grant a decree of divorce, and declare the plaintiff to be entitled to the custody of the child of the marriage.

Buchanan, J., said: The object which this Court has in view in this case is to discover what is the law applicable thereto. The facts, as His Lordship has pointed out, are not in dispute. The question is, whether a sentence of imprisonment for life carries with it the right to the innocent spouse to claim a decree of divorce. We have no Statute on the subject, and therefore we have to go to the Common Law. The older authorities are unanimous that there are only two causes for which a divorce can be obtained, namely, adultery and malicious desertion. But as time progressed in Holland, there is no doubt that the Courts, with the sanction of the Legislature, extended the law to other causes founded on similar reasons. The decisions of the Dutch Courts before the cession of this Colony to Great Britain have frequently been recognised in this Court as declaring the common law which was introduced into this Colony. On the point under investigation, it has been shown before the cession of the Colony, after several statutory declarations applicable to special cases, the Legislature referred the matter to the Courts, whereupon the Supreme Court of Holland declared that a sentence of perpetual imprisonment did in law entitle the innocent spouse to claim a divorce. *Van der Linden*, in a collection made by him of special decisions, reports the judgment of the Courts of Holland, and in his subsequent book on the Institutes, states his view of the law to be that if the grounds of a claim can, by an extended interpretation, be brought within the reason of the first two causes I have mentioned, they are sufficient to support a claim to a divorce. He expressly states that the commission of an unnatural crime, or a sentence to perpetual imprisonment, etc., are good grounds for a divorce. The two causes he mentions are neither adultery nor malicious desertion, except by constructive or extended interpretation of those terms. In the adjoining colony of the Orange River Colony, in a recent case, the Supreme Court has recognised this extended interpretation of the law,



and I find that on reference to the Transvaal Statutes that it is expressly enacted that the law-book of *Van der Linden*, in so far as it is not in conflict with the Grondwet, "shall remain the law book in this State." If that is so, it is an express recognition that the law of Holland as stated by *Van der Linden* in his Institutes, is the law in force in the adjoining Transvaal Colony also. That this provision of law is not repugnant to modern jurisprudence in other countries, I find that in Germany the Prussian Code provides for decrees of divorce being granted for opprobrious crimes for which a spouse has been sentenced to imprisonment or committed to the House of Correction. This code even goes further and says that if one spouse wilfully and falsely accuses the other of such a crime, such false accusation is of itself sufficient to justify the Court in granting a decree of divorce to the other spouse.

I am not prepared to adopt the German code in its entirety, but I mention this simply to show that the law recognised in Holland, and which has been recognised in the Orange River Colony and the Transvaal, is also recognised in other civilised countries. I think it is desirable, if we can find no good reason for differing with the decisions of other Courts in their declaration of what was the law of Holland which was introduced into South Africa, that we should, if possible, give decisions in the same tenor and spirit agreeing with the decisions of the other superior Courts of South Africa, in their construction of the common law. True we are not bound by decisions of the Orange River Colony and of the Transvaal Courts, but we may take them as aiding us. In this case I agree that the decree of divorce should be granted.

The Chief Justice added that Mr. Justice Hopley also concurred.

Mr. Russell (for plaintiff) raised the question of the claim for maintenance of the child.

The Chief Justice said that the Court would grant absolution from the instance on that part of the claim.

[Plaintiff's attorneys: Walker and Jacobsohn. Defendant: In person.]

*Ex parte* SPANGENBERG. } 1907.  
} May 3rd.

Intestate succession—Representation—Collaterals—Next of kin—*Bona vacantia*—Paternal and maternal line.

*S. died, leaving no ascendants or descendants, or brothers or sisters, but leaving relatives, including the petitioner, on the mother's side, and one half of*

*her inheritance was in the case of in re Stephens (16 S.C.R., 555) awarded to the maternal relatives. They did not in that case press for the paternal share, but the petitioner now applied for payment to them of the remaining half of the estate on the ground that there was a complete failure of relatives on the side of the father of the intestate.*

Held, that on clear proof of such failure, the relatives on the maternal side would be entitled to the whole of the inheritance.

Dr. Greer moved for an order directing that the paternal portion of the estate of the late Mrs. Esther Stephens, amounting to £1,974 13s. 10d., should be distributed amongst the heirs on the maternal side. It appeared that Mrs. Stephens perished in the wreck of the Drummond Castle off Ushant, leaving no brothers or sisters, and both her parents being dead. In 1899, by order of the Court, *in re Stephens* (16 S.C., 555), half her estate was paid out to the maternal relatives and the other half was awarded to the paternal relatives, and paid into the hands of the Master. Frequent advertisements had been published by the Master, but no relatives on the paternal side had appeared to make claim. The maternal relatives now claimed that, the paternal relatives having failed, they were entitled to succeed to the whole inheritance. Mrs. Stephens was the daughter of one William Charles Roberts, who came to Cape Town from London in 1831, and died here in 1848 at the age of 33 years. He was described as a poor tradesman, of London. The affidavits showed that he came here as an immigrant from an orphanage, and that he never communicated with any relatives in England. Of his marriage, two children were born, namely, Esther, afterwards Mrs. Stephens, and a boy, who died at the age of ten years. The number of heirs now claiming was eight.

In argument, Dr. Greer submitted that where there was a total failure of relatives on one side, the other side was entitled to succeed, and that the fiscus only came in when there was a total failure of blood relations. He quoted Maasdorp's Institutes (Vol. I., p. 114), Nathan's Common Law (Vol. III., p. 1,959), Voet (38, 17, 27), Groenewegen (10, 10, 4), Grotius 2, 28, 6 (Maasdorp's Translation, p. 129), Schorer, Note 191 (Maasdorp's Translation,

p. 494), *ex parte Booysen* (F. 188), *ex parte Stephens* (16 S.C., 555), *Raubenheimer v. Van Breda's Executors* (F. 119), *ex parte Leeuw* (22 S.C., 340), and *Tenant's Notary's Manual* (5th edition, p. 177).

De Villiers, C.J.: The Court has already decided in the case of *in re Stephens* (16 S.C.R. 555) that one-half of the estate of the late Mrs. Stephens, who was drowned in the wreck of the Drummond Castle, should be paid to her maternal relatives, and that the other half should go to her paternal relatives. There was a prayer in that case for the distribution of the unclaimed inheritance on the maternal side, but that part of the motion was not pressed. It now appears that no relatives are to be found of the father of the intestate, and the question must be definitely decided whether, failing such relatives, the maternal relatives should now receive the remaining half also of the intestate's estate. Under the Roman Law there would have been no doubt on the point, for it was expressly provided that the estates of deceased persons shall only be transferred to the *fiscus* as *bona vacantia* if the intestate has left no heir of either the paternal or maternal line (Cod. 10, 10-4). According to Grotius, however, the customs of Holland and Zeeland had departed from this practice, with the result that failing either line, the share which would otherwise devolve on the relatives of that line devolves on the Crown. This view he maintained in an opinion given by him in 1612 (De Bruyn's Opinions of Grotius, p. 351), as well as in two passages of his Introduction (2-28-6 and 2-30-3). Groenewegen, in his Comment on the Code (10-10-4) does not agree with Grotius, but maintains that failing relatives of the one line, the relatives of the other line should take the whole inheritance. Voet also lays down that, seeing that under the Schependom's law as amended in 1580, one half of the inheritance goes to the paternal line, and the other half to the maternal line, the *fiscus* should not be allowed to take the half, but the whole should be awarded as by *jus accrescendi* to that line, which is alone in existence (Voet 38-27). According to Van der Keessel (Thes. 367) the Schependom's law, which in Zeeland admitted the *fiscus* to the share of the failing line, had even there been overruled in practice, and had since, under an Ordinance of December, 1786, ceased altogether to have operation. Chief Justice Maasdorp also in his Institutes of Cape Law (Vol. I., Book I., ch. 11, par. 5) says that "upon failure of all relations on one side the whole inheritance goes to the surviving side." The weight of authority therefore, is in favour of the view that the relatives on the maternal side should on failure of relatives on the

paternal side be entitled to the whole of the inheritance. It is a view which is perfectly reasonable, and would, I feel confident, be shared in by the other South African Courts. In the present case, however, great care should be taken to ascertain whether paternal relatives may not still be forthcoming. The Court will grant a rule calling on all persons concerned to show cause on the 30th August next why the next of kin of the late Esther Stephens (born Roberts) on the maternal side shall not be declared to be entitled to a half share of the estate in addition to the half share which has already been paid to them. The rule must be published once in the "London Daily Telegraph" and once in the "Cape Times," "South African News," and "Cape Argus." It was in the interest of all concerned that the question should be decided, and the costs of this application will consequently be paid by the estate.

*Ex parte* DE DOUALIER. { 1907.  
May 3rd.

#### Bequest—Restraint against mortgage—Minor.

*Certain premises had been bequeathed to the petitioner, and after her death to her eldest child, on condition that she was not to mortgage or alienate the property. The petitioner was too poor to pay the costs of transfer or to repair the premises, which were fast becoming uninhabitable. The eldest child was a minor, and the Court, in the interest of the minor and in order to prevent the bequest from failing altogether, granted leave to mortgage the premises for such sum as would be sufficient to enable the petitioner to obtain transfer and place the premises in a habitable state of repair, and directed that the interest should be paid by petitioner during her life.*

Mr. M. Bisset moved for leave to petitioner to mortgage a certain erf in the village of Sutherland. The matter had previously been before the Court on several occasions, and had been referred for further information. The petitioner asked leave to raise £250 for the following purposes: £150 to pay for immediately necessary repairs of the property, £50 to meet future repairs, £30 to pay costs of transfer, and

£20 costs of bond. Under the will alienation or mortgaging the property was prohibited. Petitioner was in humble circumstances, and had no means with which to carry out necessary repairs. The rents had been utilised to meet the needs of the family. The father consented, on behalf of the minor heir. Counsel said that he could not press the application so far as future repairs were concerned.

De Villiers, C.J.: Under the special circumstances of this case, the Court will grant leave to execute a mortgage for £200 for the purpose of effecting the necessary transfers and for placing the property in a habitable state of repair, the interest to be paid by the petitioner during her life. The premises were bequeathed to the petitioner for life, and after her death to her eldest child, on condition that she was not to mortgage or alienate the property. The petitioner is too poor to pay the expenses of transfer or to repair the premises, which are fast becoming uninhabitable, and the eldest child is still a minor. The child's interest would suffer and the bequest would fail altogether if some means be not devised to assist the petitioner in preserving the property. The order will be granted, but the grounds should appear in the order.

OLIVIER V. ESTATE OLIVIER. { 1907.  
(May 3rd.)

Will—Condition—Uncertainty—  
*Fidei-commissum*—Restraint  
on alienation.

*Testators by will bequeathed certain land to some of their children, on condition that "in case one or more of the said children shall desire to dispose of this ground which we here bequeath, he or they shall not have the right to sell it to a stranger, but shall dispose of it van staak tot staken."*

Held, that as it is impossible to ascertain from these Dutch words to whom any legatee wishing to sell should offer his share, the condition is void for uncertainty.

This was a special case for an interpretation of a certain clause in the will of the late Andries Hermanus Olivier.

The special case was stated as follows:

1. The plaintiff is Jacobus Matthys Olivier of Armoed, in the division of Oudtshoorn, married in community of property to Catharina Andriesina Olivier.

2. The defendant is Jacomina Christina Olivier (born Du Toit), widow of

the late Andries Hermanus Olivier, now married in community of property to Izak Daniel Wilhelm Bosman, by whom she is assisted as far as need be in this case, in her capacity as executrix testamentary in the estate of the said late Andries Hermanus Olivier, lately of Jan Fouries Kraal, in the division of Oudtshoorn, who died on May 31, 1905.

3. The said late Andries Hermanus Olivier was twice married; first to the late Catharina Andriesina Olivier (born Breytenbach), who died on or about September 13, 1889, and secondly to the defendant.

4. There were six children by the first marriage, of whom the said Catharina Andriesina Olivier married to the plaintiff is one; all the said children are alive and are majors; there are no children by the second marriage.

5. The said late Andries Hermanus Olivier and the late Catharina Andriesina Olivier (born Breytenbach) executed a joint will on November 16, 1891, whereby the testator appointed the testatrix and the children of the marriage joint heirs; and the testatrix appointed the testator and the children of the marriage joint heirs; to the survivor was reserved a life interest in the whole estate, amongst other provisions not necessary to refer to herein; a copy of the said will, which was in the Dutch language, together with an English translation thereof, is hereunto annexed, marked "A" and "B" respectively. The parties do not affirm the correctness of that portion of the said English translation which is set forth in paragraph 7 hereof.

6. The testators further specially bequeathed after the survivor's death to three of their children their share of the farm Armoed, situate on "the Island" on the further side of the Oliphants River, and to their other three children, of whom the plaintiff's wife was one, all the garden ground on the side of the said river where the testators' dwelling then was; they further directed that the dwelling and "opstal" should go to their youngest son; and they bequeathed the "weiveld" jointly to all their children.

7. The bequests of the said landed property are made subject to the following condition: "Voorts is het onze uiterste wil en begeerte dat, zoo een of meer onzer kinderen van deze grond die wy hier vermaker zoude willen afstaan, geen recht hebben het aan eenen vreemden te verkoopen, maar van staak tot staken zal afstaand doen," that is to say: "Further, it is our last will and desire that, in case one or more of our children shall desire to dispose of this ground which we here bequeath (he or they shall) not have the right to sell it to a stranger, but shall dispose of it to each other in order of succession."

8. The plaintiff claims that the conditions above set forth, limiting and re-

stricting the right of alienation are void by reason of vagueness and uncertainty, and that no *fidei commissum* is thereby imposed, and is desirous of obtaining transfer of the portion of the farm Armoed bequeathed to his wife as aforesaid, free from such conditions and stipulations; the plaintiff in or about September, 1906, sold a portion of the farm so bequeathed, and is desirous of giving transfer free and unencumbered to the purchaser.

9. The defendant contends that the conditions above set forth impose a restraint on alienation whereby a *fidei commissum* is constituted binding each of the said children not to alienate save to the other children and their descendants; and that the defendant is only entitled to obtain transfer subject to the said conditions.

10. The parties pray for such order as to costs as to this Honourable Court shall seem meet.

By consent paragraph 8 of the special case was amended by inserting after "sold" the words "to one Andries Hermanus Breytenbach, who is not a member of the family."

Mr. Searle, K.C. (with him Mr. M. Bisset) was for plaintiff; Mr. McGregor was for defendant.

Mr. Searle said that the question in this case was whether the portion of the will mentioned was sufficient to constitute a *fidei commissum*. He submitted that it was not clear from the terms of the clause what was intended to be done, and that a *fidei commissum* must be clearly expressed. Counsel quoted *Drew v. Drew's Executors* (1876, Buch., 203), and Voet (36, 1, 27, McGregor's Translation).

[De Villiers, C.J.: Is it not a necessary inference that if it cannot be sold to a stranger it must be kept in the family?]

Mr. Searle: The Dutch authorities make a distinction between a prohibition as to whether it is real or whether it is personal. He quoted Van Leeuwen, Cens. For. (3, 7, 10), *In re Carey* (11, S.C. Cases, 123), *In re Naude* (1, C.T.R., 282), *Lind v. Calitz* (9, Juta, 268), Grotius (2, 20, 11), Van der Linden (1, 7, 8, Juta's Translation, p. 62), *ex parte Botha and Standen* (14, C.L.J., 299), Juta on Wils (p. 180, and *Van Wyk's Case* (13, S.C.R., 478).

Mr. McGregor submitted that it was clear from the will that the intention was that the family should deal with the property as a family. The only question was whether the testators had made their meaning sufficiently clear. On the meaning of "staaken" he cited Van Leeuwen, Commentaries (3, 15, 4), Leibbrecht, Red. Prac. (178). There was clearly a prohibition in this clause. Strangers were specifically excluded. The will said the property must go from "staak to staaken." What was meant was from "staak to staak." Van

Wyk's case was special in its terms, and did not apply to the present case. Counsel cited Sande (3, 1, 3, and 5, 2, 8), Voet (36, 1, 3, and end of 29, and 36, 1, 31), and *Rykloff's Case* (13 S.C., 64).

Mr. Searle, in his reply, cited *Joseph v. Mulder's Executors* (18 S.C., 193, and 20 S.V., 144), and Burge (2, 112-114).

Do Villiers, C.J.: The testators bequeathed the property in question to some of their children, on condition that "in case one or more of our children shall desire to dispose of this ground, which we here bequeath (he or they) shall not have the right to sell it to a stranger, but shall dispose of it "van staak tot staken." The translation attached to the special case renders those Dutch words as meaning "to each other in order of succession," but that is, to say the least of it, an exceedingly free rendering. The more correct translation would be "from line to lines," or "from branch to branches," but it is difficult to know what the testators meant by directing that in case the legatees should desire to dispose of the land they shall dispose of it "from branch to branches." Probably they meant that each legatee shall sell only to his descendants, but it is also possible that the collateral branches were intended to have the benefit of the condition. If these doubtful words had not been added it would have been possible to give effect to the condition, but as the matter stands it would be impossible to ascertain to whom any legatee wishing to sell should offer his share. A condition that the property shall not be alienated out of the family would have a known meaning in law, but a condition that there shall be only alienation "van staak tot staken" appears to me to be void for uncertainty. There is no clear indication in the will of the person or persons who are to succeed in case of alienation by any of the legatees or to whom the property should be offered by a legatee wishing to sell, and consequently the legatees must be held to have acquired the property free from *fidei commissum*. For these reasons, briefly stated, I am of opinion that the plaintiff's contention should be upheld. The costs will come out of the estate.

[Plaintiff's attorneys: Tredgold, McIntyre and Bisset. Defendant's attorneys: Walker and Jacobsohn.]



## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

FRIEDBERG V. DEPUTY SHERIFF OF PRIESKA. { 1907.  
May 3rd.

## Attachment on Suspicion.

*Plaintiff had purchased certain goods and stock at a fair price from one S., who shortly afterwards absconded. The attorney who acted for some of S.'s creditors, suspecting that the sale to plaintiff was collusive, induced defendant to attach all the goods in plaintiff's possession.*

*Held, that as defendant had neither proved that the goods were still the property of S., nor that plaintiff did not purchase from S. in good faith, he must restore the goods and pay damages and costs.*

This was an action for the restoration of certain property, and for damages.

The plaintiff, in his declaration, stated that he was the owner of certain property which had been wrongfully seized by the defendant on a judgment obtained by the firm of Stephen, Fraser and Co. against one Sindler for £500. The plaintiff claimed that the goods so seized belonged to him. He valued them at £306, and he claimed the restoration of the goods, or, failing that, the payment of their value, together with £450 as damages caused by the alleged wrongful attachment. The goods were seized from a wagon at Prieska. Defendant pleaded that the goods in question were really Sindler's, and that they were wrongfully removed from Sindler's by plaintiff shortly before the execution of the writ. Defendant denied that plaintiff had suffered damages.

Mr. P. S. T. Jones was for the plaintiff; Mr. Close (with him Mr. Pohl) was for the defendant.

Solomon Friedberg, the plaintiff, was called. He said he held a general hawker's licence. He used to go on trading trips with a wagon. Before he went on the last trip, he had goods over from a previous trip of the value of about £150, and he bought other goods amounting in value to about £130, which he also took with him on his last trip. He went from Strydomberg to Doornberg and elsewhere, buying goods and stock on

the way, including about sixty sheep. He had only seen Sindler once before when he passed in a cart. He had never had any dealings previously with Sindler. On this trip, however, he bought from Sindler. Witness was in want of some stuff, and Sindler said he was selling up and going from the farm. Witness bought £95 worth of merchandise from Sindler; also forty sheep for £30, some skins and wool. He gave Sindler a cheque for £125 and £5 in cash. This was about August 27, on which day the cheque was dated. Some of the merchandise he bartered for sheep at the place, and he got about sixty sheep in this way. Witness left forty sheep there and went on. About eight days later he returned for his wagon, which he had left to be repaired. He then asked Sindler's brother for leave to store some of the goods in the place, and, obtaining permission, he did so. He went to Prieska for the Jewish New Year holidays, some time towards the end of September. Subsequently he went to fetch the goods and took them to Prieska. Meanwhile he had bought further goods in Prieska. The Deputy Sheriff seized everything of witness's in Prieska. He claimed that all the goods were his. The wagon and donkeys were eventually returned. Witness had tried to get goods from people he had dealt with before, but he could get none. Previous to this occurrence, he had made a profit of about £50 a month. The value of the goods seized was about £300—cost to witness. He would have made £150 profit out of these. Among the goods seized was about £50 or £60 worth, which he had bought from Sindler.

Cross-examined by Mr. Close: He had lost his bankbook; he could not say when he lost it. He had only one book in which he recorded the sales. This was seized by the Sheriff. Sindler accepted witness's cheque, though they were almost strangers.

Evidence was given as to purchases of goods made by Friedberg. An inventory of the goods seized by the Sheriff was taken, and they were stated in evidence to be worth £300. They had greatly deteriorated in value. The plaintiff had obtained an interdict against the sale of the goods, and they were still in the Sheriff's custody.

Mr. Jones closed his case.

Henry D. Vos, law agent, of Prieska, was called. He said he acted for Messrs. Stephen, Fraser and Co. in the matter against Sindler. After the judgment, Sindler came to witness and an arrangement was made in terms of which Sindler paid an instalment of £50, which he was to continue paying monthly. On the 26th September, witness, having heard of a transaction between plaintiff and Sindler, went out to Sindler's place. He met a native driving some sheep, and in consequence of what the native said he saw Friedberg. The



latter said he was a broker in the matter for the sale of the sheep. Witness told plaintiff he was acting for Stephen, Fraser and Co. After further inquiries witness went, on the 1st October, with his clerk to make an inventory of the goods at Sindler's place. He had a conversation with Friedberg and Sindler's brother. Plaintiff said the goods were his, and a receipt for £154 was produced. Witness asked for a specified account and plaintiff said he had not got it; that that was his business. Friedberg said he knew the law. Witness subsequently saw a boy driving more sheep. He had since tried to trace the boy so as to bring him as a witness, but he had failed. After what the boy said, a writ was issued and was held over for a time pending the arrival of the wagon with the goods. The Deputy Sheriff spent a good deal of time trying to find out which goods were Sindler's. He asked Friedberg to point out what goods were Sindler's. Finally, the goods were attached. Friedberg, when asked by the Sheriff what the value of the attached goods were, said they were worth £150. Sindler had absconded. A warrant was out for his apprehension for "obtaining credit under false pretences." Witness considered that if Sindler had been pressed, it would have been found he was insolvent at the time.

Cross-examined by Mr. Jones: Witness had not himself valued the goods.

Further evidence was called for the defendant, it being denied that the goods had deteriorated to any considerable extent. The goods had, since the seizure, been stored in a wagon house.

Counsel were heard in argument, Mr. Close contending that the Sheriff was justified in the seizure, and that plaintiff did not discharge the duty which lay upon him of giving all information in a frank manner to the Sheriff.

Hopley, J.: In this case the plaintiff sues the Deputy Sheriff of Prieska for the return of, or, alternatively the value of, certain goods seized by him in execution of a judgment at the suit of Stephen Fraser and Company against one Sindler. Plaintiff avers that the goods were wrongfully seized, and he also sues the defendant for £450 damages. He says that the goods seized were his property and that they were worth £306, so that altogether he is asking for the return of certain goods in exactly the same order as when they were seized, or their value—£306—and for £450 damages. To this the defendant pleads that the seizure was not wrongful or unlawful, and he denies that the goods were the property of the plaintiff. He then goes on boldly to aver that the property attached by him was and is the property of Sindler. And this is all that he says, excepting that he admits that the plaintiff has not been able to get his property since the seizure. He denies that the plaintiff has sus-

tained any damages. Now, it will be seen from this plea that the defence is not taken by the defendant either that there was collusion or fraud or anything else of that sort between Sindler and the plaintiff, nor does he set up that even in the absence of such fraud, he himself, as Sheriff, acted *bona fide* and on reasonable and just cause, and without any negligence. He simply boldly takes the defence that these were Sindler's goods and that therefore he had a right to seize them. Now, he has been sued alone, without joining the judgment creditors—Stephen Fraser and Co.—in this suit, and I do not see any special objection to that course. It might sometimes be advisable to join the judgment creditors, but in a case like this that rests upon tort, it seems to me that a person injured by a tort might select any of the tort-feasors. A person like the Deputy Sheriff can always protect himself by getting the judgment creditor to indemnify him, as has been done in this case, and the plaintiff has always the right to sue both parties if their conduct has been such as to increase the damages. I do not see any reason why he should not sue either both or one or the other of them. The whole question for me to decide in the present case is whether the defendant's plea is established or not, because one must approach this case with this first cardinal fact in view: that the defendant took out of the possession of the plaintiff certain goods. He must therefore justify such action on his part, and it seems to me that the onus of proving that he took from this person goods belonging to somebody else rests upon him. The matter, however, is not altogether simply on that basis, because evidence has come from the other side establishing the plaintiff's position, and so one may take the history of the case as told by both sides, and taking it as a whole, it is necessary to pronounce whether there is anything so suspicious in the plaintiff's case or in the transaction as to make the Court doubt that in reality a *bona fide* transaction had taken place between plaintiff and Sindler. I said in the course of the case that one could not altogether exonerate merchants from blame in these circumstances. What I meant was that it was reasonable enough that they should choose to take ordinary commercial risks in order to push their trade, but that when a set of circumstances like this happens and they come to complain, one cannot altogether sympathise with or quite exonerate them, because they have put their goods, by their own election, in the hands of a person, who puts them to trouble by working fraud upon them or some other person. So that they must not be exonerated altogether from some blame for the embroglio which arises out of such a state of things.

The facts are that plaintiff, a hawker, was on one of his trading trips when he reached the farm on which Sindler carried on his business. The latter then told him that he wished to wind up the business as he was forced to leave the farm on account of its having been sold in such a way as to terminate his right to be on it. For this statement there seems to have been a good foundation in fact, and it was at all events a plausible and circumstantial story calculated to satisfy the mind of anyone with whom Sindler might wish to deal, as supplying a reason for his action. The plaintiff had not previously been acquainted with Sindler, though he knew of him as a business man in those parts, and there is no reason to suppose that plaintiff had any idea, or could have any idea, that Sindler was realising the assets of the business with the intention of absconding from his creditors. After some haggling as to prices, the plaintiff bought some produce, shop goods and sheep, and gave his cheque for their price on the Prieska branch of the Standard Bank. He then took away the goods, and his cheque was cashed a few days later by Sindler, who, shortly afterwards absconded. After trading for a short time, the plaintiff came back to the same farm and obtained leave to store his goods in Sindler's late store, then empty, while he went into Prieska for the Jewish holidays. Mr. Voss, who acted for Stephen, Fraser and Co., having heard something of the transaction, seems to have become suspicious, and made a journey to the farm, arriving there just about the same time as the plaintiff, whose conduct he also thought suspicious. The goods had then been re-loaded on plaintiff's wagon. Voss made certain enquiries, and, on his return to Prieska instructed the defendant to attach the goods upon their arrival in Prieska, which was done.

Now to justify this act it must be proved by the defendant that the goods still belonged to Sindler, or that the sale to plaintiff had been a fraudulent and collusive one. It may be granted that, looking at the matter from Mr. Voss's point of view, there were suspicious circumstances, and Mr. Voss seems to have made up his mind that the plaintiff and Sindler had conspired to defeat the rights of his client. Suspicions, however, are not enough to justify the deputy sheriff, or this Court, in depriving a man of property in his possession, and which he holds by virtue of an apparently *bona fide* transaction. I do not think that there was anything unusual or suspicious in the sale of the stock, or in the way it was done. Sindler, no doubt, intended to defraud his creditors, but, as far as I can judge, the plaintiff knew nothing of that, and purchased the goods *bona fide*, paying a fair price for them,

With regard to damages, very little evidence has been brought forward of a satisfactory nature as to the value of the goods or their present condition.

The order will be that the goods be returned forthwith, and that the defendant pay £100 as damages, with costs of suit.

[Plaintiff's attorney: G. Trollip. Defendant's attorneys: Mostert and Son.]

#### *In re* THOMAS.

Mr. Benjamin moved for an interdict restraining the transfer of certain property at George from one A. N. Robertson to F. G. Robertson. Petitioner claimed certain mineral rights over the property.

A rule nisi was granted, returnable on May 14, the rule to operate as a temporary interdict.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1907.  
May 3rd.

Mr. Douglas Buchanan moved for the admission of Francis William Walker as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Butterworth.

Mr. Louwrens moved for the admission of Coenraad J. C. Gie as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Worcester.

Mr. Benjamin moved for the admission of Louis Henri van Winsen as a conveyancer.

Application granted, oaths to be taken before the R.M. of East London.

### PROVISIONAL ROLL.

#### ORPHAN CHAMBER v. MASTERTON.

Mr. Payne moved for provisional sentence on a mortgage bond for £2,000, with interest from the 10th February, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable, together with the rents.

Order granted.

#### GRAY v. IMPERIAL BRICK AND TILE COMPANY.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £4,000, with interest from the 1st July, 1903;

counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

ESTATE KETS AND ANOTHER V. NORDEN.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £1,000, with interest from the 1st January, 1907, bond due by reason of three months' notice having been given; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. LILIAN SYNDICATE, LIMITED.

Mr. Howel Jones moved for judgment under Rule 329d for £39 7s. 6d., mineral lease rent of certain properties in Namaqualand.

Order granted.

ESTATE WOOD V. NEEZER.

Mr. Sutton moved for judgment under Rule 329d for £48, rent due, with interest *a tempore moræ* and costs.

Order granted.

GENERAL MOTIONS.

*Ex parte* SMITH. { 1907.  
May 3rd.

Release from Sequestration —  
Notice to Creditors.

*Before an estate against which no creditors have proved can be released from sequestration, notice of the application must be given in the "Gazette" to creditors and an affidavit of full and fair surrender filed, unless all the creditors have consented to the release.*

Mr. Benjamin moved for an order authorising the release of petitioner's estate from sequestration. From the petition it appeared that the creditors had all agreed to release the estate from sequestration. No meeting of creditors had been held. After the order of sequestration had been granted by the Court, and before it had been taken out of the Registrar's Office, arrangements were made with the petitioning creditors, whose claims had been settled. The petitioning creditors and the other creditors all consented to the present application. Counsel cited *ex parte Wolff* (20 S.C.R., 200).

De Villiers, C.J., pointed out that in the case of *Van Broemtsen* the Crown said there should be a full and fair surrender and notice to creditors.

Mr. Benjamin: As a matter of fact, here all the creditors have had their claims satisfied, and have signed consent papers.

De Villiers, C.J.: You may take an order, but, of course, this is not intended in any way to alter the practice laid down in *ex parte Van Broemtsen* (12, S.C., 239) where it was held that there should be a notice published in the "Gazette" to creditors and an affidavit of full and fair surrender. In that case no creditors had proved their claims, but if all the creditors have consented, then, of course, the necessity of giving notice to creditors falls to the ground.

Order granted as prayed.

*Ex parte* VILLIERSDORP MUNICIPALITY

Dr. Greor moved for a rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

LAW SOCIETY V. PRETORIUS. { 1907.  
May 4th.

Articled Clerk—Advocate—Cancelling Articles of Clerkship.

*The respondent applied to the Court for leave to have his name struck off as one of its advocates and brought to the notice of the Court that, through a misapprehension, he had omitted to have his name so struck off before entering into certain Articles of Clerkship. No objection was taken by the applicant society, to whom notice of the application had been given. The applicant society now applied for an order to have the Articles of Clerkship cancelled, on the ground that he had appeared*

*as an Advocate of the Supreme Court while serving his Articles of Clerkship. It was proved that he had been allowed by a Resident Magistrate to appear in his Court, on the ground that he was an Advocate of the Supreme Court, but that the fee for his so appearing was not paid to him but to the attorney to whom he had been articulated.*

*Held, that there was no ground for cancelling the Articles of Clerkship.*

This was an application upon notice to respondent to show cause why his articles of clerkship should not be cancelled by reason (1) of his having entered into articles of clerkship with an attorney of this Court while he was still on the roll of advocates, and (2) having appeared as an advocate of this Court in the R.M.'s Court at Steynsburg while serving under articles of clerkship.

It appeared from the affidavits that the respondent made application on the 1st February last to be removed from the roll of advocates, and to count the service that he had already given under his articles. The Law Society said that under a misapprehension at the time they did not appear to oppose the application. The Chief Justice allowed the applicant to be removed from the roll of advocates, and directed the service that he had given to count.

Respondent had been admitted as an advocate of the Supreme Court on the 19th July last, and on the 13th August he entered into articles of clerkship with Attorney Du Plessis without first being disbarred as required by section 4, Act 11, 1903.

Mr. P. S. T. Jones was for applicants; Mr. W. Porter Buchanan (with him Mr. Pohl) was for respondent.

Mr. Jones argued that Section 4 of Act 11 of 1903 provided that no advocate could be articulated unless his name was struck off the roll of advocates, and the same Act provided that advocates need only serve 18 months. Respondent entered into articles for 18 months, and so must have known this Act. He (on February 1) informed the Court that he had not practised as an advocate, and yet there was an affidavit by the Magistrate of Steynsburg to the effect that when respondent appeared before him in a criminal case he refused to hear him. Respondent then said that he was advocate of the Supreme Court, when he was allowed to appear. Under rule of Court 413 respondent could only appear as attorney, agent or advocate, and as he was not an attorney nor an enrolled agent, he appeared as advocate.

Prior to the promulgation of rule 413 articulated clerks were allowed to appear in civil cases, but in criminal cases they were never allowed to appear under section 43 of Act 20 of 1856. Respondent still appeared regularly before the Magistrate, and if he did not appear as advocate he could not appear at all.

[De Villiers, C.J.: But that is a matter for the Magistrate, who might say to respondent, "As you are no longer an advocate I can't hear you any more."

Mr. Jones having been further heard.

De Villiers, C.J.: On the 1st February the respondent applied to this Court for leave to have his name struck off the list of advocates of the Supreme Court and for an order that the articles he had served to the date of the said order shall count as service. This notice was given to the secretary of the Incorporated Law Society, inquiries were made at the time as to whether any objection was raised by the Law Society, and none were raised. It appears that some misapprehension had existed as to the terms of the 4th section of the Incorporated Law Society's Act (No. 11, 1903), and in consequence of that misapprehension the respondent had failed to apply for his name to be struck off the roll of advocates of this Court, and the Court then allowed the service to count as if the misapprehension had not occurred, and as if his name had been struck off at the time it ought to have been struck off. Against this judgment there was no appeal, and now application is made for an order which, in my opinion, would be wholly inconsistent with the order which has already been made without any objection on the part of the Law Society. The application now is to show cause why the articles of clerkship shall not be cancelled (1) by reason of the respondent having entered into articles of clerkship with an attorney of the Supreme Court whilst still on the roll of attorneys, and (2) "by reason of your having appeared as an advocate of the Supreme Court in the Court of the R.M. of Steynsburg, while still serving under articles of clerkship." As to the first objection, that has been condoned by reason of the judgment already given. But then it is contended that the judgment was given upon a concealment of facts, or such misstatement as should induce the Court now practically to set aside its previous order. Now, what had been stated to the Court on the previous occasion was that the respondent had not practised as an advocate of the Supreme Court, whereas it now appears that he had on one occasion applied to a Resident Magistrate for permission to conduct a case, and had then sworn that he was an advocate of the Supreme Court. Now, I think that when the respondent informed the Court that he had not practised as an advocate



of the Supreme Court, what he clearly meant is that he had not appeared in the Supreme Court as an advocate. I do not think there was any desire on the part of the respondent to make any misstatement of the facts, because a man may well consider that if he appears in the Magistrate's Court by virtue of his being an advocate of the Supreme Court, he does not on that account practise as an advocate of the Supreme Court, which, in strictness, he could only do in the Supreme Court. I consider it was not such a misstatement as would justify the Court in setting aside its previous order. But then it is said that since the previous order was made the respondent has done acts which entitle the Law Society now to claim that his articles should be cancelled. What he has done is this, he continued to appear before the Magistrate's Court and conduct cases there. But he states that in the conduct of these cases he has appeared entirely on behalf of the attorney to whom he is articulated. Now, if the Magistrate wishes to allow him to appear as such, I do not know that it is such misconduct on his part as to justify the Court in interfering in the matter. On the contrary, I consider that is for the clerk's benefit; it is part of his legal education to appear before the Magistrate in these cases, because afterwards, as an attorney, he will have to practise in the Magistrate's Court. That is a matter for the Magistrate. If the Magistrate allows him, he takes advantage of it. If the Magistrate does not allow it, then the respondent will have to discontinue it for the future. At the same time, I do not consider that he is guilty of any misconduct which will entitle the Court to visit any punishment upon him. The application will be refused with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice, Sir John BUCHANAN, and Mr. Justice HOPLEY.]

PENHALONGA PROPRIETARY  
MINES LTD., AND REZENDE  
LTD., V. STRICKLAND.  
PENHALONGA PROPRIETARY  
MINES LTD., AND REZENDE  
LTD., V. COCKERELL.

1907.  
May 6th.  
" 13th.

Southern Rhodesia — Mines and  
Mineral's Ordinances — Ex-  
propriation of water—Arbitra-  
tion—Act 6 of 1882.

B 1

*The applicant Company having notified to the Secretary for Mines of Southern Rhodesia under the 7th Section of Ordinance 10 of 1894 of that territory that it is intended to expropriate all the water within the limits of the respondent's farm, the Secretary for Mines informed the respondent of this notification. The parties could not agree as to the amount of compensation and accordingly the applicant gave notice to the respondent in terms of Sub-section 2 of Section 1 of the Cape Act 6 of 1882, offering the sum of £500 for all the available water of the farm and requesting an answer in 15 days. The Respondent declined the offer and communications passed between the parties as to the appointment of arbitrators but before this matter was settled the applicant Company informed the respondent that it intended to take part only of the water.*

*Held, affirming the judgment of the High Court of Southern Rhodesia, that the notice under the Act of 1882 bound both parties to proceed to arbitration upon the basis of an expropriation of the whole of the water and that it was too late for the applicant to claim expropriation of part only.*

These were appeals from a judgment of the High Court of S. Rhodesia. The cases were heard together, both in the Court below and also on appeal. The matter arose out of an expropriation of water by the mines under the provisions of Ordinance No. 10 (S. Rhodesia) of 1904. The facts sufficiently appear from the reasons for judgment given by Watermeyer, J., and from the judgment of the Court of Appeal.

The following were the sections of the Ordinance material to the cases.

2. Section 80 of the "Mines and Minerals Ordinance, 1903" (hereinafter referred to as "the said Ordinance"), shall be and the same is hereby repealed, provided that any rights which may have been affected by the said Section are reinstated save and in so far as they are inconsistent with or repugnant to the terms of this Ordinance.



3. (1) Except as to such water as is mentioned or referred to in Section 82 of the said Ordinance, the right to the expropriation of the water existing or flowing upon land held under grant from the British South Africa Company is vested in the Administrator of Southern Rhodesia.

(2) Such right of expropriation may in conformity with the provisions contained in this Ordinance be exercised by the Administrator through the Secretary for Mines, who shall exercise such right upon application being made to him under this Ordinance.

4. No expropriation of water shall be effected unless at the time of expropriation such water shall be actually and necessarily required for any mining purpose, except upon application duly made by a claim-holder and at the cost and expense of such claim-holder.

5. After a right to water upon land has been duly expropriated, such water shall be and hereby is vested in the Secretary for Mines, to be held in trust for the purposes and subject to the provisions of this Ordinance.

6. (1) The whole of the water flowing or existing upon any land may be expropriated, or only a portion thereof.

(2) As often as only a portion of the water flowing or existing on any land shall have been expropriated at the instance of one applicant, any surplus shall in turn be liable to further expropriation at the instance or request of such applicant or other applicants.

7. (1) Any claim-holder may by notice in writing intimate to the Secretary for Mines an intention to apply for the expropriation of water for the purposes of mining.

(2) Upon the arrival of any such notice as aforesaid a memorandum shall be made thereon showing the time of its having been received.

(3) Every such notice shall contain the following particulars:—

(a) The name of the farm or land from which water is desired to be obtained, and its situation, stating the district and the name of the proprietor on the Land Register.

(b) The names and situation of the claims or mine at which it is proposed to put the water to use for mining purposes.

(c) The extent or volume of water sought, whether all that may be available or a portion to be specified.

8. In case two or more notices as are referred to in Section 7 shall be given in respect to water required from the same land, the order in which the same shall have been received shall regulate the rights of the respective applicants—the earlier being preferred to the later: Provided that,

(1) In case any earlier applicant shall not within such time as may be determined by the Secretary for Mines, and duly notified in writing, elect to pro-

ceed to expropriate in terms of his notice any claim-holder who has given such notice as aforesaid shall have the first right of expropriation.

(2) All such notices shall lapse and be void unless the claimholders giving the same shall, within two years from the date thereof, proceed to take all requisite proceedings for obtaining the expropriation sought.

9. (1) The amount of compensation to be paid by a claim-holder to the owner of the land for or in respect to any water expropriated, shall in default of agreement be such as shall be determined by arbitration.

(2) For the purposes of every such arbitration the provisions of "The Land and Arbitrations (Clauses) Act, 1882," of the Cape of Good Hope shall *mutatis mutandis* extend and apply.

10. In every such arbitration as aforesaid the following principles shall be observed:—

(1) The amount to be paid for and as compensation shall be based upon a consideration of the diminution in value of the land from which the water expropriated shall be taken, as upon the date of the service of the notice required by sub-section (2) of section 1 of "The Land and Arbitrations (Clauses) Act, 1882."

(2) In estimating the amount to be paid for compensation no consideration shall be given to the circumstances that owing to the existence of a mine upon or in proximity to the land from which the water is taken the value of the land has been enhanced.

11. Any claim-holder who has given any such notice as is referred to in Section 7 shall before proceeding therewith be liable, if so required by the landowner, to provide due and proper security to the satisfaction of the Secretary for Mines for the due payment of the amount requisite to be paid to the owner of the land as and for compensation.

Mr. Justice Watermeyer, in his reasons for judgment, in the first case, said that the application raised the question when, under the Mines and Minerals Amendment Ordinance, No. 10, of 1904, the expropriation of water was completed. On the 5th December, 1904, applicant companies sent to the Secretary for Mines the notice required by section 7 of the Ordinance. This notice in the first instance mentioned the farm Inodzi only, but on December 10 an amended notice was sent, including the farms Maborda and The B. December 10 may be taken as the date when the notice was given to the Secretary for Mines, and this notice referred to "the whole of the available water flowing through" the said farms. On December 17 1904, the Secretary for Mines sent to respondent (Strickland) notice to the effect that the mining companies had applied for "all available water

within the limits" of the said farms. As the Attorney-General pointed out, this was a slight alteration from the notice sent by the mining companies, but he (the learned Judge) did not think it was important, inasmuch as the companies adopted this variation in their letter—bearing no date, but alleged and admitted to have been despatched on February 16, 1905, in which they, in terms of sub-section 2 of section 1 of the Lands and Arbitration Clauses Act of 1882, offered respondent £500 for "all available water within the limits" of the farms. This offer was refused. After negotiations as to the appointment of arbitrators by the beginning of December, 1906, the matter was practically ready for arbitration on the basis of the letter of February 16, 1905. On December 5, 1906, the attorneys for the applicants wrote to respondent to the effect that their clients did not propose to take "all the available water," but were prepared to leave a certain amount for use on the farms. The only question before the Court was whether applicants were entitled to make this substantial variation of their original proposal. The answers seemed to depend solely on the interpretation of the Mines and Minerals Ordinance of 1904. The Ordinance incorporated the Lands and Arbitration Clauses Act, of 1882, of the Cape of Good Hope. As he read that Act, the expropriation was complete as soon as the notice required by section 1, sub-section 2, of that Act, had been sent. If that view were correct, the expropriation of this water was completed on February 16, 1905, and the fact that respondent was allowed to continue to use the water after that date did not affect the question. If that view were correct, the applicants bought all this water on February 16, 1905 and now wished to sell some of it back to respondent. The application was refused, with costs.

Mr. Benjamin (with him Mr. Sutton) was for appellants; Mr. Searle, K.C. (with him Mr. Douglas Buchanan), was for respondent Strickland; Mr. Burton (with him Mr. Pyemont) was for respondent Cockerell.

Mr. Benjamin said that the same point was raised in both matters. The appellants had given notice of expropriation of certain water under the provisions of the Southern Rhodesia Mines and Minerals Amendment Ordinance, No. 10, 1904. Application was made to the High Court of Southern Rhodesia for leave to amend the notice of expropriation. That was opposed by respondents and the Court dismissed the application, and from that decision of the High Court the present appeal was instituted. The Ordinance 10 of 1904 repealed the provisions of the Ordinance of 1903, the 80th section of which provided that the control of the

flow, diversion, and use of all water flowing on any land in any mining district should be vested in the Mining Commissioner. There were other provisions in section 80 in respect of the apportionment of such water among the owners of the land and mining proprietors. Section 80 was repealed by section 2 of Ordinance 10, 1904, which provided "that any rights which may have been affected by the said section are reinstated." Section 4 of Ordinance 10, 1904, provided that "no expropriation shall be effected unless at the time of such expropriation such water shall be actually and necessarily required for any mining purpose . . . and at the cost and expense of such claimholder." Section 6 provided that the whole of the water flowing, or existing, upon any land may be expropriated, or only a portion thereof. The point in this case turned upon the construction of sub-section 2 of section 8, which read: "All such notices shall lapse and be void unless the claimholders giving the same shall, within two years from the date thereof, proceed to take all requisite proceedings for obtaining the expropriation sought." On the meaning of "expropriation" counsel quoted Sweet's Law Dictionary (p. 344) and also cited *Grimbeek v. Colonial Government* (17 S.C., 200). The learned judge, he said, seemed to think that expropriation took place at the date when the notice was given. He submitted that that view was incorrect.

[De Villiers, C. J.: Had two years elapsed?]

Mr. Benjamin: Two years have elapsed on the 16th February, this year, but the notice of motion was served for the 21st December last. Proceeding, counsel said that the respondents had not taken possession, and it was difficult to see how they could be prejudiced by the application to amend. They had not done any work, they had not expropriated, and, therefore, they could not be prejudiced by leave having been granted to amend this. And his lordship in the Court below said he would like to amend it, but he considered he was debarred by law for doing so.

[De Villiers, C.J.: When the judgment was given, had this lapsed?]

Mr. Benjamin: Yes; it had lapsed then.

[De Villiers, C.J.: Then why didn't you, instead of appealing, let the thing rest, since it had lapsed?]

Mr. Benjamin said that had occurred to him as a possible way for the companies to solve their difficulties—that was, by treating the matter as having lapsed; but the present course had been chosen, and he submitted that the Court below should have allowed the amendment, and that, therefore the present appeal should succeed,

Mr. Searle said he would contend that the judgment could be supported whichever of three views was taken of the Ordinance, which, he admitted, was not so clear and definite in its terms as it might be. There were three views which he would advance. The first was that there was actual expropriation of this water which bound the parties as soon as application was made under section 4 of the Ordinance. He submitted that sections 7, 8, and 11 did not apply to this matter at all. These sections contemplated another state of affairs, and he thought that was the view that the parties themselves took, and argued the case upon: that sections 7, 8, and 11 did not apply, but that sections 3, 4, 5, and 6 applied to this state of things, and then, of course, sections 9 and 10 would apply to both states of things. He submitted that that was really the correct construction of the Ordinance. If the Court were not with him in this, then he submitted that the reasons for the judgment were sound on the second ground—that when the notice was given, then, at all events, the rights of the parties became fixed, and then there could be no alteration or amendment in them. It was never suggested to the Court below that there was any lapse, and that because there had been a lapse this amendment could be allowed. Then, in terms of sub-section 2 of section 3, he submitted that there was actually a submission to arbitration, so that, even in case the Court were against him on the other two points, he urged that the judgment was correct on this ground. The arbitrators were appointed within the two years, and if they took some time to consider the matter, it could not, he contended, be held that there had, for this reason, been a lapse. In further argument, counsel quoted 16 Law Journal, Chancery p. 282.

Mr. Searle also quoted Russell on Arbitration (8th edition, pp. 56-57), section 25, of the English Land Clauses Consolidation Act, 1845, and section 8 of Ordinance 10, 1904. He submitted that the parties had now been placed in such a position that it would be most inequitable if the proceedings were ripped up.

Mr. Burton said that he had nothing to add to the legal argument, but there were a few circumstances peculiar to the case of Cockerell to which he drew the Court's attention. His client would suffer great prejudice if the amendment were now allowed.

Mr. Benjamin, in reply, pointed out that in the amended notice it was proposed to allow each of these farms a portion of the water. Counsel quoted Bell's Laws of Scotland (section 960, note H), and submitted that the cases quoted by his learned friend depended upon particular statutes. He cited *Corporation of Parkdale v. West* (12, A.C., 602).

Mr. Searle cited *Tirerton Railway Company v. Loumoor* (9 A.C., 480).

*Cur. Adv. Vult.*

*Postea* (May 13th.)

De Villiers, C.J.: The third section of the Ordinance No. 10 of 1904 of Southern Rhodesia enacts that the right to the expropriation of water flowing upon land held under grant from the British South Africa Company is vested in the Administrator of Southern Rhodesia, and this right is exercised by him through the Secretary for Mines, who must exercise such right upon application being made to him under the Ordinance. The fourth section enacts that no expropriation of water shall be effected unless such water shall be actually and necessarily required for any mining purpose, and except upon application duly made by a claimholder and at the cost and expense of such claimholder. The ninth section enacts that the amount of compensation to be paid by a claimholder to the owner of the land shall in default of agreement be determined by arbitration, and that for the purposes of such arbitration the provisions of Act No. 6 of 1882 of this colony shall *mutatis mutandis* apply. The tenth section enacts that the amount to be paid as compensation shall be based upon a consideration of the diminution in the value of the land from which the water expropriated shall be taken as upon the date of the service of the notice required by sub-section 2 of section 1 of our Act 6 of 1882. That sub-section enacts that if a corporate body authorised by Act to take land or materials for the taking of which the owner is entitled to compensation, does not agree with the owner upon the price, or recompense, such corporate body shall cause to be served upon the owner a written notice offering a sum as compensation and requiring such owner to state in writing, within a limited time to be specified in such notice, whether he is willing to accept the sum offered. Under the following sub-sections, if the owner refuses to accept the offer or does not answer within the specified time, the matter must be determined by arbitration under the provisions of the Act, but the corporate body may take the land or materials before any proceedings to settle the amount of compensation are taken. The third section provides for the manner in which arbitrators shall be appointed, and for the time and manner in which the award must be made. On the 15th of December, 1904, the applicant companies applied to the Secretary for Mines for the expropriation of all the available water flowing through the farm Inodai, the property of the respondent, situated on the Umtali River, for the use of the companies' mines. This notice was in the form and contained all the details which are required by the Ordinance. On the

17th December, the Secretary for Mines by letter informed the respondent that, under the provisions of the Ordinance, the company had applied for the expropriation of all the available water within the limits of his farms for use in connection with the company's mining operations. The parties could not agree as to the amount of compensation to be paid, and accordingly, on the 15th February, 1905, the applicant companies sent a notice to the respondent in terms of sub-section 2 of section 1 of Act 6 of 1882, offering the sum of £500 for all the available water of the farms, and requesting an answer in 15 days. On the 3rd March, 1905, the respondent wrote declining the offer, and communications passed between the parties as to the appointment of arbitrators without any satisfactory result. In the meantime, the respondent continued to use part of the water for the ordinary uses of his farms, but, in consequence of the notice of expropriation which he had received, he refrained from making any improvements which he had contemplated. Objections having been taken by the applicant companies to the arbitration proposed by the respondent, he wrote to the companies on the 4th December, 1906, that he had appointed one Lionel Cripps. No objection was taken to Cripps, but on the following day the companies wrote to the respondent saying that it was not their intention to expropriate the whole of the water on the two farms, and proposing to take part only. The respondent objected to any alteration of the original notice, whereupon the present application was made to the High Court for leave to amend the original notice. This application was refused, and against the order refusing the application the applicant companies now appeal. The learned judge held that the expropriation was complete as soon as the notice required by Act 6 of 1882 was sent, but, although the term expropriation is used in different senses in the Act I am by no means satisfied that expropriation could be legally complete until actual possession was taken of the water. The question, however, still remains whether the applicant companies were entitled to withdraw their application after giving the notice under Act 6 of 1882. That Act provides that if the owner refuses to accept the sum offered or neglects to reply to such notice within the time specified therein, the matter in difference shall be decided by arbitration. This provision is imperative, and neither party can, in my opinion, after such notice, avoid having the matter decided by arbitration without the consent of the other party. The matter in difference in such a case is not whether the corporate body is entitled to expropriate the whole or the part, but whether the offer made by such body is a sufficient compensation for

what it intended, according to its notice, to expropriate. The owner is powerless in the matter, for when once he has received notice under the Act he is bound to part with the property for such amount as the arbitrators shall decide. In strictness there is no contract between the parties, for the owner, however unwilling to part with the property, is bound by the notice. Even in the case of a contract for the sale of property it is laid down by Voet (18, 1, 23) that if the amount of the purchase price is left to the decision of a certain arbitrator who is able and willing to act, there is sufficient certainty as to price to constitute a valid sale. In the case of arbitrations under the Act, there are provisions to prevent any failure of arbitration. If one of the parties fails to appoint an arbitrator within the time allowed to him, the arbitrator appointed by the other party is deemed to be appointed by both parties. If an arbitrator dies or fails to perform his duty as such, the Act contains provisions for filling his place. I am satisfied that the Legislature did not intend to place the owner in a worse position than if he had agreed to sell the property at a price to be fixed under the provisions of the Act. After the making of such an agreement the person claiming to expropriate would not be entitled to claim that the price of other property, or less property than that sold, shall be decided upon by arbitration. If, therefore, the case depended entirely upon the meaning of the Cape Act, I should have no doubt as to the correctness of the judgment in the Court below. The applicants' counsel, however, relied upon the 2nd sub-section of section 8 of the Rhodesian Ordinance as showing that the owner is not bound by a notice under sub-section 2 of section 1 of our Act, and, therefore, not entitled to treat it as having the effect of a contract. The sub-section of the Ordinance provides that "all such notices shall lapse and be void unless the claimholders giving the same shall, within two years from the date thereof, proceed to take all requisite proceedings for obtaining the expropriation sought." The notices here referred to do not include the notice under the Cape Act 6 of 1882, the effect of which would appear to me to be the same under the law of Southern Rhodesia as under our law. In this view of the case it becomes unnecessary to inquire whether the notices mentioned in the second sub-section of the Rhodesian Ordinance should be confined to the case of two or more notices relating to the same land, or whether the claimholder has proceeded to take all requisite proceedings when once he has given notice under the Cape Act, or whether the sub-section is more than a provision for the benefit of the owner. The applicants having given notice under the



2nd sub-section of section 1 of our Act 6 of 1882, were not, in my opinion, entitled to claim an arbitration in respect of the taking of less water than was mentioned in such notice, and the appeal must be dismissed, with costs.

Buchanan, J.: I fully concur.

De Villiers C.J., stated that the appeal of *Penhalonga Proprietary Mines, Ltd., and Another v. Cockerell* was also dismissed with costs, on the same ground. Mr. Justice Hopley, he added, concurred in the judgment.

[Appellants' Attorney: G. Trollip; Defendants': Van Zyl and Buissinne.]

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### ADMISSIONS.

{ 1907.  
{ May. 7th

Mr. De Waal moved for the admission of Nicolaas Theunissen Michau as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Cradock.

#### PROVISIONAL ROLL.

##### ARDERNE V. ABRAHAMSON.

Mr. De Waal moved for provisional sentence on a mortgage bond for £2,000, with interest from the 1st January, 1905, less £80 paid on account, and for £6 5s. 6d., insurance premium, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Dr. Greer (for defendant) produced an affidavit by his client, but

Mr. De Waal said that the affidavit had not been served upon his client and he had not previously been aware that there was any appearance for defendant.

The matter was ordered to stand over until Tuesday next, question of costs to be mentioned at the hearing.

##### PITTS AND THOM V. GERRYTS.

Dr. Greer moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court, upon which a balance of £50 12s. remained unpaid, and £9 9s. 2d. taxed costs.

Defendant did not appear.

Attachment granted as prayed.

##### GORDON MITCHELL AND CO. AND OTHERS V. MILLSTEIN AND CO.

Mr. Inghold moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Mr. Inghold moved for the appointment of Alfred Newton Foot as provisional trustee, with power to sell perishables and deal with live stock.

Order granted, with powers as prayed.

#### ILLIQUID ROLL.

##### HEPWORTHS LTD., V. MCGLASHAN.

Mr. Louwrens moved for judgment under rule 329d for £39 9s. 2d., moneys collected by defendant, and for goods sold and delivered, with interest and costs.

Order granted.

##### JOYCE AND MCGREGOR V. TUBRIEN.

Dr. Rainsford moved for judgment under Rule 329d, for £55 18s., less £1 paid on account, being a sum of money advanced, with interest *a tempore morae*, and costs.

Order granted.

#### REHABILITATION.

Dr. Rainsford moved, under the 117th section of the Ordinance, for the discharge from insolvency of James Patrick Boyle.

Order granted.

#### GENERAL MOTIONS.

*Ex parte* ARDERNE AND OTHERS. { 1907.  
{ May 7th.

Mr. P. S. T. Jones moved, on behalf of petitioners, as a syndicate owning certain land at Newlands, for an order authorising cancellation of certain sales to one John Talanda by reason of his failure to produce sureties or pay the purchase price, as stipulated in the conditions. Talanda had left the Colony, and was believed to have gone to German South-West Africa.

Buchanan, J., said that as the matter involved a question as to the payment of transfer duty, notice of the application should have been given to the Revenue officials.

Mr. Jones submitted that there was good evidence in the petition that the sale had been cancelled as between the petitioners and Talanda.

Buchanan, J.: The matter will be ordered to stand over until Friday next to enable notice to be given to the Registrar of Deeds, who may, if so advised, file a report.



*Ex parte* RHENISH MISSION SOCIETY  
(CARNARVON).

Mr. Marais moved for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond, which had been erroneously and accidentally destroyed along with other papers by one Solomon Cornelius, in whose possession the bond had been. The Registrar of Deeds was of opinion that a rule should issue.

Order in terms of report of Registrar of Deeds, rule nisi to be published once in "Ons Land," and to be returnable on May 28.

*Ex parte* GOLIGHTLY.

Mr. Porter Buchanan moved, on behalf of George H. Golightly, of the Paarl and Carnarvon, for an order allowing a certain break in his service of articles to count as part of his service. Petitioner had been absent from his articles for a period of 122 days, owing to an attack of pleurisy, and he asked that 90 days should be allowed to count as service, and that he should be allowed to serve the balance of 32 days at the end of his articles. Counsel cited *Fraser's case* (14, C.T.R., 406).

Ordered that the break in the continuance of the service be condoned, and that 90 days' leave of absence be allowed to count as service.

PUXTY V. STREETER.

This was an application for suspension of execution of a certain decree of civil imprisonment granted against applicant at the instance of the respondent.

Applicant appeared in person; Mr. Benjamin was for respondent.

Affidavits having been read,

Charles Ivor Puxty (the applicant) went into the box and said that he had no means whatever to satisfy the judgment.

Cross-examined by Mr. Benjamin: Witness was released from custody at Mossel Bay upon payment of £6 at the time and £6 a month afterwards. He paid £6 on his release, the money having been furnished to him by a friend in Mossel Bay. Witness had pointed out to Mr. Le Roux, attorney, certain movable property that he had in Cape Town. He had an iron shed in Roeland-street, and there were goods in the offices of "Acraum," in Long-street. The matter arose from the "Acraum" business, in which witness was a partner.

[Buchanan, J.: I suppose the Sheriff could sell "Acraum" without a special licence?]

Mr. Benjamin said that he did not know. He understood that "Acraum" was a rival of "Sacco."

Further cross-examined: Witness had been requested to surrender his estate

and had been threatened that, unless he did so, his creditors would sequester his estate.

By the Court: Witness intended to surrender his estate. His schedules were now being prepared.

Buchanan, J.: Execution of the decree will be suspended for three weeks to enable applicant to surrender his estate. He should take steps at once, or he may be re-arrested.

RYNHOUD V. RYNHOUD AND ESTATE  
J. F. RYHNOUD.

This was an application brought by Mary Ann Rhynhoud upon notice to respondents to show cause why a sum of £30 should not be paid to enable applicant to proceed with her action against her husband, George W. Rhynhoud, for divorce or judicial separation, or why an order should not be granted restraining the executors in the estate of his late father from paying over to him the amount of his inheritance pending result of the action.

Mr. Pohl was for applicant; there was no appearance for respondent.

Mr. Pohl read an affidavit by applicant, and intimated that certain affidavits had been filed by respondents.

Buchanan, J., said that the affidavits would be read.

Mr. Pohl proceeded to read the affidavits, from which it appeared that the respondent, George W. Rhynhoud, had pledged his inheritance for the purpose of defending the action.

Ordered that the second respondents, the executor and executrix of the estate of the late J. F. Rhynhoud, be interdicted from paying over the sum of £30, part of the inheritance owing to the respondent out of his father's estate, and authorising the second respondents to pay the said sum of £30 to the attorneys of applicant.

HICKSON V. COLONIAL GOVERNMENT  
AND ANOTHER.

Costs—Taxing Master's *allocatur*  
—Review.

*H. had applied to the Court for leave to appear as curator ad litem on behalf of his minor son in an action instituted against the respondents jointly. The matter was settled out of Court, respondents agreeing to pay taxed costs. The Taxing Master refused to allow costs of H.'s application as between party and party on the ground that they ought to have been incurred before the issue of summons.*

Held, on Review, that the said costs not being unnecessary they must be regarded as costs between party and party no matter when they were incurred.

This was an application calling upon the Colonial Government and the Woodstock Town Council to show cause why the taxation of plaintiff's bill of costs in the suit against respondents should not be reviewed.

It appeared from the affidavits that the Taxing Master had disallowed costs in respect of an application made by the present applicant for leave to him, as father and natural guardian of the interested minor, to carry on an action on behalf of the minor with others in an action against the present respondents. The action had been settled, defendants agreeing, *inter alia*, to pay taxed costs. The applicant claimed that the charges disallowed were necessary and reasonable, and should be allowed in taxation as between party and party. The Government contended that the charges should not be allowed, but the Municipality raised no objection to their being allowed, and tendered its moiety of the costs.

The report of the taxing officer was as follows: In this case summons was issued on the 9th October, 1906, the warrant to sue having been signed by the several plaintiffs, and also by R. W. Hickson as father and natural guardian of Harry Randolph Hickson, jun. On the 5th November, 1906, the said R. W. Hickson applied to the Court for leave to carry on and combine the action on behalf of the said minor, which was subsequently granted on his filing an indemnity guaranteeing the minor against any costs that may be incurred in the action on his behalf. On taxation of the costs as between party and party, the charges in connection with this application were objected to by the attorney representing the Colonial Government, but the attorney representing the Council of the Municipality of Woodstock raised no objection thereto, and in fact agreed to these charges. I, however, disallowed these charges, as I considered that everything that was necessary to be done to give each plaintiff his or her proper status should have been done before issue of summons. And the charges in connection with the application were therefore not properly included in the bill of costs as against the defendants. I was not at the time aware of the decision in the case of *Van der Walt v. Hudson and Moore* (4 Juta, 327), where it was laid down that as the father was the proper person to sue on behalf of his minor son, no objection could be taken by the defendant on the ground that no leave had been obtained from the Court.

Dr. Greer was for applicant; Mr. M. Bisset was for the Colonial Government; Mr. Struben was for the Woodstock Council.

Dr. Greer, in argument, said that the question was whether these were necessary costs. The costs, he urged, were in the same position as those incurred by a *curator ad litem*. He referred to *Maasdorp's Institutes*, 236, and contended that the father was compelled to come to Court to protect the interests of the minor, who, unless this was done or unless a curator was appointed, would be unprotected in the action. These costs were really part of the costs incurred in asserting the minor's rights. Counsel referred to *ex parte Montmort* (5 S.C.R., 118.) The applicant only came to the Court as father and natural guardian, and if he had not come the minor's interests might have suffered.

Buchanan, J., said that the whole issue seemed to him to be whether these were necessary costs.

Dr. Greer said that they were necessary costs. As to the position of the Woodstock Municipality, he contended that this being a joint and several liability, the tender of the Woodstock Municipality of half the costs was insufficient. On this point he quoted the case of the *Metropolitan Tramway Company v. the Gas Company and the Cape Town Corporation* (16, C.T.R., 445.)

Mr. Bisset said the position the Government took up was that these were wholly unnecessary costs, and that no one was benefited by the application except the plaintiff himself. Plaintiff should have waited to see if such application were necessary.

Mr. Struben urged that all that the plaintiff could ask of the Municipality was simply a moiety of the costs, and that the Municipality was entitled to deduct arrear rates and taxes from that moiety.

Buchanan, J.: No question has been raised as to whether this matter comes properly before the Court, and I assume that the Taxing Master, in the execution of his duty as Taxing Master, has authority to tax this bill of costs. The action between the parties was settled out of Court, and by that settlement the defendants undertook to pay the plaintiff's taxed costs. Before the action was ripe for hearing the father of the minor, who was interested in the matters in dispute, moved for authority to represent such minor as his *curator ad litem*. Such authority was not perhaps necessary, but it was necessary if the father wished to protect himself against personal liability for costs. The action was clearly in the interests of the minor. A question might be raised as to whether it was a successful motion, and on that ground possibly something might be said, as the order of the Court was granted on condition that the father found security, but the result was that

the father agreeing to make himself responsible, received an order of Court authorising him to sue on behalf of the minor. Having received such an order, I think that the costs incurred in obtaining that order are fairly taxable as between party and party. The Taxing Master disallowed these costs on the ground, according to his report, that they should have been incurred before the issue of the summons. On that point I think the judgment of the taxing officer was not quite sound. Whether they were incurred before the issue of summons or after is not, I think, the true test. The issue rather is, whether or not they were wholly unnecessary to the action. I think, looking at the whole of the circumstances, these costs cannot be said to be wholly unnecessary, and that, therefore, they are taxable as between party and party. I have not gone into the different items charged. Some of them do not seem to me to be fairly chargeable; but that is a matter the taxing officer will decide upon. The Court will overrule the decision of the taxing officer, and will declare that the costs of the application were necessary costs, and are as such taxable as between party and party. As to the costs of this application, the Government alone raised this objection, and I think they should pay the costs of the application. As to the other respondents, it would seem that each defendant agreed to settle separately on the basis of each paying half the damages agreed upon, and I consider the attorney should have accepted the offer of the Municipality to pay their half of the costs, and therefore the applicants must pay the Municipality's costs.

[Attorney for applicant: A. W. Steer. Attorneys for Colonial Government: Reid and Nephew. Attorneys for Woodstock Council: Moore and Son.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

LOMBERTO V. BASSO. ) 1907.  
( May. 8th.

This was an action for damages for libel.

Plaintiff, in his declaration, stated that the defendant had on several oc-

casions stated to other persons that he (the plaintiff) had stabbed a man in Italy, and had had to run away, and that that was the reason why he was in a foreign country. He alleged that thereby the defendant meant to signify and did signify that he had been guilty of assault with intent to murder, or with intent, to do grievous bodily harm. Plaintiff claimed that he had sustained damages on account of these false, scandalous, and defamatory statements, and he asked £250 as damages. Defendant, in his plea, denied having made the statements complained of.

Dr. Greer was for the plaintiff; defendant was not represented.

Among the witnesses called for the plaintiff was a boarding-house keeper, who said the plaintiff was formerly his partner in the business. On account of witness hearing from several customers that plaintiff had stabbed a man in Italy, witness paid him what was due to him and terminated the partnership, as provided for by the terms of the deed of partnership. Witness considered that plaintiff's association with the business was detrimental on account of these rumours.

Witnesses were called, who deposed that Basso had made the statements complained of. Defendant, it was stated, was "a dealer in Italian groceries," and it appeared from the evidence that he was not now in Cape Town. Defendant was asked to apologise, but he maintained that the accusation was true, and said that if he were taken to Court he would say things that plaintiff would not care to have said.

The plaintiff gave evidence. He said he had been in this country about ten years. He had always been on good terms with Basso until last December. Then there was a quarrel over an account, and Basso drew a knife. Afterwards witness heard of the statements Basso made concerning him. The statements were untrue. He had never stabbed a man, nor had he ever been charged with stabbing a man. People had changed in their behaviour towards him on account of these statements.

The defendant's wife, who was in court, stated, in answer to the Chief Justice that her husband was now at Lobito Bay. Her husband did not know the case was on, as matters were stopped for about three weeks, and he did not hear from the lawyers. She had not had an opportunity of writing to him, but she could do so now. Defendant left on the 19th April.

Dr. Greer said the notice of set-down was served on the 24th April on the defendant's attorneys.

The defendant's wife said it was she who made these statements. Plaintiff had slandered and assaulted witness and her husband.

Plaintiff, recalled, denied this.

[De Villiers, C.J.: You did not say anything to defendant affecting his or his wife's character?]

Plaintiff: No.

Llewellyn van Breda, the defendant's attorney, said there had been a misunderstanding between the attorneys in the matter. Witness had understood that the case would be set down next term; otherwise, counsel would have been instructed. About a week ago witness became aware that the plaintiff had gone to Lobito Bay on a business trip. Defendant said some time ago that he was going on a short business trip, and that he would return shortly. He may have been told by a clerk that the case would not come on this term.

In reply to Dr. Greer, witness said defendant was barred in March, but it was agreed that the bar should be removed. There would have been no need for an extension of time within which to plead, if the plaintiff's attorneys had carried out their agreement, and had not barred within ten days.

Dr. Greer said the plaintiff's object was to clear his character.

De Villiers, C.J., said he would not give heavy damages, without giving the defendant an opportunity to appear.

Dr. Greer said plaintiff did not ask for large damages.

De Villiers, C.J., said that the defendant's wife had admitted the statements, and it was not pleaded that they were true. Plaintiff had not suffered serious damages. The judgment of the Court would reinstate him in the opinion of those who might possibly have believed the story told about him. From the statement of the defendant's wife he was satisfied that the only result of a postponement of the case would be to add to the costs, and that the issue would be the same in any case. Judgment would be given for the plaintiff for £50, with costs.

#### CLARKE V. HEATHCOTE.

This was an appeal from a judgment of the Resident Magistrate of Engcobo.

It appeared that the plaintiff alleged that five head of his cattle had been poisoned through drinking sheep dip left in a pot on the commonage by the defendant. It was denied that the animals died as a result of poisoning by this means. The Magistrate gave judgment for plaintiff for £60, made up of a number of items, and against this the defendant now appealed.

Mr. Benjamin was for the appellant; Mr. Bisset was for the respondent.

Mr. Benjamin, in argument, quoted Bain on Damages, p. 426. He urged that, as there was no special damage alleged in the summons, the Magistrate was wrong in awarding a sum of £4 8s. 4d. as "some compensation to plaintiff for the disturbance of his rights."

De Villiers, C.J., said that if the notice of appeal had specified this item as being excepted to, the plaintiff might have foregone that amount.

Mr. Benjamin said he had been instructed to press that the judgment was wrong in relation to the whole sum awarded by the Magistrate. There was considerable doubt, counsel submitted, as to the cause of the animals' deaths, and the Magistrate should have given absolution from the instance.

Without calling on Mr. Bisset, the Court dismissed the appeal.

De Villiers, C.J.: It seems to me clear from the evidence that the plaintiff's five head of cattle died from the effects of arsenical poisoning. It is true that the stomachs of all the cattle that died were not minutely examined, but two of them were examined and properly analysed, and the other head of cattle showed exactly the same symptoms as the two the contents of whose stomachs were sent to the analyst. There was found to be arsenic in the contents of the stomachs of these two in quite sufficient quantity to account for the deaths of the animals. Then the contents of a pot were examined and the dip found therein was found to be rich in arsenic. This dip had been left in a pot close to a dipping tank and on a place where the plaintiff's cattle lawfully grazed. The symptoms of the illness came upon the plaintiff's cattle in the neighbourhood of that dipping tank, and footmarks of cattle were found in and about the place where this pot had been standing. It is also proved to my satisfaction that the defendant was responsible for the pot of dip being left where it was. It is said that it had been covered with corrugated iron, and that stones had been placed upon that, but in my opinion that does not remove the element of negligence in the case. It appears to me that it was a matter of great negligence on the part of the defendant in leaving a dip of that nature, which he must have known to be poisonous, in a spot where cattle might have access to it. It is well known that cattle will go about licking at things such as salt and other matters of that kind, and the defendant might have expected that cattle would probably appear on the scene and have a taste of this stuff. In fact, counsel for the defendant candidly admits that, if it is once proved that the cattle did die from the effects of taking the poison from this pot, the defendant would be liable. Well, I am satisfied that the deaths were caused by the cattle taking some of this dip, and consequently, in my opinion, the defendant is liable for damages for the loss of these cattle. The plaintiff himself gave evidence as to the value of the cattle, and according to him one of the heifers was worth £16, a black heifer was worth £14, and a black ox was worth £12 10s.



The Magistrate would have been quite justified upon that evidence in giving judgment for the full amount of £65, quite independently of the expenses of the Government analyst, or of any special damages alleged to have been sustained by the plaintiff. But he took a round sum of £60, and then, in analysing as to how he arrived at that amount, he says that £4 8s. 4d. is some compensation to the plaintiff for the disturbance of his rights. Well, if the defendant had given notice to the plaintiff that that is his special ground of appeal, that he admits he is liable for damages, but that he appeals upon this point of the £4 8s. 4d., it is quite possible that the plaintiff might have said: "Very well, I won't insist upon that." But the appeal is general; it is upon the whole case as to the defendant's liability, and considering that there is quite sufficient evidence, independently of this £4 8s. 4d., that the plaintiff has sustained damages to the extent of £60, I do not think the Court would be now justified in making any amendment of the judgment. The appeal will be dismissed, with costs.

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### PROVISIONAL ROLL.

MANSON V. TRAKMAN. { 1907.  
May 8th.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £500, with interest from 1st July, 1906, less £6 10s. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property to be declared executable and the rents attached by the Sheriff.

Order granted.

BRITTAIN V. ZIMMER.

Mr. Toms moved for provisional sentence for £137, balance of certain mortgage bond for £600, with interest at 8 per cent. from the 1st January, 1907, bond due by reason of non-payment of instalments; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### GENERAL MOTIONS.

*Ex parte* LIQUIDATORS REY- } 1907.  
NOLDS' VEHICLE FAC- } May 8th.  
TORY, LIMITED.

Mr. Russell moved for an order sanctioning a compromise proposed to be entered into between the petitioners and a certain contributory.

Buchanan, J., said that the proper course was to give notice of the application by advertisement, and allow the petition to lie for inspection before moving for sanction.

An order was granted directing that the petition should lie for inspection at the office of the liquidators for 14 days, after which date the Court may be moved to confirm the same, publication once in the "Cape Times."

### *Ex parte* ESTATE SLABBERT.

Mr. Howes moved, on the petition of the executor testamentary of estate late Jurgens Johannes Slabbert, for a supplementary order authorising the raising of a bond for £644 10s. on mortgage of the landed property. Petitioner stated that in August, 1905, leave was granted by the Court to raise a mortgage for £250. That power had not been taken advantage of, and on the 13th February last an application was made for authority to raise a further bond for £363, the petitioner being under the impression that the order formerly granted could now be taken advantage of. It appeared, however, that that was not so, hence the present application.

The matter was referred to the Master for report.

### *Ex parte* ESTATE SCHOLTZ.

Will—Conditional bequest of property not to go out of the family.

*The late S. bequeathed certain immovable property to his children and grand-children (by substitution) subject to the condition that it was not to go out of the family. All the legatees now asked that this provision should be cancelled.*

*Held, that the Court had no power to alter the will of the testator.*

Mr. P. S. T. Jones moved, on the petition of the thirteen legatees under the will of the late Theodorus Ernst Scholtz, of Ganna Leegte, division of Aberdeen, for leave to cancel a certain provision in the will. Petitioners stated that the late Mr. Scholtz, by his last will and testament, dated 1st March, 1904, bequeathed specific portions of his landed property to them, which had now been surveyed and sub-divided, and diagrams framed so as to give to each of the petitioners, to whom transfer was to be passed, the piece of ground bequeathed to him or her. The bequests were subject to the provision: "Met betrekking tot de gronden hierin ver-



maakt door ons aan de kinderen en klein-kinderen voormeld, is het onze expresse wil en begeerte dat geene de regt zal hebben noch toegelaten worden eenig part of deel van gemeld gronden aan eene vreemde te verkoopen of vervreemden, daar het onze begeerte is dat dezelve in de familie zullen blijven." Petitioners were anxious to annul this provision, of which none of them wished to take advantage, and were desirous of receiving transfer free from any such condition. Owing to three of the legatees, namely, the children of the late Johan F. Scholtz, being minors, petitioners were advised that any agreement which may be made amongst them with a view of cancelling the above provision must receive the sanction and approval of this Court. They prayed for an order authorising the mother and natural guardian of the minors to enter into a joint agreement to cancel and annul the provision in question. Counsel also read an affidavit by the *curator ad litem* of the minors, pointing out that three of the legatees wanted to raise a mortgage, and that if the restriction remained they would be placed in a difficult position.

Buchanan, J., observed that it was a pity no translation of the clause was annexed to the petition. He read the clause as a prohibition against alienation out of the family.

Mr. Jones said it was a question as to whether the clause constituted a real or a personal prohibition, as discussed by Sande. If it were a real prohibition then, of course, the property would go to four generations, but if personal then it would only apply to the particular persons concerned. Counsel quoted Sande, 3, 5, 4 (Webber's Translation, pp. 212 and 213) and 3, 3, 7 (Trans. p. 187). If the clause in question were merely a personal prohibition, he submitted that the parties could sell one to the other, and that there would be no further prohibition. He also cited Voet 36, I. 27 (McGregor's Trans., p. 72).

Buchanan, J.: The testator seems to have made a will—I say "seems," because the will itself is not attached to the petition, as it ought to be—in which he bequeathed his landed property to his children and his grandchildren by substitution. And he added a clause that the land so bequeathed shall not be by them alienated to a stranger, "the desire being that the property should remain in the family." Application is now made to the Court to authorise the transfer of this landed property to the legatees free from this obligation imposed by the will, on the ground that the legatees have agreed to dispense with it. No doubt it would be very advantageous to the legatees to agree to do away with a burden which the testator imposed, but if they take the

land they must take it subject to the burden, or they need not take it at all. The Court has no power to alter the will of the testator, and no order will be made on the application.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

O'BRIEN V. LOGAN. { 1907.  
May 10th.  
" 13th.

Architect — Fees — Project not carried out—*Quantum meruit*.

*Where a proprietor instructs an architect to prepare plans and the proposed work is not carried out the Court will not feel bound in making its award by the scale of fees customary in England but will award only a quantum meruit.*

This was an action for the recovery of an amount of money for services rendered.

The plaintiff's declaration was as follows: (1) The plaintiff is an architect practising at Cape Town; the defendant resides at Matjesfontein in this Colony; (2) in or about the month of February, 1905, the defendant employed the plaintiff as his architect for the customary and usual remuneration to prepare plans, drawings, and specifications of a certain hotel to be erected for the defendant upon certain ground situate in Queen Victoria-street, Cape Town, and now occupied by certain buildings known as Poole's Hotel. The estimated cost of the said hotel so to be erected was the sum of £120,000 sterling; (3) the plaintiff, in pursuance of the said contract of employment, duly prepared plans, drawings, and specifications as aforesaid, and the defendant duly accepted the same, and at the request of the defendant the same were duly passed and approved by the Corporation of the City of Cape Town; (4) thereupon the plaintiff became, and was entitled to, the said customary and usual remuneration, which is an amount reckoned at the rate of 2½ per cent. upon the said estimated cost. Such remuneration amounts in all to the sum of £3,000, together with the sum of £25 for certain

extra prints supplied to the defendant at his request, and accepted by him, which is a reasonable charge for the said work so performed by the plaintiff; (5) the defendant further in, or about, the month of March, 1906, employed the plaintiff as architect to prepare plans and specifications, as well as bills of quantities for certain alterations and additions to a certain hotel at Worcester, known as the Commercial Hotel, for the customary and usual remuneration, as aforesaid. The estimated cost of the said alterations and additions to the said hotel was the sum of £1,200; (6) the plaintiff, in pursuance of the said contract of employment, duly prepared the said plans and specifications, as well as the said bills of quantities, and the defendant duly accepted and used the same; (7) thereupon the plaintiff became, and was, entitled to the said customary and usual remuneration of 2½ per cent., reckoned upon the said estimated cost in respect of the said plans and specifications, and a further 2½ per cent. so reckoned in respect of the said bills of quantities, being in all the sum of £60, which is a reasonable remuneration for the work so performed by the plaintiff; (8) the defendant is further justly and lawfully indebted to the plaintiff in the sum of £30 sterling, being for professional services rendered and expenses incurred in connection therewith by the plaintiff for and on behalf of and at the special instance and request of the defendant between the months of March and October, 1906. The said services were rendered in connection with the Masonic Hotel, Beaufort West, and an account thereof and of the said expenses has been duly rendered to the defendant. (9) All times have elapsed, all things have been done and all conditions have been fulfilled necessary to entitle the plaintiff to claim from the defendant payment of the said sums of £3,000, £25, £60, and £30, but the defendant, after lawful demand duly made, refuses to pay the said sums or any portion thereof. Wherefore the plaintiff claims: (a) Judgment for the said sums of £3,000, £25, £60, and £30 (or £3,115 in all), with interest *a tempore morae*. (b) Alternative relief. (c) Costs of suit.

The defendant's plea was as follows: (1) Paragraph 1 of the plaintiff's declaration is admitted. (2) As to paragraphs 2 and 3 thereof, defendant says that in February, 1905, plaintiff and one Armstrong approached defendant to join them in a scheme for the flotation of a limited liability company to erect and own an hotel on the site of Poole's Hotel, Cape Town, the said Poole's Hotel being defendant's property. (3) Plaintiff proposed that he, Armstrong, and defendant should be jointly interested in the scheme, and that the approximate cost of the hotel should be £100,000. (4) Defendant undertook to assist in the scheme, and plaintiff for the purposes

thereof and in the mutual interests of the parties aforesaid undertook to prepare plans, drawings, specifications, and estimates of cost, to enable defendant to proceed to England on behalf of the said parties with a view to effect the flotation of the proposed company. (5) Thereafter plaintiff prepared plans, drawings, and specifications accordingly, and upon their completion to the mutual satisfaction of the parties jointly interested as aforesaid, the plans were submitted to and approved of by the Corporation of the City of Cape Town as a necessary preliminary to the flotation of the company upon the basis thereof. (6) Up to the present time, owing to the prevalent general depression, no further steps have been taken by the parties to the said scheme to effect the flotation of the proposed company. (7) It was agreed between the parties in the event of the company being floated and the hotel being erected, that plaintiff should act as architect and receive fees in the usual course for the plans prepared and other work performed by him in such capacity. (8) Save as above, defendant denies each and all the allegations in paragraphs 2 and 3 of the declaration and specially that the employed plaintiff as architect to prepare the said plans, drawings, and specifications. He denies that he is responsible to plaintiff in any event for his fees in regard to the preparation of the said plans, and says that plaintiff will not be entitled to recover such fees unless and until the said company is floated and the said hotel erected pursuant to the arrangements made as aforesaid. (9) With regard to paragraph 4, he admits that plaintiff prepared certain extra prints for the furtherance of the flotation in England of the proposed company, and says that the said prints were supplied in terms of the arrangement aforesaid and for the furtherance of the common project. Otherwise he denied the allegations in paragraph 4 of the declaration. (10) Defendant admits that he employed plaintiff as set out in paragraph 5 of the declaration, and says that plaintiff undertook to prepare plans and specifications for the alterations and additions required to the defendant's licensed premises at Worcester, known as the Commercial Hotel, on the special stipulation that the actual cost of making such alterations and additions should not exceed £1,000. He says, further, that tenders for the execution of the work set out in the plans and specifications as prepared by plaintiff were duly called for, but that, as all the tenders received were for sums far in excess of the limit of £1,000, no tender was acceptable or accepted. (11) The plans and specifications were thereupon returned to plaintiff to enable him so to alter and reduce them as to allow of the work being executed at the specified

cost, and they are in plaintiff's possession, and have not, so far as defendant is aware, been so altered and reduced. Defendant has not received bills of quantities for the proposed work and he has made no use whatsoever of the plans and specifications thereof. Defendant is prepared to pay to plaintiff whatever sum he may be entitled to in respect thereof upon completion of satisfactory plans and specifications framed in such a manner as to enable the work to be done for the sum specified, but denies that plaintiff is now entitled to claim any remuneration in respect of the preparation of the plans and specifications and bills of quantities returned to and in the possession of plaintiff. Save as above, he denies each and all the allegations in paragraph 5, 6, and 7 of the declaration. (12) With regard to paragraph 8 of the declaration, defendant admits having in the month of March, 1906, engaged plaintiff to inspect and report on certain building operations at Beaufort West, and that plaintiff did some small services and wrote two or three letters in connection therewith, but says that the charge of £30 in respect of the services rendered and expenses incurred in connection therewith is excessive. He admits that he is liable to pay to plaintiff a reasonable sum in respect of such services and expenditure, and says that he is prepared and hereby tenders to pay to plaintiff a sum of £25 (with costs to date hereof) in full satisfaction of plaintiff's claim under this head. (13) Paragraph 9 of the declaration is denied. Wherefore, subject to the above tender, defendant prays that plaintiff's claims may be dismissed with costs.

Mr. P. S. T. Jones for plaintiff. Mr. Close (with him Mr. Bisset) for defendant.

Arthur T. O'Brien, the plaintiff, stated his qualifications as an architect were obtained in America. In February, 1905, the defendant employed him in connection with the proposed hotel. Armstrong introduced him to the defendant on the 9th of that month. After talking over the proposal, the defendant employed him to draw plans and specifications for a hotel on the site of the present Poole's Hotel, to be known as the Hotel Selborne. Mr. Logan had some sketches drawn by Messrs. Parker and Forsyth, but said he thought them too ordinary. The defendant handed witness the drawings, and said, "Kick off and get on with these drawings." Witness produced drawings in March, which the defendant approved of. About July 25, the defendant said he was endeavouring to buy more property as he wanted a larger hotel. Eventually he did, witness was informed by him, purchase additional ground. In October, 1905, the defendant said he wanted two hotels under one roof. The original

scheme had about 80 rooms, and the new one 120 rooms, so that one manager could run the two houses. He was instructed to prepare working plans for the new arrangement. Witness told Mr. Logan the cost would be approximately £125,000, and the defendant did not limit him. The witness gave evidence as to further interviews and correspondence with Mr. Logan, and deposed as to receiving a permit from the Town Council in connection with the erection of the Hotel Selborne. The plans were approved by Mr. Logan, and witness had done all that was necessary in order that the work should be proceeded with. He had drawn up the specifications. The charge he made of 2½ per cent. on the estimate was the usual one in such cases. He estimated that the cost of the building was, roundly, £120,000. It worked out, on cube measurement, at £122,388. There were no bills of quantities taken out. He had made repeated demands to Mr. Logan for some payment on account, but had received nothing. There was much correspondence. Mr. Logan refused to pay him anything. On sending a detailed account on the 16th February, he received a reply from the defendant in which he said he objected to being spoofed, and had consigned the account to the waste paper basket. The writer said that he (O'Brien) knew very well the conditions he had agreed to, and that when the work commenced he would be paid as it went on. With regard to the Commercial Hotel, Worcester, witness prepared specifications and bills of quantities and took tenders. There was, however, no building work carried out there. Defendant asked whether it could be done for a thousand. Witness said he did not know until he got it on paper, but that he thought it would be about £1,500. He told witness to go on and that afterwards they could cut it down. On his instructions witness called for tenders, the lowest of which was £1,857. Mr. Logan complained of this as being too high, and eventually it was cut down to £1,059. Mr. Logan had previously told him to try and get them down to £1,200. It was not customary for the proprietor to receive bills of quantities. It was impossible to get tenders without bills of quantities. Witness did not guarantee an estimate. On witness cutting the figures down to £1,060, Mr. Logan said that if the contractor (Mr. Poole) would do it for £1,000, he would give him the extra £60 if he did a good job. This was agreed to, but nothing further was done.

Cross-examined by Mr. Close: Armstrong, who was a contractor, introduced witness to Logan, and the latter said he had some land, and wanted to build a hotel costing about £50,000. He said he estimated the land and the licence as being worth £50,000. Witness was instructed to prepare sketches for a

hotel worth £50,000. In July, 1905, Mr. Logan told witness he had acquired more land adjoining the site of the proposed hotel. Armstrong was the representative of Milligan Bros., a firm of steel-work contractors in the United States. Witness was not dealing with Armstrong; he was dealing with Logan. He always understood that Mr. Logan would find the money for the building.

Evidence was given as to the reasonableness of the plaintiff's charges by J. Collingwood Tully, F.R.I.B.A., and Frederick Cherry, M.R.I.A.I.

The plaintiff (re-called) said the work in connection with the Hotel Selborne matter occupied him about two months. Witness and two others were engaged on the plans. These other two were his brothers, and they were fully qualified architects. He paid them £30 and £25 a month respectively.

Mr. Jones closed his case.

James D. Logan, the defendant, said that Armstrong, whom he did not know previously, wrote to him asking for an interview, so that he might lay a proposition before him for the re-building of Poole's Hotel. Armstrong and plaintiff called upon him together, that being the first occasion upon which he had seen either of them. At that interview Armstrong said he (witness) had one of the best sites in Cape Town upon which to build a hotel. He suggested that they should form a company to build a hotel. Witness informed them that he had already formed that intention, and had plans out. Messrs. Parker and Forsyth had previously prepared plans, and there were negotiations in 1902 with reference to the formation of a company. At the interview referred to, it was agreed that the cost of the building should not exceed £100,000. Witness was to sell the land for £50,000, £25,000 to be in cash and the balance in shares. Witness was to supply half the capital, on the condition that his firm should supply the liquor to the hotel, and Armstrong undertook to find the other half of the capital, on condition that his firm should have the steel work to do. O'Brien and Armstrong, witness understood, were working together. O'Brien's fees were not discussed, except to the extent that he was to have his ordinary fees, after the work was commenced. O'Brien's share in the enterprise was that he was to provide the plans. Witness did not employ O'Brien to do this work on his (witness's) account. It was Armstrong's suggestion that O'Brien should do the work.

By the Court: Armstrong said that O'Brien would do the work as architect, and should not have any fees until the work went through. O'Brien agreed to this.

Examination continued: It was perfectly understood that this work should be done with a view to a company be-

ing formed. Witness did not contemplate building the hotel for himself. Times in respect to hotel business were then very bad. Before that time—in 1902, when matters were much better—his project was to build a hotel costing £50,000, and that also was with a view to forming a company. There was no engagement of Mr. O'Brien by witness individually. Witness got a copy of the plans from the plaintiff for the purpose of taking them to England. Witness told O'Brien there ought to be a proper notarial agreement drawn up. The prospects of floating a company grew worse as time went on. The present was not an opportune time to float such a company. Witness was willing to perform his part of the agreement, and if Mulligans agreed, the plaintiff would be employed as architect in the carrying out of these plans. In regard to the Commercial Hotel matter, witness told O'Brien at the outset that he would not pay a penny more than £1,000. On ascertaining that the lowest tender was £1,200, witness declined to accept it.

Cross-examined by Mr. Jones: He never instructed O'Brien to take out bill of quantities in connection with the Commercial Hotel work. He never agreed that £1,200 would be a fair price for the work. Witness thought that O'Brien was one with Milligan Bros. O'Brien did all this work on the off-chance of the company being floated. Armstrong had gone away. If the latter carried out his undertaking on behalf of Milligan Bros., witness would perform his part. As a matter of fact, witness, Armstrong, and O'Brien were a syndicate.

Mr. Jones: Do you hold this agreement is binding on Milligan Bros?

Witness: It is binding on Armstrong.

You entered into an agreement of this sort right off the reel with persons you had never seen before?—Yes.

You were dealing with £50,000 worth of your property, with people you had never made any inquiry about?—I would have done nothing affecting my property without being careful.

Re-examined, Mr. Logan said that Mr. O'Brien and Mr. Armstrong came to him with much larger ideas than he had entertained when he thought of floating a company in connection with the new hotel.

[Hopley, J.: The company might have been floated if there had not been this depression?]

Witness: I am still prepared to carry out my part of the agreement.

Herbert Kitson, secretary to Mr. Logan, gave corroborative evidence. He said that so far as he was aware Mr. Logan never contemplated building the new hotel himself, his idea being to float a company. It was agreed



between Mr. Logan and the plaintiff that the price for the Commercial Hotel, Worcester, should be £1,000.

Cross-examined by Mr. Jones: He did not remember that plaintiff ever gave a guarantee that this work would be done for £1,000. He looked upon plaintiff as subsidiary to Armstrong in the matter of the Hotel Selborne.

Mr. Close closed his case.

Mr. Jones contended that, subject to the Court being satisfied of the engagement of plaintiff by the defendant as architect, for the Hotel Selborne, plaintiff was entitled to 2½ per cent. commission on the contemplated cost, the work having been abandoned through no fault of the architect. He quoted Emden on the Law of Leases and Building Contracts, 103, 106, and 109; Hudson on Building Contracts, vol. 1, p. 78, and referred to the cases of *De Wit v. Cape Canning Company*, 11 S.C.R., 116; *Ackermann v. Adamson*, 19, S.C.R., 274; *Le Swan v. Nourse* (Transvaal S.C.R., 1903, 814); and quoted Nathan, vol. 3, section 1,449. The onus was on the defendant, he urged, to show the terms of employment. The presumption was strongly in the plaintiff's favour, and he submitted that he had not discharged the onus of rebutting that presumption. Counsel further referred to the case of *Rowe v. Gothelph* (11 C.T.R., 666), and said if the Court found on a *quantum meruit*, and the work were hereafter proceeded with, the plaintiff's claim for the full 5 per cent. would be met with a plea of *res judicata*, and that was the reason why plaintiff now claimed the 2½ per cent., which, in the circumstances, he (counsel) contended the architect was entitled to.

Mr. Close submitted that the defendant's version of the arrangement between himself, Armstrong, and O'Brien was the correct one, viz., that it was an engagement between the three to build this hotel subject to a company being floated. It was, he urged, only agreed that plans should be drawn up for the purpose of floating a company, and that the work should be done for the company, and should be paid for by the company. At the most, there was only a common employment of plaintiff by the two: Logan and Armstrong. On the facts he submitted that the arrangement was either, as Mr. Logan had said, or that there was a complete misunderstanding, and that the parties were at cross purposes, and there was no agreement between them. As to the question of the 2½ per cent., counsel argued that there was no evidence of custom, and that if there were such custom proved, it was not recoverable. He quoted Hudson, 78 and 87; Emden, 104, and contended that a reasonable remuneration for the plaintiff's services was £130, and for his assistants' work £75. Mr. Close, in further argument, cited 2, *Macassey and Strong*, 25, and

the cases of *Rowe v. Gothelph*, *Ackermann v. Adamson*, *De Witt v. Cape Canning Company*, *Le Swan v. Nourse*, *Lucke v. Von Coller* (10 C.T.R., 338), and *Pearce v. Pearce and Walker* (19, E.D.C. Rep., 80).

Mr. Jones having replied,

The Court gave judgment for the plaintiff for £350, with costs.

Hopley, J., reviewed the facts of the case, and said he found as a fact on the evidence that there was no evidence of any agreement between the plaintiff and Armstrong, nor any understanding by which they should work together as partners in this matter. He (the learned judge) thought that the evidence showed that the plaintiff was taken by Armstrong to the defendant as a competent architect who would be able to aid in the pushing through of the scheme formed by Logan and Armstrong. Both the defendant and Anderson were at the time satisfied that this scheme would go through, and it seemed *a priori* unlikely that there was anything like a bargain with the architect that he was to do the work at his own risk and was not to be paid unless there were a successful flotation of the company. Although Mr. Logan may have had an idea in his mind that all these costs would come out of the flotation of the company, and although he may not have thought at the time that he was rendering himself individually liable for these costs for the preparation of the plans and so forth, and although the idea may have got crystallised in his mind that that was the real state of affairs—that the company was eventually to pay and that he himself was not liable—still he (the learned judge) did not think that anything was said at the time of the transactions which would set up the state of affairs which Mr. Logan now wished to maintain. Both the defendant and the plaintiff might be perfectly honest in their evidence, but he thought that the plaintiff's recollection of the matter was the more trustworthy, and also that it was supported by the course of conduct of the parties, and by the written correspondence which had passed. As to the amount claimed by the plaintiff, the Court had never been bound by the arbitrary scales laid down by the body of architects in England, and had never adopted as a basis for their charges by architects in this country what seemed to be the customary remuneration in England; it had rather been the rule of the Courts here that if a contract had not been carried to completion, and if there was no custom proved as to the exact amount, the Court should fix as best it could a sum which it thought the architect's work was worth. In the present case, as in the case of *Rowe v. Gothelph*, plans had been approved and accepted, and to a certain extent acted upon. Now such plans were only steps



towards carrying out a project from which, if it were completed, both the employer and the architect would receive considerable benefits; the former in the shape of a completed building, the latter by way of customary fees and charges; but it would be, to his mind, an injustice that an owner should be required to pay very large fees when the scheme never saw completion. He did not think the Court had ever gone so far in this country as to say that a man should pay the same as though he had got the full advantage of the scheme being carried out. What was done in such circumstances was that the architect was given what the Court considered to be a fair remuneration for his work, and on this basis it seemed to him that £250 would be a fair amount to allow the plaintiff for the work of himself and of his assistants in this matter. With regard to the extra plans, he found that they had been ordered by the defendant, and he thought £20 would be a fair sum to award. As to the matter of the Commercial Hotel, Worcester, his lordship said he did not think that the plaintiff, in his instructions, was absolutely limited to the £1,000, nor that it was clearly put to him that he would be entitled to nothing if this sum was exceeded. He therefore thought that the plaintiff was entitled to payment of £50 in respect of that work. The result would be that judgment would be given for £250 in respect of the work on the Hotel Selborne, £20 for the extra plans, £50 in regard to the Commercial Hotel work, and £30, as tendered, for the other work—£350 in all—with costs.

[Plaintiff's Attorney: G. Trollip. Defendant's Attorney: Van Zyl and Buisinne.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WESTERN WINE CO. AND OTHERS V. FEDERAL COLD STORAGE CO.	1907. Feb. 20th. Apl. 23rd. " 24th. " 30th. May 10th.
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Commonage — Servitude — Registration — Filing of general plan.

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*One O. B. had sold certain erven on his farm subject to the right of purchasers to user of a certain commonage shown on a general plan of the farm filed with the Registrar of Deeds. Thereafter the defendant's predecessor in title purchased certain of these erven and also the remaining extent. Defendants denied the servitude and had encroached on the commonage by appropriating to their exclusive use certain portions thereof. Plaintiffs now claimed a declaration of rights in respect of the commonage.*

*Held, that, as the filing of the general plan with the title deeds was equivalent to the registration of a servitude, the defendants must be ordered to remove such fences as protected their encroachments.*

This was an action brought by certain six plaintiffs, who are erf-holders at a place called Berghville, near Tulbagh Station, against the defendant company to have their rights declared in respect of certain property that they hold at Berghville, and for damages.

The declaration set out that in the year 1875 one Oloff P. Bergh was the proprietor of the farm Nooitgedacht, in the Tulbagh division, and as such proprietor Bergh caused to be laid out on the farm a village which he called Berghville, and he caused to be prepared a general plan showing a subdivision of the ground, and showing certain pieces of ground adjoining the lots as commonage for the benefit of the lots. On the 5th May and 27th September, the same year Bergh caused to be sold by public auction a number of these lots according to this general plan, which plan was filed in the office of the Registrar of Deeds. The auctioneers sold by public auction on condition that the buyers of lots and erven and their successors in title would have equal rights of grazing on the commonage. The plaintiffs were either original purchasers of erven, or as successors in title they were entitled to all the rights of the original purchasers. Subsequent to the sale by public auction about 1900 Bergh sold all the land left vested in him to one Verster, predecessor in title of the defendant company. In 1903 and 1904 the defendant company having purchased the land now owned by them from Verster encroached upon the commonage rights of the plaintiff and others by cultivating and fencing in certain

portions of the commonage. They claimed exclusive control of the commonage, and denied that the plaintiffs had any rights. The first two plaintiffs, D. L. Malherbe and Jacob Caplin, claimed damages in £250, and the others £50 each, with a declaration of rights, and an order compelling the defendant company to remove all fences erected which interfered with the free access of plaintiffs and their cattle, and an interdict.

The plea admitted that in 1875 Mr. Bergh was the owner of the farm, and that he caused a general plan to be prepared. Plaintiffs denied that the portions were reserved as commonage for the benefit of the lots. In 1877, Bergh sold and transferred to one Joubert portion of the land now claimed by the plaintiffs as commonage. It was denied that the purchasers of the erven and their predeceutors in title bought their lots upon conditions contained in the declaration that the commonage was reserved. Verster sold to the Verster Cold Storage Company, and that company sold to the defendant company. The number of proposed lots laid down on the general plan were 214, of which 39 were deducted. Of these the plaintiffs held 18, 14 were owned by other persons, and the remaining 7 were owned by the defendants, who also owned the remaining 175 lots of the intervening spaces between them. The defendant company denied that any intervening spaces belonging to the plaintiffs were enclosed. Only the lots of which they were the owners were enclosed. The company was entitled to fence in the portion which Bergh, as of right, fenced in in 1875. In reconvention they claimed against Malherbe, one of the plaintiffs, £250, for fencing in and cultivating part of the commonage, and £100 and an interdict against Samaai, who did not reside on the lots, for trespass by grazing his cattle on the farm of the defendant. There was no claim against the others.

A general plan of the village of Berghville, transferred to O. P. Bergh in 1872, and a plan of a resurvey and extension of the village was put in from the Deeds Office.

Mr. Searle, K.C. (with him Mr. Roux), was for the plaintiffs, and Sir H. Juta, K.C. (with him Mr. Close), was for the defendants.

Jacob Daniel Theron said that land was sold at the sale at which he was present, which was not part of the village. People bought parts outside what was pointed out as commonage. In respect of the piece which witness bought, he got no right of commonage. A considerable number of the village lots were sold. Witness lived as a tenant in the village under Fagana and De Klerck, who had purchased the lots with commonage rights. Witness exercised his rights equally with the others on the commonage, speculating

in cattle. Bricks were made on the commonage by others, and witness, like the others, cut wood for his own use. During the time he was there no part of the commonage was enclosed, but some of the unsold erven were enclosed by Bergh. All the erven above the road had to get water. The lower side, where there was a river, had no right to water.

Cross-examined by Sir H. Juta: Wood and stone were got from the Government ground. He could not say who made the bricks on the commonage.

O. P. Bergh stated that the agent who acted for Isaac Verster in the sale by witness to him, saw a copy of the general plan. After the sale went through, witness made Verster a present of the general plan. The commonage, which was a large area, was of value.

Cross-examined by Sir H. Juta: Witness sold a number of lots out of hand, and in the transfers of a number of these lots there was no reference to the general plan. Witness left it to the conveyancer to give transfer. By equal rights to the water, witness meant that if he kept 100 cattle, the others would be entitled to keep the same number.

A tenant under Verster, the Verster Cold Storage, and in 1896 a tenant also under Mr. Bergh, stated that he grazed his cattle on the commonage, and during Mr. Bergh's time there was no interference. Bergh did not interfere with the erf-holders making bricks or cutting wood. Witness had built huts on the commonage, and when a surveyor came along, he ordered their removal. Mr. Verster paid the cost of their removal to within the boundary of the erven. There was some valuable grazing ground on the commonage. Before Mr. Verster sold to the Verster Cold Storage, there was no interference with the erf-holders.

Cross-examined by Sir H. Juta: The huts were not removed because coloured people who occupied them were polluting the water. Witness was positive that Verster paid for their removal.

Jacob Kaplan, one of the plaintiffs in the case, and owner of four and a half erven at Berghville, stated he had been resident there for about seventeen years, during which time he had owned several erven. About twelve years ago Mr. Berg held a sale at which the general plan was shown. The commonage was also pointed out.

Mr. Malherbe, one of the plaintiffs, said he knew the piece of commonage ground between the road to Tulbagh and the railway line. There was the railway fence on one side, but all other sides had been enclosed by the company. The extent of the ground would be close on 50 morgen, and he also complained that during the last couple

of years portion had been ploughed up and cultivated. He would be satisfied on a survey to remove his fence back to the boundary, if it took in other property. Before this action he had not had any notice that he was encroaching on other property. He regarded the commonage rights of value to the erf-holders; if there were no such rights, the erven would not be worth anything. Witness had suffered damage through not having grazing ground for his cattle and horses. The cattle were accustomed to graze on the enclosed part. Three years ago witness had to purchase an adjoining piece of ground for grazing purposes.

Petrus Jacobus Uys, another of the plaintiffs, gave evidence on his diagram. He bought from Mr. Isaac Verster and took transfer in 1905. Before he bought the erven he saw people's cattle and horses grazing on the commonage, which increased the value of the adjoining property by about half. Since Berg's time a larger portion of the commonage rights had been taken in by the company.

Noah Metter, who came to live on the property in January, 1881, gave evidence as to use which the people made of the commonage. There was no dispute until three or four years ago. Besides grazing, there were rights to water, clay, and wood. He was also present at the public sale of Mr. Berg's lots when the general plan was exhibited. There was no question that the rights of grazing, etc., on the commonage were very valuable to the erf-holders.

Walter Piers Murray, Registry Surveyor and Examiner of Diagrams in the Deeds Registry, stated that he had held that appointment since 1903. His office was a department of the Deeds Office. He produced the general plan of the village of Berghville. The plan referred to the deed of transfer of 1872, and said "for deductions see portfolio." He produced the portfolio. A large number of general plans were filed. All erven were shown on the plan. He had a plan of the lots cut off in 1901. He could not explain how the six lots, cut off from what was marked commonage on the general plan, were laid out. He regarded the general plan and the outline plan as supplementing each other.

Cross-examined: The quitrent grant and diagrams were filed in the Surveyor-General's Office.

Re-examined: General plans of a village were filed if the diagram of the farm on which the village was laid out was not large enough to show all erven. If the diagram was sufficiently large all erven would be shown on it. When the recent deductions were made the diagram of the seller or a certified copy of it would have been produced. The certified copy would be issued from the

Surveyor-General's Office. The defendants could not know exactly what they bought without referring to the general plan. The actual extent of what they bought was in the transfer deed.

William de Neufville Lucas said that he had been Registrar of Deeds since 1901. The general plan was filed because the diagram could not show all deductions. It was very unusual for diagrams to be large enough to show lots. The general plan was really an extension of the diagram—a subsidiary diagram. According to the practice now obtaining in his office if any diagram or general plan contained a reference to commonage he would not allow a deed of transfer to be registered inconsistent with the general plan. The general plan should not be accepted until any servitude on the property had been registered. Until recent years these plans were filed without registration or servitudes. He regarded the general plan as a registered diagram. Even if for the present case this was sufficient registration he thought it would be better to have the servitude registered against the deed of transfer by way of an endorsement.

Cross-examined: Registration was an official act which the Registrar of Deeds was required to do. There might be a large number of documents filed in the Deeds Registry, e.g., such as powers which were recorded, but not registered. His signature would be necessary to registration, and his signature to a transfer deed would cover the diagram attached to the deed. The general plan was optional in some cases, but essential in others. If it were impossible to lay down lots clearly on the diagram, the Registry Surveyor would be justified in insisting on a general plan. Diagrams were not registered, although there was an index for diagrams and general plans. There had to be a diagram to register a deed referring to a diagram.

One might have a transfer deed without a diagram, where there was no deduction. The area of the remaining extent was given in the transfer deed, but if he was buying a piece of land like that he would find out what the "streets, etc.," referred to, were. To ascertain what had been cut off, it would be necessary to refer to the general plan, and to the index, which was really part of the general plan.

Mr. Searle closed his case.

Mr. Close asked for absolution from the instance on the ground that even if there was a servitude against defendants such servitude would only allow each erfholder a reasonable use of the commonage, and there was no proof that plaintiffs had been deprived of such a reasonable use. A servitude had to be registered in the Deeds Office, and evidence of what took place at the

sale was inadmissible. He referred to the case of *Colonial Government v. Stephan Bros.* (17 S.C., 59).

[Maasdorp, J.: You may define their use, but you cannot confine them to a certain area, and you have enclosed a portion of what they claim as commonage.]

Just as roads shown on the general plan which had become useless could be closed up, so some portion of this ground could be closed up.

[Maasdorp, J.: People entitled to the common user of a thing are entitled to the common user of the whole of it.]

The Court will always apply the principles of law which require that servitudes should be restricted, and here, even if there was a servitude, the plaintiffs still enjoy the user of a reasonable portion of the farm.

Ryno Johannes Verster said that he was manager of the defendant company. The company had a capital of half a million pounds, and was registered in England. He held between 20,000 and 25,000 shares. The farm in question was taken over from the Verster Company for £12,800. Certain other properties were also taken over; the whole lot for £105,000. He never saw the general plan, and did not know that there was a general plan with the words "Village commonage" marked on it. He didn't know of any commonage rights, and did not give defendant company any intimation of such rights.

Cross-examined: He was managing director of the Verster Company, which company sold to the defendant company. The Verster Company bought from Izak Verster, his brother. His brother, J. C. Verster, bought from Bergh for £2,000, and sold to the Verster Company for £6,000. He would be responsible for the prospectus of the Verster Company, and he bought from his brother for the Verster Company. He did not look at the title deeds of the property. He did not know where the extent of the place came from; he, Mr. Earp, and Dr. Petersen must have signed the declaration of seller.

Re-examined: He had for the last 25 years been residing in Cape Town, where he had a flourishing butchery business. The transactions between the Verster and Federal Companies took place when cold storage business was flourishing. He got £30,000 for the goodwill of his business. He knew the extent, but did not inquire if there were servitudes. He got a clear title deed, but he never looked at it. When he bought he did not know whether they were getting clear title or not, but he was not buying for himself. He did not know exactly how many erven had been cut off, but he knew how many morgen they were getting. The prospectus said so many morgen.

Edmund Yolden Taylor, a broker, said that in 1903 he was interested in the deal between the Verster Co. and the proposed (now existing) Federal Co. He made out the broker's note. He was present at the negotiations; nothing was said about a servitude.

Cross-examined: The broker's note said nothing about the extent, and nobody ever looked at the title-deeds. He had no knowledge of the extent of the land.

Bassett Bisset, Government land surveyor, said that he made a plan of the land in question. Malherbe's fence actually enclosed one whole street and portion of another and the commonage.

Cross-examined: Malherbe's fence took in a small piece of the commonage. Outside erven, about 3½ morgen, had been cultivated above the railway line, and about 48 morgen below the line, plus a piece of about three morgen inside an old fence. On reference to the general plan, it would be discovered that there was a servitude of commonage.

Mr. Close closed his case.

Mr. Searle said that there were few, if any, material facts in dispute. In fact, if it were not for the claim for damages, the matter might be decided upon exception. The facts alleged in the declaration had been substantially proved and the question was whether, upon these facts, the plaintiffs were entitled to the relief claimed. Counsel, in arguing the legal questions, quoted the cases of *Hiddings v. Tops* (4. Searle's Reports, 107); *Ohlsson's Cape Breweries v. Whitehead* (9 Juta, 84); and *Estate of Gardiner v. Town Council of Port Elizabeth* (Supreme Court Cases, 507), as authorities in regard to general plans. He also quoted the case of *Dreyer v. Ireland*, 1874 (Buchanan, 193); *Steele v. Thomson* (13 Moore's Privy Council Reports, 280); *Hirsh v. Gill* (10 Juta, 156); and referred to 10 *Cape Law Journal*, 20; 22 *Cape Law Journal*, 161; and 23 *Cape Law Journal*, 37, in regard to the validity of plans and diagrams. Counsel further quoted the cases of *Ex Parte Kotze* (22 Supreme Court Reports, 170); *Colonial Orphan Chamber v. Marnitz* (9 Juta, 47); *Ex Parte Dutch Reformed Church of Heidelberg* (15 C.T.R., 598); *Richards v. Nash* (1 Juta, 312); and *Judd v. Fourie* (2 E.D. Reports, 41). He submitted on the authority of the cases quoted that the plaintiffs were entitled to the declaration of rights claimed.

Mr. Close quoted the case of *Hofmeyr v. De Waal* (1 Juta, 424), in support of the contention that evidence to vary a transfer deed was inadmissible unless the certain varying condition said to be made was endorsed by the parties on the transfer deed. On the question of the effect of filing in the Deeds Office, counsel quoted the case of the *Steyler-*



*villc Management Board v. Bosman* (10 Juta, 67). He also referred to Voet, 8, 2, 2; 2 Maasdorp, 145; and Foster on Practice of the Deeds Office; and to the cases of the *London and South African Exploration Company* (8 Juta, 96); *Leitjes v. Ollerendraw* (3 Searle, 268); *Clayton v. Metropolitan and Suburban Railway Company* (10 Juta, 301); *Johnson v. Fincham* (9 Juta, 292); *Picnaar v. Van Zyl* (16 Supreme Court Reports); and *Stegmann v. Bam* (20 Supreme Court Reports, 1). He contended that the bulk of the authorities showed that the onus was on the plaintiffs to prove, first of all, that there was any agreement at all, and, secondly, that the defendants had express notice of it.

Mr. Searle having replied,

*Cur. Adr. Vult.*

*Postea* (May 10th).

Maasdorp, J.: It is alleged in the plaintiffs' declaration that in 1875, Oloff Bergh, the owner of the farm Nooitgedacht, had a village called "Berghville" laid out upon his farm, of which a general plan was made, showing the subdivision of the ground into a number of lots or erven, and also showing a certain piece of ground adjoining the said lots as commonage for the benefit of the lots or erven. Thereafter, in 1875, some of the erven were sold at public auction in accordance with the general plan, which was duly filed in the office of the Registrar of Deeds; and at the sale the following condition, amongst others, was announced, "that the buyers of erven and their successors in title, would all have equal rights of grazing and general commonage rights over the portion of ground reserved as commonage on the said plan." And it is further stated that all the purchasers of erven at the said sale purchased on these conditions. The plaintiffs were either purchasers at the sale, or are successors to such purchasers, and the defendants are the owners of some of the erven sold at the sale, or sold subsequently, and also of the remaining extent of the farm. It is stated that in 1903 and 1904, the defendants encroached on the commonage rights of the plaintiffs by cultivating and appropriating to their exclusive use certain portions of the commonage, and thus depriving the plaintiffs of grazing for their stock; and the defendants also enclosed certain portions of the commonage and some of the streets with a wire fence, excluding thereby the stock of the plaintiffs from the commonage. The plaintiffs allege that they have sustained damages in the sum of £50 each, and two of them, Malherbe and Caplin, specially claim damages in the sum of £250 each. They further pray for a declaration of rights, and an order compelling the defendants to remove the fences, and interdicting them from enclosing and cultivating the commonage and streets. The

defendants admit that the village was laid out in accordance with the general plan which was filed in the office of the Registrar of Deeds, and which contains the words, "village commonage," in a portion of the farm not cut up into lots, but they deny that these portions were reserved as commonage for the benefit of the erven, and they also deny that the plaintiffs, or their predecessors in title, bought their erven upon the conditions contained in paragraph (4) of the declaration. The defendants further state that a village was laid out as consisting of 214 erven, but of these only 39 were sold and deducted from the extent of the farm, and of the 39 erven 18 belonged to the plaintiffs, seven to the defendant, and 14 to other persons. They admit that portions of the ground claimed as commonage, and some of the streets, have been enclosed by them, and their predecessors in title, and they claim the right to retain these enclosures, but deny that they have interfered with streets upon which the erven of the erf-holders abut. It appeared at the trial that the plaintiffs recognised the fact that the defendants had not interfered with, and did not claim the right to interfere with, streets to the use of which they were entitled, and that part of the issue was, by common consent, dropped out of the case, and the only issue that remains is in respect of the rights to the commonage claimed by the plaintiffs. In their pleadings the parties appear to have refrained from committing themselves to any clear and definite statement of their legal position. Upon the plaintiffs' declaration it is questionable whether they base their case upon a duly registered servitude, or upon contractual conditions, apart from registration, which are in some way binding upon the defendants. The declaration contains the allegation that the erven were sold in accordance with a general plan, bearing the words, "village commonage," which was duly filed in the office of the Registrar of Deeds. That this filing amounts to registration of the servitude the pleader is careful not to allege. That the plan was filed is admitted by the defendants, and they again on their part do not boldly allege that no right of servitude was registered in manner required by law, but in a general way traverse the claim made by the plaintiffs. Then again there is a statement in the declaration of the conditions upon which the erven were bought some twenty-eight years before the defendants became the owners of the remaining extent, without in any way connecting the defendants with the conditions, by alleging either registration or actual knowledge thereof on the part of the defendants. And on defendants' part no exception is taken to this inconsequential character of the de-



claration, nor do they set up want of registration, or want of notice, but they deny the existence of the conditions. Then we have in the plea some information given about the existence of a line of railway on the farm and the position of the erven, without its being indicated how these circumstances affect the case. My object in dwelling upon the state of the pleadings is to point out that it was difficult to ascertain from them whether the plaintiffs proceeded upon a registered right of servitude or upon the actual knowledge on the part of the defendants of the existence of an unregistered right of servitude created by a contract, of the conditions of which the defendants were aware at the time they acquired the property for valuable consideration. It became, however, quite clear during the argument, that the plaintiffs' contention was that they possessed a right of servitude, which was duly registered according to law, and their counsel said the plaintiff claim was based upon such registered rights and not upon knowledge on the part of the defendants of an unregistered right. This I now take to be the main issue which has to be decided by the Court. A great deal of evidence was given of the incidents at the sale, to which the defendants' counsel took exception, but which was allowed on the ground that it was a direct issue raised between the parties whether those incidents did occur without their relevancy being questioned upon the pleadings. And it was also considered likely that, in case a registered servitude was established, its extent and locality might be fixed by such evidence. In so far as this evidence bears upon the question of notice to the defendant of the creation of a servitude at the time the erven were sold, it would now appear to be irrelevant, because it is admitted that the issue is not before the Court. The sole question in respect of the creation of the servitude that has to be determined is whether the servitude in question was duly registered according to the provisions of our law. That such registration was necessary to the constitution of the servitude was admitted, and is established by a series of decisions of this Court. The matter therefore resolves itself into an examination of the title deeds of the property of the defendants, upon which the plaintiffs claim the servitude. This examination must embrace the title deeds of Bergh, who laid out the village of Berghville upon the property, and sold the erven now held by the plaintiff, together with the title deeds of the successive owners, down to the defendants. It will be discovered, upon making this inquiry, that there is endorsed upon Bergh's transfer a concession to the Government of a right to take a certain quantity of water from the

property. Isaac Verster succeeds Bergh as owner of the property, and there is no servitude specially registered against his title deed, but the property is transferred to him, subject to such conditions as are mentioned in Bergh's transfer. The Verster Cold Storage Company then became the owners, and they take subject to the conditions mentioned in the transfers of Bergh and Verster, but in addition there is a servitude of water leading registered against their transfer in favour of a number of erf-holders of the village of Berghville, whose names are given. The defendants took their transfer from the Verster Company, and their title is subject to the conditions mentioned in the preceding transfers. Anyone perusing the body of the transfers, together with the written document annexed to them, will discover only two servitudes as created upon the property after Bergh became the owner, and they consist of two servitudes of water rights granted to the Government and the erf-holders. This, I say, is all that will be discovered in the shape of servitudes upon reading the transfer deeds. It is, however, contended that we should not stop there, but should also examine the diagrams attached to the transfer, and the general plan of the village of Berghville, which is filed in the Deeds Office, and is expressly referred to in the transfers. It appears that when the erven were sold by Bergh, a general plan of the projected village was filed in the office of the Registrar of Deeds. It seems to be a practice of that office to require the filing of such a plan, whenever the diagram attached to a deed of transfer is so small that it is impossible to represent upon it the deductions of erven from the remaining extent. And with this general plan of the village a folio is kept, in which are entered the sale and transfer of erven appearing upon the general plan. In ordinary cases deductions are specially mentioned upon the deed of transfer, and shown upon the diagram, but in the case of a village the number and smallness of the erven render it impossible to do this, and necessitate recourse to a general plan and folio, a general reference being made in the deed of transfer to the general plan, which in its turn refers to the folio. For the purposes of these deductions this general plan, according to the evidence of the Registrar of Deeds, is regarded as a subsidiary diagram, as is taken as embodied in the diagram. It seems, therefore, that we must take the entries in the folio as corresponding to the endorsement of deductions upon the seller's deed of transfer, and the general plan to form part of the diagram attached thereto. In accordance with the above-mentioned practice

a general plan of the village of Berghville was in this instance filed by Bergh in the office of the Registrar of Deeds, and a folio was opened for entering the sales and deductions of erven. The following endorsement was made upon Bergh's deed of transfer: "For subdivisions vide general plan filed." This endorsement also appears upon the transfer deed of Verster, to whom Bergh sold the remaining extent, and in the body of Verster's transfer deed appearing the words: "The remaining extent (including streets, etc., as shown in the general plan of the village of Berghville)." This remaining extent is sold and transferred by Verster to the Verster Company, and by the Verster Company to the defendants, both the last transfers bearing the words: "The remaining extent measuring—(including streets, etc., as shown in the general plan of the village of Berghville)." Now, upon referring to this general plan it will be found that it is described: "The general plan of the projected village called Berghville and adjoining village commonage situate at Tulbagh-road railway station." Upon the plan references are made to certain transfer deeds and to the folio containing deductions of erven. Upon the figure representing the remaining extent of the farm surrounding the erven the area is described by the words, "village commonage," written in three different places in large letters. The plan itself, therefore, purports to be in express terms a plan, amongst other things, of the village commonage, adjoining the village, and the position of the commonage is given upon the figure representing the farm and village. Now, the question arises whether the fact that the words above mentioned appear upon the registered general plan of the village amounts to a registration of the grant of a servitude of common pasturage in favour of the erf-holders of Berghville against the remaining extent of the farm. I may say that in my opinion the presence of these words upon the general plan is equivalent to of the remaining extent of the farm attached to the title deeds of that property. In order to decide the question raised, it is necessary to ascertain how the Court has in the past regarded these general plans. The earliest case bearing upon the point is that of *Hiddingh v. Tops* (4 Searle, 107), in which the direct effect of the plan itself upon the decision of the Court is somewhat obscured by the admission of evidence of conditions of sale announced on the day of sale, the admissibility of which has been questioned in so far as it affects subsequent purchasers without notice. Hodges, C.J., said in that case: "There was a representation at the sale by the seller that the purchaser of each lot should have the use of roads leading to the public road over and in-

to the estate, and the claim of the defendant, who purchased at the sale, must be limited to that." Consequently this judgment did not rest mainly upon the registration of a right of servitude, as it was evidenced upon the general plan filed in the office of the Registrar of Deeds. But some of the reasons given by Watermeyer, J., for his decision, are of great importance. He said: "I look upon the general plan as a contract in writing, because it would be understood by the parties in a more simple way than if words had been employed in describing all the streets and lots." Applying this view to the present case, we have this result, that a written contract was exhibited to the purchasers at the sale of erven, which was subsequently registered against the title deed of the sellers. This document upon the face of it intimated that the land surrounding the erven was village commonage, and I take it it was intended to convey, and did convey, to the purchasers that this village commonage was for their use. This very document was registered against the title deeds of the defendants in this case, and to any person perusing it the idea must be conveyed that the ground indicated upon the plan, upon which the words, "village commonage," appears, is ground intended to be village commonage for the use of the erf-holders: but I do not intend to base my decision, or to build too much, upon this single observation made by Watermeyer, J., and I shall consider the other cases dealing with this subject. Briefly stated, I think the case of *Ohlsson's Breweries v. Whitehead* (9 Juta, 84), amounts, in so far as it touches this point, to a decision that where a street is marked upon a plan as adjoining a lot sold, it is an indication that the street is intended for the use of that lot. Consequently a servitude is created over that street by the mere indications in the plan, without any mention of such servitude appearing in the transfer deed, further than such as is involved in a general reference to the plan; and I think we may deduce from the case of the *Estate of Gardiner v. Town Council of Port Elizabeth* (19 S.C.R. 514), the conclusion that where an open space is shown on a plan exhibited at the sale, there is an intimation to purchasers that it is intended for the use of such purchasers as buy lots to which it may, from its locality, be a convenience. Here again the condition of sale constituting the servitude is taken from the plan alone. And in that case the Chief Justice said that in his opinion the filing of the plan with the title deeds, would constitute registration, which would be effectual against subsequent purchasers. It was not, however, necessary to deal with the question of registration in that case. Here, again,

we find a servitude created by registered general plan, without express mention of it in the deed of transfer. The effect of a representation in the diagram is also dealt with in the case of *Garret v. Andries* (11 C.T.R., 672). The conclusion I come to is that the general plan in this case, which must be taken as part of the diagram attached to the defendants' title deeds, indicates and was intended to indicate that the erfholders of Berghville are entitled by grant to a servitude of pasturage on the remaining extent of the defendants' farm. I am of opinion that the servitude has been effectually registered, but I am also of opinion that the registration, as regards formalities, has not been executed in a satisfactory manner. It has not been registered in the manner at present insisted upon and rightly insisted upon by the Registrar of Deeds. It has been registered in a way which cannot be safely adopted in future because of the uncertainty it gives rise to. A servitude to be certain in its character and perfectly secure, should be clearly set out in the body of the registered deed of transfer. The way in which this servitude is indicated upon the general plan, although it establishes the erfholders' right of grazing, leaves the extent of the right doubtful. There is nothing to indicate that the whole of the remainder of the farm is subject to this servitude. If the general plan is to be taken as indicating the servitude, then the servitude should not be extended beyond what is indicated on the plan. The words "village commonage" appear in three places on the plan, and there is no indication that they were intended to affect the land lying beyond the Waterval River, which, both as to its physical character and title deeds seems to be distinguishable from the rest of the farm. I think the plaintiffs are entitled to rights of common pasturage over the remainder of the farm Compagnie's Post or Nooitgedacht, with the exception of the land laid out as erven; of portion O; and of the land lying to the north-west of the Waterval River, as marked upon the general plan; and a declaration of rights is made accordingly. The defendants are ordered to remove all fences placed by them upon the Commonage as above described. I am satisfied that the action of the defendants did cause some damage to the plaintiffs, but that damage was estimated by the latter on the basis that each could run as many head of stock as he pleased. The Court has not the material to decide, and is not asked to decide how many cattle each is entitled to run. That must be matter of arrangement. Twenty pounds damages will be awarded to the plaintiffs jointly. The defendants claim in reconvention damages from the plaintiff Malherbe for enclosing a small portion of the remain-

ing extent of the farm. Malherbe lays no claim to the ground, he admitted the trespass, and offered to remove the fences. No damage was proved, and no extra costs could have been incurred in respect of this claim. Malherbe is ordered to remove the fences off the defendants' land, and to pay them one shilling. No order is made as to costs of this claim in reconvention. As to defendant's claim against Samaai. I can only say there is not satisfactory proof either of trespass or damages, and absolution from the instance is granted, without costs. The defendants are ordered to pay the costs of the claim in convention.

[Plaintiffs' Attorneys: Wahl, Fuller and De Klerk. Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

### THIRD DIVISION.

[Before the Hon Sir JOHN BUCHANAN.]

REX V. SWARTS. { 1907.  
{ May 10th.

Master and Servant—Justice of the Peace—Neglect of Servant to commence work on the date for which he is hired—Act 18 of 1873, Sec. 7—Sub sec. 1.

*S., a hired servant, was prosecuted before a justice of the peace for having neglected to commence work at the date agreed upon. He was convicted, sentenced to imprisonment with the option of a fine and ordered "to return to his master's service" after serving his sentence.*

*Held, on review, that as he had never been in the service of this master and as the J. P. would have had no power to order him to return to it if he had, the latter part of the sentence must be struck out.*

Buchanan, J.: This case came before me for review from the Special Justice of the Peace of Porterville. The accused was charged with contravening sub-section 1 of section 7 of Act 18, 1873, the Master and Servants' Act, in that he did wrongfully and unlawfully and without sufficient

cause fail or refuse to commence service at the stipulated time. He pleaded not guilty, but was found guilty and sentenced to pay £1, or in default, one month's imprisonment with hard labour. The Special Justice of the Peace added this: "On expiration of service (I suppose he means service of sentence) to return to his master's service." This man had engaged himself, according to the evidence, to join the prosecutor for the ploughing season, but instead of doing so he engaged himself to another master. The conviction and sentence will be confirmed, but the latter clause of the sentence must be struck out for two reasons, viz: (1) that the Special Justice of the Peace has no authority to order the prisoner, on the expiration of his imprisonment, to return to his master, and (2) the prisoner was never in this person's service, so he could not return to the master, seeing that he had never been there. He was punished for not going there.

#### PROVISIONAL ROLL.

##### GENERAL ESTATE AND ORPHAN CHAMBER V. SAFIERDIEN.

Mr. Toms moved for provisional sentence on a mortgage bond for £300 with interest.

It appeared that the matter had previously been before the Court, and had been ordered to stand over *sine die*.

In the absence of proof that notice had been given to defendant of the present application, the matter was again ordered to stand over.

##### FIELD AND CO V. KLAAS.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### ILLIQUID ROLL.

##### NEUKIVEL V. LACEY.

Mr. Struben moved for judgment under Rule 319 for £98 0s. 7d., balance of account for work and labour done, and materials supplied, with interest *a tempore morae*, and costs.

Order granted.

#### REHABILITATION.

Mr. Gutsche moved, under the 117th section of the Insolvent Ordinance, for the discharge of Wm. Henry Lloyd.

Granted.

#### GENERAL MOTIONS.

##### WARD V. WARD. (1907. May 10th)

Mr. De Waal moved, on behalf of petitioner, for a decree of divorce, with

forfeiture of the benefits under the ante-nuptial contract, by reason of defendant's non-compliance with an order of restitution of conjugal rights.

Rule absolute.

##### *Ex parte* BRAUDE.

Mr. M. Bisset moved, on the petition of Nische Braude, for an interdict restraining her husband, Aaron Braude, of Matjes River, Oudtshoorn, from interfering with, or molesting her and her child, pending result of an action now being instituted by her for a judicial separation on the ground of cruelty. Counsel (in answer to the Court) said that no notice of the present application had been given to the respondent.

Rule nisi granted, to operate as an interim interdict, rule returnable on the 14th June, or at the trial of the action, should the same be heard previously thereto.

##### *Ex parte* ESTATE STEPHAN

Dr. Greer moved for the appointment of a *curator ad litem* to represent certain minors in a special case to be heard in the Supreme Court, between the executors of Estate H. R. Stephan and the executors of Estate J. C. Stephan. It was stated that the secretary of the Board of Executors was *curator nominate* of the minors.

Order granted appointing the Board of Executors as *curator ad litem* of the minors interested under the will.

##### DOOVEY V. CASIMALI.

This was an application calling upon respondent, in his capacity as executor testamentary in the estate of applicant's late husband, to show cause why he should not pay over to Mrs. Doovey a sum of £150, being six monthly payments at the rate of £25 per month, as stipulated under the will.

Dr. Greer was for applicant; Mr. Benjamin was for respondent.

Mr. Benjamin applied for a postponement.

Dr. Greer said he thought his learned friend would not press that application after he (Dr. Greer) had explained the position of his client. Mr. Casimali had failed to pay her anything from the estate for a certain number of months, and he had now filed certain affidavits. On the strength of those affidavits he (Dr. Greer) was not prepared to go on with the case. Mr. Casimali showed—and he (counsel) thought—it was pretty clear that the estate was practically insolvent, and that he was unable to pay these moneys. He contended, however, that as the applicant had not been furnished with an account of the estate, she was justified in bringing this application, and that it would



only be fair that the costs should come out of the estate.

Mr. Benjamin said he was not instructed to consent to any such proposal, and he submitted that in the interests of the creditors the costs should be paid by the applicant, who was not justified in bringing the application.

Buchanan, J., said that he would hear the application.

Affidavits were read, from which it appeared that the executor intended to surrender the estate as insolvent.

Buchanan, J., said he was satisfied that the applicant had a *prima facie* case, and judgment would be granted for costs, and applicant would, therefore, appear as a creditor against the estate.

#### FRIEDLANDER BROS. V. ESTATE GILLET.

This was an action brought by Friedlander Brothers, of De Aar, against the executors of the estate of Nicolas Joseph Gillet to recover the purchase price of certain land, and quitrent which had accrued thereon.

Plaintiffs, in their declaration, said that defendants were sued in their capacity as executors testamentary in the estate of the late Nicolas Joseph Gillet, in his lifetime of Cape Town, who died on May 11, 1905. On December 17, 1902, the said Gillet purchased from plaintiff at a public auction, held at De Aar, certain 12 lots of ground in the Friedlander township for £264. It was provided in the conditions of sale that the purchase money should be paid on the day of sale, or one-fifth on account, and the balance should be accepted on mortgage of the property purchased, bearing interest at the rate of 5 per cent. The said Gillet failed to pay any portion of the purchase price, and to pass a bond, and under the conditions of sale the whole of the purchase price, together with interest at 5 per cent. from date of sale, had become payable. Plaintiffs had tendered, and hereby again tendered transfer against payment of the purchase price, and they prayed for judgment for £264, with interest thereon at 5 per cent., and £108 quit-rent, which had accrued on the land.

Defendants, in their plea, said that they had no knowledge of the alleged sale, and they did not admit that the said Gillet had purchased under the conditions of sale the pieces of ground in question. No conditions signed by the said Gillet had been produced to them. They had no knowledge of any such conditions, and they craved leave to refer at the trial to the original conditions of sale upon which plaintiffs sold on the 17th December, 1902.

Mr. Benjamin was for plaintiffs; Mr. Inghbold was for defendants.

Petrus Stephanus Gillie, attorney and auctioneer, Britstown, said that in December, 1902, he held a sale of erven at Friedlander township, De Aar. The late Mr. Gillet was present, and on the 17th December he bought twelve lots, as shown in the vendu roll (produced). On that particular day there was only one other buyer. The prices of the erven sold ranged from £500 or £600 to about £20. Before Mr. Gillet bought there were negotiations between him and Mr. Friedlander with regard to the erven near the outspan place, and it was arranged between them that Mr. Gillet, whatever the bids amounted to, should pay £20 per lot, and that he should pay cash. Witness did not actually see Mr. Gillet signing conditions. He had seen conditions that had been signed. At the time witness held the sale the hotel had been burned down. He got a few rooms from the military. Between Christmas and the New Year the papers were removed from his office. Information was given to the police, but he had not been able to recover his papers. Amongst the missing papers was the form signed by Mr. Gillet. Witness had erroneously stated in an affidavit he had sworn that Mr. Gillet bought q.q.

Cross-examined: Witness was under a misapprehension when he said that Mr. Gillet bought q.q. The mistake arose in the copying of the vendu roll. He admitted that he had also stated on affidavit that Mr. Gillet did not sign the conditions, but explained that when his memory was refreshed by his clerk he remembered having seen the conditions that Mr. Gillet had signed.

Daniel C. Steyn, formerly employed by Mr. Gillie as clerk, said that after the sale Mr. Gillet signed two copies for each lot sold to him. The papers were put by witness among other papers in the office. Witness and his principal went to Britstown for the New Year. On returning to De Aar they found that the papers had disappeared. He had seen Mr. Gillie occasionally since, but this matter was not again mentioned to him by Mr. Gillie until about a month ago.

By the Court: Witness was not aware whether the purchase price was paid to Mr. Gillie.

Otto Adler, who attended the sale, said he remembered Mr. Gillet purchasing a block of erven at the sale.

Percy S. Dale, surveyor, also spoke to seeing Gillet buying the plots.

Wolf Friedlander (one of the plaintiffs) said that after the sale he saw the late Mr. Gillet. Mr. Gillet said that he had bought the ground to use it for wagon-making, blacksmith's shop, and engineering. Mr. Gillet talked about paying cash. He had not seen Mr. Gillet since that time. For a considerable time he was unable to ascertain Mr. Gillet's address.



By the Court: Witness did not press the claim for interest beyond the date of demand on the 3rd February last in view of the delay which had occurred. He left the matter in the hands of the Court. He was prepared to take judgment for the purchase price at £20 per lot.

Mr. Benjamin closed his case.

Harry Gibson (one of the executors) said that he knew a good deal about the late Mr. Gillet's Prince Albert-road business, but he knew nothing about the transaction in question.

By the Court: Witness was acting in the interests of the widow and children, because he did not think he was justified on the information before him in admitting the claim.

After hearing counsel on the facts,

Buchanan, J.: In this matter I think the executors were quite justified in the interests of the estate in not admitting this claim until it had been further investigated, seeing that the correspondence shows that the statements at first made by the executors were contradicted afterwards by the facts, and that the recollection of Mr. Cillie, who was the auctioneer, was not very clear about the circumstances. In such a case, and, in the absence of any written document signed by Gillet, they had hardly any option but to contest this case. However, I think, on the evidence that has been led, it is clear that the sale did take place to Gillet, and I think it is also clear, according to Mr. Friedlander's evidence, that the price agreed upon between them was £240 for these 12 lots. Mr. Friedlander is very fair in this matter, and he leaves the amount to be awarded to the Court, and is willing to accept judgment for this amount, and not for the sum appearing on the vendu roll, with interest from the date of demand, on 3rd January last. There will be judgment for the plaintiffs for £240 with interest from the 3rd January, 1907, including the quitrent for the year 1907. The estate, under the circumstances, unfortunately, must pay the costs.

On the application of Mr. Benjamin, Mr. Friedlander was allowed his expenses as a necessary witness.

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and a Jury.]

MARTIN V. ZULUZWENI. { 1907.  
May 10th.

Magistrate—Judgment in excess of plaintiff's claim.

*Z. summoned M. in the Court below to defend an action in which he sought to have it declared that certain goats attached at the instance of M. were his, Z.'s, property and had been wrongfully attached. M. consented to judgment in terms of the summons but the Magistrate ordered, failing return of the goats, the payment of their value and also payment in respect of some of them which had died while under attachment.*

*Held, that the Magistrate's judgment must be amended so as to bring it into accord with the terms of the summons.*

This was an appeal from a judgment of the Resident Magistrate of Kentani, in an interpleader action relating to the ownership of certain goats.

Mr. J. E. R. de Villiers was for appellant, who was respondent in the Court below; there was no appearance for the present respondent.

Mr. De Villiers said that appellant was summoned in the Court below to appear in a certain action to determine whether eleven goats valued at £4 were the property of Zuluzweni. The appellant consented to judgment. He now said that the Magistrate allowed 15s. per head for the goats, while 7s. 3d. only was claimed, and that certain of the goats died, for which he had been held liable, though there was no evidence that the goats died through any fraud or negligence on his part. Counsel submitted that the Magistrate's judgment was wrong, inasmuch as it had gone beyond the consent. On the question of liability for the goats that died, he cited Voet (6, 1, 34).

De Villiers, C.J.: The only question raised in the summons in the R.M.'s Court was whether or not the goats which had been attached at the suit of Martin (the respondent in that case) were or were not the property of Zuluzweni (the claimant in that case). In the record appearing in the Magistrate's Court, he seems to have treated it as a question of a claim for 11 goats, or their value, £4; the question of the value of the goats was not raised at all in the summons. It was incidentally mentioned that that was their value (£4), but their value was not claimed. The sole question was, were these goats the property of Zuluzweni or were they not? The respondent in that case, through his agent, admitted that he could not claim to issue execution in respect of these

goats, and what the Magistrate then ought to have done was simply to have declared that the goats attached are the property of the claimant Zuluzweni, and are not liable to execution at the suit of the respondent, who shall pay the costs in the Magistrate's Court. That should have been his order. Instead of that, he went further, and added, "and any that have died in the pound must be made good by the payment of 15s. each by the respondent." There was no claim for making good any loss. The Court will allow the appeal, with costs in this Court, and order the judgment to be amended so as to read as follows: "Declared that the goats attached are the property of the claimant (Zuluzweni), and are not liable to execution at the suit of the respondent, who shall pay costs in the R.M.'s Court."

#### REX V. DU PLESSIS.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Cape, who had convicted appellant of the theft of a horse, and sentenced him to four months' imprisonment, with hard labour.

From the record it appeared that the appellant had brought the horse to Cape Town, and had it sold by public auction. At the trial he said he had bought it from a Jew at Maitland, and he produced what purported to be a receipt.

The ground of appeal was that the conviction and sentence were not supported by the evidence given in the Court below, and were contrary to law.

Mr. Upington was for appellant, Adrian du Plessis, of Rustenberg, division of Stellenbosch; Mr. Nightingale was for the Crown.

Mr. Upington said that the appellant's version was that he bought the horse from a man, who apparently was the thief, and he produced at the trial a receipt purporting to have been given to him by the man from whom he bought. Although there might have been circumstances of suspicion, there was such an element of doubt in the matter that accused should have been given the benefit of it, and acquitted. Appellant was well connected, and there was no reason why he should become a thief for the sake of a paltry £8.

Mr. Nightingale submitted that on the evidence the Magistrate was quite justified in disbelieving the story told by the accused.

De Villiers, C.J.: There can be no doubt in the present case that the horse was stolen, and that possession of a recently stolen horse was traced to the accused. Then it lay upon him, when charged with the offence, to give a satisfactory explanation as to how he got possession of

the horse. His explanation is that he bought the horse from a Jew, and he produced a receipt, which he said he had got from that man. Unfortunately it appears that he only mentioned this receipt at the time when he was charged in court. When he was arrested he said nothing about it, nor did he say anything about it before the Magistrate at Stellenbosch when first he was brought before him. That in itself raises some doubt as to the genuineness of that receipt. Then the matter does not end here. When he saw Mr. Stamper (the auctioneer) about this horse, he gave his name as C. du Plessis, whereas it is A. du Plessis, and he said he came from the Paarl, whereas he came from Stellenbosch. Mr. Stamper was cross-examined upon the point, but he was positive that the man said his name was C. du Plessis, and that he came from the Paarl. When the accused gave evidence himself, he denied having given his name as C. du Plessis, but he did not deny the statement of Mr. Stamper that he said he had come from the Paarl. The Magistrate must have credited Stamper's statement that he also said his name was C. du Plessis. That is a double misrepresentation. Well, these are circumstances which the Magistrate was bound to take into consideration, and if he was satisfied that the witnesses for the prosecution were stating the truth, and was not satisfied that the accused was telling the truth, and that the document was a genuine one, he was bound to find the accused guilty. The only argument that can be raised in the case was that he was the son of a respectable well-to-do farmer and that there is an extreme improbability that he would steal the horse, if he could have got a horse from his father. Well, these things very often are done by people in good circumstances; they have temptations, and they commit a crime of this kind. The evidence is very strong against him, and he must suffer punishment for the offence. The appeal must be dismissed.

#### REX V. BOOI.

##### Game Laws—Trespass.

*It is an offence under the Game Law Amendment Acts of 1886 and 1891, to trespass with dogs upon land on which shooting or hunting of game is prohibited, even if the trespasser did not actually shoot or hunt game.*

This was an appeal from a judgment of the Resident Magistrate of Beaufort West, who had convicted appellant and another boy of a contravention of section 7, Act 36, 1886, as amended by Act

38, 1891, in that on the 25th March they did kill, catch, capture, and pursue game and trespass upon the commonage of the Municipality, without obtaining the permission of the Municipality. Appellant was fined 10s.

Dr. Greer for appellant (Antonie Boo); Mr. Nightingale was for the Crown.

Dr. Greer submitted that it was clearly the intention of the Act that it was to be applied to persons in pursuit of game, and that there was no evidence in this case that the boys were on the commonage with the intention of hunting game.

De Villiers, C.J.: The decision of the Magistrate was perfectly correct. These two boys were upon the commonage with eight dogs. It is suggested by them that the dogs followed them against their will. If they knew they were going to the commonage, it was their duty to go back and lock up the dogs, and not allow the dogs to accompany them, and go on land where they had no business to be. The proper notice was given by the Municipality that persons who trespassed on the commonage with gun or dog would be prosecuted, and, in spite of this notice, the accused went upon the commonage with eight dogs, two of them being greyhounds. It appears to me that the Act was intended to meet a case of this kind. In the Act of 1886, it is said that "no person shall at any time, either with or without a game licence, kill, catch, capture, pursue, hunt, or shoot at any game." It stopped there. Then the Act of 1891 added these words: "Or with gun or with dog trespass," so as to make it clear that it is not the hunting or the shooting alone, but also the trespassing with gun or dog that is punishable under the Game Preservation Act. I am of opinion, therefore, that the decision was right, and that the appeal must be dismissed.

GILPIN V. FYNN. { 1907.  
May 13th.

Fencing Act, 1883 — Cost of repairs.

*The plaintiff whose land was separated from the defendant's land by a dividing fence which was in a dilapidated condition, gave notice to the defendant that the repairs would be executed under the 14th section of Act 30 of 1883. In executing such repairs the plaintiff raised the height of the fence by affixing a barbed wire 9 inches above the height of the old fence and he also affixed several iron posts between the old posts, which were all of wood.*

*Held, affirming the judgment of the Magistrate's Court, that the plaintiff could not, under the claim for expense of repairs, claim from the defendant a share of the expenses incurred in altering the nature of the fence, but should be confined to the expense incurred in restoring the fence to its original condition.*

This was an appeal from a judgment of the Resident Magistrate of Stutterheim, in an action brought by appellant against respondent to recover £15 15s. 3d., in terms of sections 13, 14, and 15 of the Fencing Act (No. 30, 1883), being half costs of repairing a certain joint boundary fence between their respective farms Campagna and Redlands. The Magistrate had granted absolution from the instance, and ordered each party to pay his own costs.

The Magistrate, in his reasons for judgment, said: The defendant denies having received the notice marked (a) from the plaintiff. Admitting that he received it, there is no intimation in it that he (plaintiff) intended making what is practically a new and different description of fence at very considerable cost. According to the notice, the defendant had the right to assume that he intended repairing the old fence, that is, putting in new poles and wires where necessary. Instead of this, he makes it not only a foot higher, but fixes in iron standards which were not in the original fence. The bulk of the account is for standards and fixing them in position. I maintain the defendant had the right to be consulted before this additional expense was incurred, and that he was deprived of his right to have the matter, in case he protested, settled by arbitration. I think, however, he must have known that the plaintiff was working at the fence, and he should have made it his business to see or inquire what was being done. For that reason, I decided that he must bear his share of the costs.

Mr. J. E. R. de Villiers was for appellant; Mr. Benjamin was for respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The plaintiff has treated this case throughout as if it were a case of repairing the fence. I take it that notice was given in terms of the 14th section of the Act, and that notice was that he was going to repair the fence, and the summons claims the sum of £15 15s. 3d., being half the cost of repairing a certain joint boundary fence between the farms Campagna (belonging to the said plaintiff) and Redlands (belonging to the said defendant). Then the plaintiff puts in an account accord-

ing to which he has not only repaired the fence, but he has altered the fence and erected a different fence from the one which was there before. He has placed in iron standards which were not there before, and he has raised the fence 9 inches by placing another barbed wire above the wire of the previous fence. In my opinion, that is not repairing a fence. The plaintiff could only, under these circumstances, claim the costs of actually repairing the fence, that is, placing it in the condition in which it was before. Repairing is to restore to a sound or good state any injury, dilapidation, or partial destruction. It does not include a work such as was done here. The mistake the plaintiff made was that he did not keep the account of the cost he incurred for the purpose of repairing, and if he had done so I have no doubt the Magistrate would have considered the claim for such portion as amounted to repairing. But the plaintiff was unable to give an answer as to how much was expended on the actual repairs, and the Magistrate was compelled to dismiss the case. However, this judgment will enable the plaintiff still to bring his action for the half of the costs incurred for the purpose of repairing the fence. Under these circumstances, I am of opinion that the Magistrate's judgment was right, and that the appeal should be dismissed with costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

LAZARUS V. INSOLVENT ( 1907.  
ESTATE SWART. ( May 13th.

This was an application to have a certain writ of execution, issued against the property of the applicant by the trustees of the insolvent estate of J. J. Swart, in pursuance of a judgment given at the Circuit Court, Oudtshoorn, set aside.

The judgment of the Circuit Court was that Swart must give to Lazarus transfer and delivery of a certain farm on 1st October, 1906, and if Lazarus failed to pay the purchase price on that date, then he should have to pay £4,000. Lazarus elected to take the farm instead on transfer. The time was extended on a deed amending the judgment, and there it was stated that Lazarus should attend at Robertson and there delivery of the farm should be made to him by Swart, and £1,750, less £800, should be paid; on transfer being passed, Lazarus

was prepared at that time to make payment. He had prepared for the payment in Cape Town on transfer and possession being given. On the 9th October Lazarus was present at Robertson. He went to the farm, it having been understood that Swart should be present at Robertson, but he was not there.

The respondent took up the position that he never refused to give possession.

Mr. Louwrens (with him Mr. Howes) was for the applicant, and Mr. Burton (with him Mr. M. Bisset) was for respondent.

Voluminous affidavits were read on both sides, and Mr. Louwrens having been heard in argument on the facts,

Maasdorp, J.: In the judgment given in this case the defendant was ordered to pay two instalments of the purchase price of the farm he had bought from the plaintiff upon 1st October last, upon which date also transfer was to be given by the plaintiff to the defendant. Some difficulty arose upon the 1st because of the time it required to prepare the necessary documents, and the parties agreed that the judgment should be carried out in its terms on the 9th. Upon the failure of the defendant to carry out the judgment, a writ of execution was taken out. The applicant now prays that the execution may be set aside on the ground that the plaintiff was not prepared on the 9th October to give him possession of the property. If it appeared upon the evidence that that allegation was true, the Court would have refused to allow execution to proceed, because it was the duty of the seller not only to give transfer of the property, but also to give possession. The question arises whether the respondent was not able to carry out his obligations by giving the necessary possession. It is stated that a Mr. De Villiers had set up a claim to remain in possession, based upon a lease which had been entered into between him and the plaintiff in this case. Referring to the affidavit made by De Villiers and put in in this motion, it would appear that he at present sets up no such claim. He made a clear statement that he does not realise, and that he only remained upon the property because the applicant requested him to do so. There is therefore at present no obstacle in the way of the applicant taking possession, because, if in the face of this affidavit resistance is offered by De Villiers, he would upon the production of this document be ejected without any trouble. But the question arises whether at the time when the execution was issued De Villiers refused to give up possession, and set up an agreement which he had made with the plaintiff as granting him a right of occupation. Now, upon the statements as they appear upon the affi-



davits, I think it will not be difficult to arrive at the conclusion that as a matter of fact Swart never entered into an agreement of lease for a period of ten years for this valuable farm, or half of this valuable farm with a young boy of the age of 17 years or 18 years, but the question is not whether the agreement was actually made, but whether it was alleged by De Villiers that it had been entered into, because if De Villiers set up that agreement as a genuine contract between him and the plaintiff, then it became the duty of the plaintiff to eject him, and put Lazarus in possession. The question, therefore, arises whether at any time De Villiers set up this contract as a bar to the occupation of the applicant. If this affidavit of his is true, then it is clear that he never refused to give Lazarus possession. Looking at all the affidavits before the Court, we have abundance of evidence that upon the 9th October the applicant proceeded to the farm, exercised rights of ownership, stated to the witnesses who have made affidavits that he was there to take possession, and that he there dealt with De Villiers as a person under his control. De Villiers was simply carrying out his directions, and he at that time, to the knowledge of the parties, was merely obeying the applicant in whatever he did upon the farm, and was not treated as a lessee at all. I come to the conclusion, without going into the details and without stating plainly what might be thought of the statement made in some of the affidavits of the applicant himself in the matter, that it has been proved to my satisfaction that De Villiers never set up any claim to keep the applicant out of the property. There is, however, clear evidence that the real person who exercised some rights of a tenant upon the property was the father of young De Villiers, and that during the indisposition of his father the young man continued in occupation for some time. When his father came back upon the property he regarded himself as being there by leave of the applicant, his son never took over the rights which he obtained from the applicant, and De Villiers, sen., never said whether the applicant took possession. Under the circumstances, the application will be refused, with costs.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SIMPSON AND MARWICK V. } 1907.  
SWINTON. } May 14th.

This was an action to recover £108 4s. 8d., for professional services rendered and disbursements made on behalf of the defendant.

The declaration was as follows: (1) The plaintiffs are James Simpson and David William Marwick, carrying on business as Writers to the Signet at Edinburgh, Scotland, under the style or firm of Simpson and Marwick. Defendant is Edith Swinton, married out of community of property to Frederick William Swinton, and duly assisted by him as far as need be. Defendant is resident at Plumstead, near Cape Town. (2) From time to time, between January, 1903, and August, 1904, plaintiffs, at the special instance and request of defendant, rendered professional services and made disbursements in Scotland for and on behalf of defendant; (3) Defendant is indebted to the plaintiffs in the sum of £50, as being the fair, reasonable, and customary charges for the professional services so rendered, and is further indebted to the plaintiffs in the sum of £58 4s. 8d., as being the amount of the disbursements so made, or in all the sum of £108 4s. 8d. A specified account has been duly furnished to defendant. (4) Of the said sum of £108 4s. 8d. the sum of £68 19s. has been duly taxed, and allowed as a bill of costs as between attorney and client in the suit of *Swinton v. De Meyer* by the Auditor of the Sheriff Court of the Lothians and Peebles at Edinburgh, Scotland, and a copy of the said bill of costs so taxed has been served upon defendant. The balance of the said sum of £108 4s. 8d. consists solely of disbursements made as aforesaid. (5) Despite demand duly made, defendant wrongfully and unlawfully neglects and refuses to pay to plaintiffs the amount of her said indebtedness or any part thereof, wherefore plaintiffs pray for judgment for: (a) The sum of £108 4s. 8d.; (b) interest *a tempore morae* on the sum of £108 4s. 8d.; (c) alternative relief; (d) costs of suit.

The defendant filed a plea as follows: (1) Defendant admits clause 1 of plaintiffs' declaration, but says as to the remainder that James Simpson, one of the plaintiffs, rendered her certain professional services as a friend, and she denies owing the plaintiffs the sum of £108 4s. 8d. claimed. (2) Defendant has received the account and bill of costs as stated and also the demand, and she



admits that she has not paid the sum claimed.

In the replication the plaintiffs denied the allegations of fact and conclusions of law in the plea contained, joined issue thereon with the defendant, and again prayed for judgment.

Mr. P. S. T. Jones was for the plaintiffs, and there was no appearance on behalf of the defendant.

Judgment as prayed, with costs, including costs of a commission.

ESTATE VAN ECK AND { 1907.  
ANOTHER V. VAN NIEKERK { May 14th.  
AND ANOTHER.

#### Will—Construction.

*The late E. had married a wife by whom he had seven children, all still surviving. After her death he married a second wife (the first defendant) by antenuptial contract which contained no provision for her support in the event of her surviving him. He had also issue by her, she survived him and subsequently married N. After his second marriage E. made a will by which he bequeathed to his second wife "a share in the farm named 'De Pannet,' together with the children born of his former marriage, as also a wagon and span of draught cattle and 300 head of sheep (or goats), including house furniture, the half of everything." The executor (plaintiff) contended that by this clause (a) Mrs. N. and each of the children of the first marriage were entitled each to one eighth share in the farm (b) that she was entitled to one half share in the wagon and oxen, in the 300 sheep and in the furniture, (c) that as regards the residue of his estate, E. died intestate.*

*The first defendant (Mrs. N.) contended (a) that under the said will she was entitled to a half share in the farm the remaining half to go to the children of the first marriage, share and share alike. (b) That she was entitled to a half share in the wagon and oxen and in the 300 sheep and the household furniture.*

*The second defendant (issue of the second marriage) contended that the above clause of the will was void for vagueness and uncertainty.*

*The Court gave judgment in terms of the contention (a) of the first defendant and (b) and (c) of the plaintiff. Costs to come out of the estate.*

This was a special case, to have the meaning of a certain clause in the will of the testator interpreted, and was stated as follows: The plaintiffs are: Petrus Johannes van Eck, in his capacity as executor testamentary in the estate of the late Hendrik Philippus van Eck, of De Pannen, in the district of Aberdeen; Petrus Johannes van Eck, in his individual capacity; Hendrik Phillipus van Eck; Louis J. van Eck, married in community of property to Christina van Eck, daughter of the late Hendrik Philippus van Eck. The defendants are: Johanna Catharina van Niekerk, formerly the second wife of the late Hendrik Phillipus van Eck, now married without community of property to Petrus Johannes van Niekerk, and the curator *ad litem* to the minors. The late Hendrik Philippus van Eck (hereinafter called the testator), was married on or about 24th January, 1870, in community of property to Christina Swanepoel. There were born of the said marriage seven children, all of whom are still alive. The said seven children by themselves or by their curators are plaintiffs in this action. The said Christina van Eck, wife of the testator, died on or about 3rd May, 1893. On or about 16th October, 1896, the testator was married out of community of property to Johanna Catharina Bothma (now Van Niekerk), the first defendant. The testator and the said Johanna Catharina Bothma executed an ante-nuptial contract bearing date 16th October, 1896, copy of which is hereto annexed marked A. There were born of the said marriage two children, both of whom are alive and still minors. The said children by their curator *ad litem* are defendants in this action. On or about 13th September, 1897 (prior to the birth of either of the said last two children) the testator executed a will, copy of which is hereto annexed marked B. On or about 6th January, 1904, the testator died, and the said will was valid and unrevoked at the time of his death. A copy of the inventory in the estate of the testator is hereto annexed marked C. The plaintiffs contend: (a) That according to the terms of the said will the farm De Pannen should be divided in equal

shares among the seven children of the testator's first marriage and the first defendant. (b) That according to the terms of the said will the first defendant is entitled to receive one half-share in the wagon and span of oxen and 300 head of small stock and household furniture. (c) That as regards the residue of his estate the testator died intestate.

The first defendant contends: (a) That by the said will there was bequeathed to her one half share in the farm De Pannen, and to the children of the first marriage aforesaid the remaining half share therein; (b) That by the said will there was bequeathed to her one half share in the said wagon, in the span of oxen, and in the 300 head of small stock and household furniture.

The second defendant contends: (a) That the said clause of the said will whereby the testator purports to make a disposition of certain of his property is void for vagueness because of the testator's true intention with regard to the subject and object matter of his intended disposition being uncertain; (b) alternatively in case the foregoing contention be not upheld that the testator died intestate as to one half of his movable and immovable property.

The portion of the will for the interpretation of the Court was as follows: "That whereas the testator is married by ante-nuptial contract to Miss Johanna Catharina Bothma, he therefore leaves to her, when he shall come to die aforesaid, a share in the farm named 'de Panne,' division of Aberdeen, together with the children or heirs born of his former marriage, as also a wagon and span of draught cattle complete and three hundred head of sheep (or goats), including house furniture, the half of everything."

Mr. Watermeyer for plaintiffs, and as *curator ad litem* to the minor plaintiffs. Mr. Upington for the first defendant. Mr. Sutton as *curator ad litem* to the children of the second marriage.

Counsel having been heard in support of their respective contentions,

Maasdorp, J.: It appears in this case, the testator was married in 1870 to his first wife, by whom he had 7 children, all of whom are still alive. She died in 1893, and in 1896 he married the first defendant by ante-nuptial contract executed by them. Each party retained his or her own property, and no special provision is made for the wife by the husband. In 1897, the testator executed the will in question. I shall refer in full to the clause which is now in dispute between the parties. The will is in Dutch, and this is a translation of that paragraph: "That whereas the testator is married by ante-nuptial contract to Miss Johanna Catharina Bothma, he therefore leaves to her, when he shall come to die aforesaid, a share in the farm named 'de Panne,' division of Aberdeen, together with the children or

heirs born of his former marriage, as also a wagon and span of draught cattle complete, and three hundred head of sheep (or goats), including house furniture, the half of everything." It is contended by the executor on behalf of the children of the first marriage that the intention of the testator was that the farm "de Panne" should be divided into equal shares amongst the seven children of the testator's first marriage and the first defendant. Upon that point the first defendant's contention is that by the will there was bequeathed to her one half share in the farm "De Panne," and to the children of the first marriage the remaining half share. The contention with reference to the movables mentioned in the clause is on the part of the plaintiff that according to the terms of the will, the first defendant is entitled to receive one-half share in the wagon and span of oxen, of 300 head of small stock as well as furniture. The contention on behalf of the first defendant is the same. The second defendant contends that the will is wholly void through vagueness, as it is of such a character that it is impossible to construe the intention of the testator with certainty. All the parties are agreed that after the property disposed of under this clause is accounted for that there will be some property left, with reference to which there is no distribution, and with respect to which the testator must be regarded as having died intestate. As the contention now stands with reference to the movables, there is no dispute between the parties, and it is unnecessary for the Court to express an opinion, except in so far as the construction of the will in that respect may affect the rest of the will. But it seems that the parties are agreed now as to the disposal of the movable properties. They are not of very great value, and in the face of the fact that there is some doubt attached to the meaning of the testator, it is well that the parties should have a family understanding as to the division of that property, and I take it there is no dispute, and a fair distribution will be arrived at by the parties themselves. With reference to the disposal of the farm, it seems to me that the testator, in disposing of the farm, left a share to his wife, together with the children born of the former marriage. Now, a doubt is created as to the exact share which he left to her. Upon the construction of that portion of the clause taken by itself it is possible that he intended that she should share in half of the farm, while the children took the other half. It is also possible he might have intended by that clause that she should only take an equal share with each of the children in the division of this farm, and if nothing further had been said with reference to the division of the farm, then

the Court would have had to deduce from the clause by its interpretation together with the rest of the will, the probable intention of the testator; but it seems to me that the difficulty is cleared up by the testator himself. After providing that there should be left to her a share of the farm he proceeds to say that he also leaves to her a wagon, span of oxen, and some small stock and furniture, and then he specifies that in making this provision for her, the provision shall amount to the half of "everything." Now, the Court must give full effect to the words by means of which he here specifically defines his intention in the former part of the clause. He states that he leaves to her the half of "everything." "Everything" would include all the property that he possessed, whether movable or immovable, if taken in the plain sense. "Everything" would refer to whatever has been specified before in the clause, and amongst the things specified in the clause is the farm. It is contended on behalf of the plaintiffs that the meaning of "everything" must be restricted, and that everything only refers to what immediately precedes, but it seems to me that that would create a worse difficulty, because it would be difficult to ascertain to what exactly the words should be restricted. It is contended by Mr. Watermeyer that they should be restricted to the sheep and furniture, and not extended to the wagon and a span of draught cattle. Why exactly a line should be drawn there I cannot understand. It certainly seems to have been the opinion of the plaintiff, in the first instance, that "everything" should at least apply to all the movables. Then a difficulty arises for the plaintiff, as the wagon stands in the same position as the farm, and consequently Mr. Watermeyer finds himself obliged to give up the wagon at least and withdraw the application of "everything" from the wagon. As a matter of fact, there seem to have been two wagons amongst the property when he died, and 600 small stock. Now, I made the suggestion during the argument that when he disposed of his wagon and small stock he intended that they should be regarded as half of what he actually possessed, and he did not then intend that there should be a further division of the moveables mentioned. I was inclined to think when he mentioned the movables he specified them as the half he intended his wife to have, and that she should take half of the farm also. But as I have said, the parties themselves are agreed that the movables specifically mentioned should be distributed and divided between the widow and the children. My opinion upon that part of the case is not so clear that I should suggest that that arrangement

should be departed from. The conclusion I come to is that the testator in making provision for his wife, whom he seemed to be mainly thinking of when the will was made, bore in mind that no provision was made for her by the ante-nuptial contract, and he was determined to secure her in as comfortable circumstances as he could. And not only that, but it may be taken he expected there would be a family by her also, and the division amounted to a division between the two families. A declaration will be made in terms of contention (a) of the first defendant, in terms of (b) of the plaintiffs and the first defendant, and in terms of (c) of the plaintiffs' contention, the costs to come out of the estate.

[Plaintiff's Attorneys: Herold and Gie. First defendant's attorneys: Berrange and Son. Second defendant's attorney: H. A. P. Van Holdt.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

#### ADMISSIONS.

{ 1907.  
May 14th.

Mr. Toms moved for the admission of Vincent Angus Leppan as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Elliotdale.

Mr. De Waal moved for the admission of Frederick Laurence as an attorney and notary.

Application granted, and oaths administered.

#### PROVISIONAL ROLL.

##### LITCHFIELD V. GODFREY.

Mr. Marais moved for judgment for costs, interest having been paid.

Order granted for costs.

##### MCCALGAN AND CO. V. COURTENAY AND CO.

Mr. Roux moved for judgment for costs, the capital amount having been paid.

Order granted for costs.

##### SMIT V. BARIS.

Mr. W. Porter Buchanan moved for provisional sentence for £7 10s. on certain conditions of sale, being balance of purchase price of certain ground on the Wynberg Flats, plaintiff tendering transfer.

Order granted.

LEWIS V. DAVIS.

Mr. Toms moved for provisional sentence on an unsatisfied judgment of the First Civil Magistrate of Johannesburg for £30 6s., with interest, from the 1st October, 1906, less £10, paid on account, together with £4 2s. 5d. taxed costs. Counsel also applied for a decree of civil imprisonment against defendant.

Defendant admitted the debt and judgment, but said that he was wholly without means.

De Villiers, C.J., said that the proceeding was irregular. Judgment had not been obtained in this colony against the defendant, and he could only hear the application for a decree of civil imprisonment if the defendant consented.

Defendant promptly said that he objected.

Mr. Toms said that the procedure, if allowed, would save costs. It was based upon the analogy of the Civil Magistrate's Courts in this colony. He cited *Van Zyl's Judicial Practice* (p. 246), *Soeker Bros. v. Humbly* (3 C.T.R., 357) and *Mostert v. Forde* (17 S.C., 256).

De Villiers, C.J.: Judgment will be given in terms of the summons for the amount of the Transvaal judgment. If you wish to proceed further you must apply afresh.

GENERAL ESTATE AND ORPHAN CHAMBER V. SAFIERDIEN.

Mr. Toms moved for provisional sentence on a mortgage bond for £300, with interest from the 1st January, 1904, less £3 10s. paid on account, with £4 19s. 6d., insurance premiums, bond due by reason of nonpayment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

HARCOMBE AND ANOTHER V. MEYER.

Mr. Douglas Buchanan moved for judgment under Rule 329.d. for £48, rent due, and costs.

Order granted.

REHABILITATIONS.

Mr. W. Porter Buchanan moved, under section 117 of the Insolvent Ordinance, for the rehabilitation of Agnes van der Heever.

Granted.

Mr. De Waal moved for the rehabilitation of Johannes Gerhardus Naude.

Granted.

GENERAL MOTIONS.

*Ex parte* LEWIS. { 1907.  
May 14th.

Mr. Douglas Buchanan moved for a certain rule nisi, under the Derelict Lands Act, to be made absolute.

Rule absolute.

ALEXANDER V. PRESTWICH AND OTHERS.

This was an application to make absolute certain rule nisi interdicting respondents from disposing of a concession obtained from King Lewanika, in Barotsiland.

From the petition upon which the rule was granted, it appeared that applicant claimed that he was interested as to one-eighth share in a certain concession obtained from Lewanika by an expedition, called the Dreadnought Expedition, sent up to Barotsiland. Petitioner said that he had advanced £30 to aid the expedition, and that he had incurred other expenses in connection therewith, amounting to £1 3s. 4d. Respondents, he alleged, would not recognise the rights of himself and others in relation to the results of the expedition. He proposed to institute an action for a declaration of rights, and an order authorising the endorsement of the names of himself and others entitled to share in the concession. Petitioner apprehended that, unless respondents were interdicted, he and others would be deprived of a chance of enforcing their rights under the concession.

Dr. Greer was for applicant; Mr. P. S. T. Jones was for the respondent, F. Z. S. Peregrino. The other respondents did not appear.

Dr. Greer said that inasmuch as the respondents, Frank and Robert Prestwich, were not in the Colony, he would ask for an extension of the return day of the rule as against them in order that the notice should be served upon them. As against Peregrino, he moved to make the rule absolute.

The respondent Peregrino, in an affidavit, denied that he in any way intended to act adversely to the interests of the applicant. He was prepared to meet the applicant in any action he might bring. He denied the applicant's allegations, and said that the rule obtained by him was vexatious and unnecessary. He prayed that the rule might be discharged, or, in the alternative, that it should be ordered to stand over pending the arrival of the Prestwiches.

In a replying affidavit, the applicant said that the concession was now in the name of Peregrino only, and he (deponent) was not protected at all in the matter. He had no knowledge that the Prestwiches had left the Colony.

until he was so informed by Peregrino. The concession had been withdrawn from the bank without applicants' knowledge.

[De Villiers, C.J.: I suppose, Mr. Jones, Peregrino can't object to being restrained from parting with this concession?]

Mr. Jones: Our case is that it is wholly unnecessary.

[De Villiers, C.J.: If the applicant's allegations are true, it is necessary.]

Mr. Jones said there was a further affidavit by Peregrino showing that the latter had tried to get the applicant to sign a document so as to get the agreement between the parties from the bank. It was important that this deed should be before the Court, and in its absence he submitted that there were no facts before the Court to justify this application. Before the Court could grant an interdict, there must be proof of clear right on the part of the applicant.

De Villiers, C.J., said that all the applicant said was that he had an interest in a certain document which Peregrino was in possession of, and which the plaintiff had an interest in. Then why not submit to the rule?

Mr. Jones said that if the rule were made absolute, he would submit there should be no order as to costs.

De Villiers, C.J., said that if all the statements made by the petitioner were correct, then it qualified him in asking the Court to restrain Peregrino from parting with the concession. There had been a *prima facie* case made out for an interdict, and the Court would make the rule absolute against Peregrino, but no order would be made as to costs.

#### *Ex parte* WILLEM AND BOTHA.

Mr. Bisset moved for an order confirming a certain agreement of sale. Petitioners were bequeathed property which the testator provided should only be disposed of to one of the other legatees. The Master approved of the agreement, subject to security being given.

An order was made in terms of the Master's report.

#### *Ex parte* LUCHERON.

Mr. Long moved for an order authorising the Registrar of Deeds to register certain transfers. Consent papers had been filed by all interested persons, but as the petitioner was the executor in the estate of his deceased brother, from whose estate the property was sought to be transferred, the Registrar had refused to pass transfer, holding that an order of Court was necessary.

Order granted.

#### *Ex parte* VERMAAK.

Mr. Roux moved for leave to mortgage certain property in order to raise money to improve property in the estate of the petitioner's deceased husband, in which the petitioner had been bequeathed the life interest. All the legatees consented.

Order granted.

#### *In re* GOLDEN MILE GOLD MINING AND DEVELOPING SYNDICATE, LIMITED (IN LIQUIDATION).

Mr. Roux moved for confirmation of the first and final report of the official liquidators. The report stated that there were no assets, the directors paying the cost of liquidation.

Order granted in terms of report.

#### *Ex parte* WORDON AND PEGRAM.

Mr. P. S. T. Jones moved for an order authorising the reduction of the capital of Wordon and Pegram, Limited, from £60,000 to £20,000.

Order granted.

#### ROBEIN V. ROBEIN.

This was an action brought by John Robein, a coloured labourer, of Stellenbosch, against his wife, Maria Robein, also of Stellenbosch, for a decree of divorce, on the ground of her adultery with one Willem Hendricks.

Dr. Greer was for plaintiff; defendant did not appear.

Evidence was given to the effect that the parties were married at Stellenbosch on the 19th May, 1890. In October last plaintiff received a certain communication from Hendricks, and in consequence he spoke to his wife, who admitted having misconducted herself with Hendricks. Amongst the witnesses was Hendricks, who is a married man, and who admitted that he had had illicit intercourse with defendant in 1903. He said that there had been a quarrel between Hendricks and defendant. The secret of their relationship only came to plaintiff's ears last October.

Decree granted; no order as to costs.

#### CORREIA V. CORREIA AND ANOTHER.

This was an action brought by Joseph Nicolas Correia, of Cape Town, against his wife, Mary Christina Correia, of Maitland, for a decree of divorce and forfeiture of the benefits of the marriage on the ground of her adultery with one Levett Manthorpe Shannon, against whom £200 damages were claimed.

Mr. Struben was for plaintiff; defendants did not appear.



Mr. Struben stated that defendants had filed affidavits, in which they made certain improper allegations against the plaintiff. They admitted, however, that they were living in adultery, and that the first defendant had given birth to two children, of whom the second defendant was the father.

Plaintiff said that he was married to defendant in community of property at the Roman Catholic Church, Somerset-road, Cape Town, in June, 1884. In 1891 his wife was sent to gaol for obtaining goods by false pretences. In 1893 she became very friendly with a butcher at Rochester-road, Salt River, and he spoke to her about her conduct. In 1898 his wife left the house, taking a good deal of the belongings with her.

By the Court: Witness was now informed that his wife lived with the second defendant at Maitland.

Georgina M. Dobson, niece of the first defendant, gave evidence to the effect that at various times in 1900, 1903, and 1905, she had visited her aunt, and found her living at Salt River and Maitland with the second defendant. Her aunt had during that time given birth to two children.

By the Court: Shannon was a signalman, and earned about £11 or £12 a month.

Mr. Struben (in answer to the Court) said that he did not press the claim for damages, but he asked for costs against the second defendant.

Decree of divorce granted, with declaration of forfeiture of the benefits of the marriage. The second defendant to pay costs. No order as to damages.

#### GABRIEL V. GABRIEL.

This was an action brought by Janet Gabriel, of Diep River, against her husband, Stephanus Gabriel, for a decree of divorce, on the ground of his adultery with one Asa Slamedene, a Malay.

Mr. Douglas Buchanan was for plaintiff, who sued *in forma pauperis*; defendant did not appear.

Plaintiff said that her husband was living with the Malay at Diep River, and he also had turned a Malay. Formerly he lived with the woman at Salt River. Defendant passed witness's house regularly with the other woman.

Mr. C. Stent, plaintiff's attorney, said that the defendant had admitted to him that he was living in adultery.

Decree of divorce granted, with declaration of forfeiture of benefits of the marriage, and costs. Plaintiff to have custody of the minor children.

#### HOWES V. HOWES.

Mr. Pohl moved for a decree of divorce in default of defendant's com-

pliance with an order of restitution of conjugal rights. An affidavit of non-return was read.

Rule absolute with costs.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

KLEINBOOI V. TAYLER. { 1907.  
May 15th.

Fire — Injury to Veld — Negligence—Responsibility.

*K., a transport rider, in outspanning for the night kindled a fire which either went out or was put out the same night. On the next morning the servants of one J. kindled another fire in close proximity to that which had been kindled by K. K. having made use of this fire inspanned his oxen and drove off leaving the fire still alight and in charge of J's servants, who, apparently, did not extinguish it before leaving. The fire spread and did considerable damage to T's veld.*

*Held, on appeal, that the fact that K. had made use of this fire did not render him responsible for the damage or for any part thereof.*

This was an appeal from a judgment of the Resident Magistrate of Matatiele in an action brought against appellant by respondent to recover £20 damages for loss caused by a fire through the negligence of appellant.

The summons alleged that plaintiff was the owner of certain two farms in Matatiele district, and that on the 13th August last two wagons, one under the charge and control of defendant and the other the property of Gideon Joubert, junior, and under the charge of his servants, outspanned near the farm Alwin Rein, and lighted a fire, and through the negligence of defendant and the servants of Joubert the fire escaped, etc.

The Magistrate, in finding for plaintiff for £20 damages, said there was not the slightest doubt that plaintiff had

proved damages. It appeared to him that the two wagons were mutually responsible for the fire.

It appeared from the record that the fire spread to Mr. Tayler's two farms and did an immense amount of damage to his veld, the result being that he had to remove his cattle to other grass. The cattle died from poverty.

Mr. Tayler had also sued the other servant, Mohosi, and had obtained £20 damages against him.

Mr. M. Bisset was for appellant; Mr. Sutton was for respondent, James A. F. Tayler.

Mr. Bisset submitted that appellant was not responsible for the spreading of the fire and that there was no proof of damage. Kleinbooi had his fire in the evening, and the other driver had his fire next morning, and it was this latter fire which spread to Mr. Tayler's veld.

Mr. Sutton submitted that this was a joint fire for the mutual benefit of the drivers, as shown by the records in the respective cases, and that there was joint responsibility upon the natives to extinguish the fire.

Hopley, J.: In this case the facts proved and placed on record are quite simple, and it is for this Court to say whether the Magistrate has drawn the correct conclusions of the legal position from the facts which he heard in evidence before him. It appears that the present defendant and the servants of one Joubert had reached a spot in the course of their journey, which was one undertaken for the conveyance of grain, where they outspanned for the night, and in the evening the defendant made at his wagon a fire, to which Joubert's servants came and warmed themselves, cooked their food and ate it, and went to bed. That fire went out, or was put out by the defendant, and no harm originated from it. In the morning Joubert's servants made a fire at their wagon, and defendant in his turn went and sat and cooked and ate at that fire. He then inspanned his wagon and went off, leaving the outspan before the servants of Joubert, and presumably leaving the fire burning at their wagon. They, it appears, did not take pains to put out the fire as carefully as they should have done. There must still have been something in the nature of sparks or live coals, and, in all probability, a wind was blowing. They left very shortly after the defendant. Some time after they had gone, an adjoining farmer, Van Straaten, saw that the veld was alight. He went down to the fire, and, according to his evidence, there seemed to be little doubt that the fire which had been used that morning had set the veld alight. He pursued these people, and got something in the way of damages that had accrued to him, out of the defendant. Now, this

is one of the things which has been taken by the Magistrate as an admission by the defendant of his liability for the damage, but, as I read the evidence, it was nothing of the kind. Van Straaten, in the manner of the white man when dealing with natives, took the matter strongly into his own hands, and said to the native: "You are responsible; you will pay me for that; if you do not pay me so many bags of mealies from what is on your wagon, I will detain you, the wagon, oxen and all." Under such duress as that the defendant paid, but I do not consider that payment, under such circumstances, involves the least admission of liability. I do not think the Magistrate ought to have taken that into account at all.

Then it is argued that because benefits in common were derived from this fire that was burning in the morning, therefore all the parties who used that fire and derived any benefit from it are responsible for the proper control of that fire, and must be held liable for any damage caused by it. It is a startling proposition to advance, and yet it is one upon which the Magistrate has founded his judgment. I know of no principle of law which would go to that length, and it is startling because, if it goes so far, everybody who goes to a fire and warms his hands at it, or takes a cup of coffee there, might be singled out and held equally responsible for all that arises by reason of the fire.

The evidence clearly shows that the fire was lighted by Joubert's people, and that it was at Joubert's wagon. It was their fire, whatever benefits the defendant may have derived from it by reason of having gone there and cooked his food at it. After all we must look at this matter in a commonsense way, and see under whose control that particular fire was, and whose was the responsibility for it. Now, I think the responsibility was with Joubert's servants. They built the fire near their own wagon, and it was their duty to put it out. I think that the defendant, when he left the fire, had every right to suppose that they would put it out. He left the fire, went on with his inspanning, and departed with his wagon. What more could he have done under the circumstances? Was it his duty to deal with the fire at the other people's wagon before they had left the outspan? It may be that they would have resented any such interference. I cannot see that there was any negligence on the part of the defendant. The whole of the action was founded on negligence, and no negligence had been proved. Therefore the appeal must be allowed, and the judgment changed to one of absolution from the instance, with costs in the Court below and in this Court also.

HARMENING V. FARO. { 1907.  
May 15th.

**Cattle trespass—Cultivated and uncultivated lands—Act 15 of 1892, Schedules C and D—Recovery of trespass money overpaid—Mistake of law.**

*Certain cattle, the property of respondent had trespassed upon H.'s unenclosed cultivated land. They also trespassed upon his uncultivated land, which was also unenclosed. H. demanded payment in respect of both trespasses, 9d. for the first mentioned trespass and 3d. for the second, per head. F. paid the demand and there was no evidence to show that he did so under protest. He afterwards brought an action to recover back a portion of the money paid on account that it was an overcharge. The Magistrate gave judgment in his favour for a small sum.*

*Held, on appeal, that as F. had paid without protest under a mistake of law, he was not entitled to recover anything.*

*Seemle, it is very doubtful whether a land holder can lawfully charge for trespass by the same cattle committed on the same occasion upon both cultivated and uncultivated land, or whether rather the minor trespass is not merged in the greater.*

— — — — —  
This was an appeal from a judgment of the Resident Magistrate of Matatiele in an action brought against appellant by respondent to recover £1 0s. 3d. alleged to have been overpaid for trespass of cattle.

The summons called upon defendant (Harmening) to show cause why he should not repay to plaintiff £1 0s. 3d. alleged to have been overpaid in respect of trespass by plaintiff's cattle on the farm Hermitage. Plaintiff said that he paid £1 7s. under protest, that the correct charge was 6s. 9d. (27 head at 3d.), and that defendant refused to refund the overcharge. Defendant's plea was that 29 head of cattle trespassed on the cultivated ground of Hermitage, and that the money was not paid under protest. Defendant said, further, that his manager (De Klerk) only received 22s. 6d., and he denied liability.

The Magistrate found that 27 cattle only trespassed, that they trespassed on defendant's cultivated land, and plaintiff was liable to pay 9d. per head and 9d. for herding, and that plaintiff paid under protest 27s. 9d. He gave judgment for plaintiff for 6s. 9d., with costs, and allowed defendant 9d. for herding.

Mr. Bisset for appellant (defendant in the action); Mr. Gutsche for respondent (plaintiff).

Mr. Bisset submitted that the plaintiff had not sufficiently discharged the onus of clearly proving that he paid 27s., and not 22s. 6d., as alleged by the defendant's manager, De Klerk. The Magistrate's finding, as it stood, amounted to an allegation of fraud against De Klerk. Counsel also submitted that there had been no overpayment, since the cattle trespassed not only on the cultivated lands, but also the grazing lands of defendant. As to the question of whether the money was paid under protest, he contended that any overpayment had been made in mistake of law, and that it was not recoverable. He cited *White v. Colonial Government* (2 Juta, 350). In any case, Harmening was not bound by the tariff, and he had his common law rights.

Mr. Gutsche submitted that there was ample evidence on the record to support the findings of the Magistrate on the facts.

[Hopley, J.: What do you say as to the question of trespass money being due both on the cultivated and grazing lands?]

Mr. Gutsche contended that the intention of the Act would be defeated if trespass money were allowed to be accumulated in that way.

[Hopley, J.: It seems to me that a more important point is whether this money was paid under protest, and whether it is now recoverable?]

Mr. Gutsche submitted that it was clear the money was paid under protest. He quoted from the dicta of Mr. Justice Gibbs, referred to by the Chief Justice in *White v. Colonial Government*, at p. 352. He also cited *Max Knapp and Another v. Loongaana* (7 E.D.C., 61). If any mistake had been made by plaintiff, it was a mistake of fact, and not of law.

Hopley, J.: The Magistrate in this case has found, on evidence which is not very strong, but still he is justified in so finding if he likes, that the amount of £1 7s. 9d. was actually paid to De Klerk, who, if that were the case, does not seem to have accounted to his employer, the present appellant, for the whole of the amount. That is the finding of the Magistrate, and one cannot say that there is not sufficient evidence to justify it.

It would appear that 27 head of cattle belonging to Faro, plaintiff in the Court below, trespassed on defendant's land.

De Klerk, the defendant's servant, told plaintiff's messenger that 7s. 9d. must be paid. He says he thought the tariff was 3d. per head. The messenger went to his master and got the money, but on his return he was told that the charge would be 1s. per head and 9d. for herding the cattle, the defendant in the meantime having come upon the scene and pointed out that the cattle had been in his cultivated lands, and directed that 1s. be charged. The boy went back, but the plaintiff was absent from his house, and accordingly the messenger borrowed a sovereign from plaintiff's brother. This money he took to De Klerk, and the Magistrate has found that it was paid in addition to the 7s. 9d.

Now, the first question is as to whether that is an overpayment at all, in the circumstances. Mr. Bisset contends that there is nothing in the tariff to prevent a charge of 1s. a head, which would bring the amount to 27s. 9d., allowing 9d. for herding and 27s. for the trespass. He says that a man may charge 3d. for the trespass on the unenclosed land, which is proved here to have taken place, and a further 9d. for the trespass in the cultivated lands. I must say that I do not at present feel disposed to decide that point. My own impression has always been that when there has been a trespass on unenclosed and enclosed lands, there being a higher charge for the trespass on the enclosed or cultivated lands, the minor trespass was merged in the larger, and that no double charge or charge for both trespasses was ever made. I have not considered all the terms of the tariff, and it is not necessary for the decision of this case, but my own impression has been that if a man has charged upon the higher tariff, as a rule, he has to drop the lower rate.

Putting that point aside, the more important point comes, under what circumstances was the payment made, and can it, having been made under such circumstances, be recovered in an action at law? Now it is said that the payment was made under protest, and the Magistrate has found so, but there is not, to my mind, a tittle of evidence to that effect. The Magistrate seems to have found that there was a payment under protest, because after the payment had been made, when the defendant heard about it, he then wrote protesting against the charge which had been made, and subsequently instituted proceedings. But even then, when one goes on to analyse the evidence, the protest he made was as between the 7s. 9d., which he had been willing to pay, and the £1 7s. 9d., which he considered an overcharge, because he said that his cattle did not trespass save on the grazing land, and that whatever trespass they did commit afterwards was

committed when they were in charge of the herd supplied by the defendant.

He was protesting against the extra sovereign, because he said the cattle never were upon the cultivated lands until the defendant took charge of them. There was no protest saying: "You are overcharging me. The cattle may have been on your cultivated lands, but you are overcharging me. To get my cattle back I am paying you, but I shall sue you hereafter for the amount." It seems to me that the Magistrate found that there was a protest, when there was no evidence upon which to found such a finding.

Without any protest, if it was a wrong payment at all, it was paid under a mistake of law. It was not a mistake of fact. On that point the Magistrate is against the respondent, because he has found that the trespass had been during the night on the cultivated lands. Can money paid under a mistake of law, without protest at the time, be recovered? There are many cases which have decided that money so paid cannot be sued for in the Courts of this Colony. Mr. Bisset goes further, and says that his client is not bound by the tariff in this case, that he might charge any arbitrary amount he chose to fix upon, and that if a person chose without protest to pay that amount he cannot afterwards come and sue. I think there is a great deal in that view, because a person so overcharged need not accede to the payment, he need not pay. He may say to the person holding his cattle, "Go and impound my cattle, and I am ready to pay the tariff charges to the poundmaster; I am not going to pay your exorbitant charges." At the same time, if he pays, as plaintiff did in this case, without protest, he is precluded from coming afterwards and saying he wants his money back.

There is good reason for this, because if there should be a protest at the time, the person detaining the cattle might refuse to accept the money under protest, and take the course provided by law of impounding the cattle, or might call in assessors to establish clearly his claim. The payment, if made without protest, would lead the injured party to believe that the other acquiesced in the position he had chosen to adopt. He hands over the cattle and loses the benefit of strengthening his case by evidence which he might have got whilst detaining the cattle. In any case, it seems a great pity that for so paltry a sum as this all this litigation should have been undertaken. Where a great principle is involved one can understand people spending money for the elucidation of the law upon the matter. In cases like this it seems to me that clients are sometimes advised to adopt risky procedure for small prospective benefits, even if they gain everything which they claim.



The appeal must be allowed, and the Magistrate's judgment changed to one of absolution from the instance, with costs in his Court; respondent to pay costs in appeal.

[Applicant's Attorneys: Findlay and Du Toit. Respondent's Attorneys: Dold and Van Breda.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* FERNWOOD ( ) 1907.  
SYNDICATE, LTD. (May 16th.

Mr. P. S. T. Jones moved on the petition of H. M. Arderne and other co-proprietors of ground at Newlands, for an order cancelling and declaring void the sale of certain lots to John Talanda. The petitioners stated that Talanda had failed to carry out the conditions of sale, having neither produced sureties nor paid any part of the purchase money. Both the petitioners and Talanda had treated the sale as void. Talanda had left the Colony, and was now believed to be in German South-west Africa. Petitioners said it was impossible to obtain a declaration in terms of section 20, Act 5, 1884. A question had been raised as to whether petitioners were liable to pay transfer duty on the sale to Talanda. The matter had been before Mr. Justice Buchanan, who had referred the petition to the Registrar of Deeds for report. The report had now been obtained, and it appeared that no opposition was raised to the proposed order. Mr. Jones quoted several sections of the Act 5, 1884.

[De Villiers, C.J.: The petitioners should proceed by a rule nisi. The Registrar of Deeds does not represent the Treasury of the country, and in any case the Treasurer would have to be made a party to the application. The 32nd section provides the machinery for a case like the present.]

Mr. Jones, in further argument, cited *Ex parte Stevens* (6 C.T.R., 150), *Scott v. Isaacs and Another* (12 C.T.R., 791), and *Owen's case* (16 C.T.R., 79). He submitted that it would be very hard upon petitioners if they had to pay transfer duty both upon the sale to Talanda and the subsequent sales to other people, seeing that they had received no payment from Talanda.

Rule nisi granted, calling upon John Talanda and all other persons concerned to show cause on the last day of next term why the sale should not be cancelled as prayed, rule to be published once in a Cape Town newspaper and to be sent by registered letter to John Talanda, German South-west Africa.

*In re* CLARKE AND CO., LTD. (IN LIQUIDATION.)

Mr. W. Porter Buchanan moved for confirmation of the second report and liquidation account of the official liquidators. The report had lain for inspection as directed, and no objection had been raised. Since the first report was presented, the liquidators had received the first dividend from the Transvaal estate amounting to about £13,500, and they now applied for an order authorising (1) payment of a further sum of £15,750 to debenture holders; (2) a compromise proposed to be entered into with the landlord with regard to rent, and (3) payment of liquidators' commission upon assets realised in Cape Town.

Order granted in terms of the report.

*Ex parte* ESTATE GRESSE.

Mr. M. Bisset moved, on the petition of the surviving spouse and executrix testamentary, for an order varying the order granted by the Circuit Court at Beaufort West, on the 6th March last, and allowing the petitioner to pay the debts of the estate out of the balance of the proceeds of the sale of the farm Spitzkop, and repair the village properties, and pay any balance remaining in to the Master. The will provided that, at the death of the surviving spouse the property should go to one Cornelis Foord, adopted son of the old folks, and at his death, to his children. Foord consented to the present application, which, it was stated, was absolutely necessary to save those interested from beggary.

De Villiers, C.J., said that he could not alter the judgment of the Circuit Court upon an application of this kind, unless all the parties were before him. The petitioner had not appealed against the previous judgment.

Mr. Bisset said that under the proposal which petitioner made, the creditors would be duly protected.

De Villiers, C.J.: It is clear that it will be quite impossible to carry out the wish of the testator that the properties mentioned in the will, the farms, should go after the death of his wife to Foord and the children of Foord. The property had to be sold for the payment of the debts of the estate. An order has been made for the sale of the pro-





on her own behalf sown certain crops, and that defendant, in his capacity as executor, had made use of that crop which she had sown, and had used the proceeds on behalf of the estate. Well, that would be a substantial ground of action. If she had lawfully sown the crop on her own behalf and the executor had possessed himself of the crop afterwards and reaped it, and paid the proceeds into the estate, then it would be an amount which she could recover from the estate. The defence is that the matter is *res judicata*, inasmuch as the account had been duly confirmed. Now, in my opinion, that defence wholly failed. The plea of *res judicata* does not apply at all; there had been no confirmation of the account, there may have been an approval by the Master, by his signing it, but there had been no such confirmation of the account as to make it a judgment of the Court. The Magistrate does not seem to have supported the plea as it stood. He did not treat the matter as *res judicata*, but his decision was that, inasmuch as the executor had been appointed by the Master of the Supreme Court, any action against the executor must be brought in the Supreme Court. Now, that, clearly, is a position that cannot be maintained. The executor, although appointed by the Master of the Supreme Court, can still be sued in any other competent Court in respect of debts owing by the estate. The Transkeian Magistrate would have had full jurisdiction to decide this case; at all events, the first claim which I have mentioned. Now, the only question is whether the plea might be taken to mean that the executor has fully administered and no longer has any funds belonging to the estate in his possession, but, reading over the plea carefully, I do not see how that can be inferred. It is quite consistent with the plea that he may still have sufficient funds in the estate to pay any other claims that were made. It is also quite consistent with the summons and with the plea that the plaintiff may have made a demand before the final liquidation of the account for the amount of this claim. The only doubt I had about the case is whether there is a sufficient *prima facie* reason for believing that the plaintiff will succeed on her first count. It is possible that the woman may have a good claim, and I do not wish by any judgment of mine to prevent her from asserting and making good that claim. The only course open, therefore, is that the Court should allow the appeal and remit the case to the Resident Magistrate to decide on the first count of the summons—because, as to the others, I should think they would not be brought forward—with leave to the defendant to amend the plea, if so advised, by plead-

ing that he has fully administered the estate, without knowledge of the plaintiff's claim, and that he has no funds as executor to meet such claim, defendant to pay the costs of appeal, but all other costs, including costs already incurred in the Resident Magistrate's Court, and to be incurred, to abide the result of the decision of such Resident Magistrate's Court.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1907.  
May 21st.

Mr. De Waal moved for the admission of Willem Daniel Bosman as an attorney and notary.

Application granted and oaths administered.

BROWN V. WARD AND CO.

Mr. Louwrens moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

LEWIS V. DAVIS.

Mr. Toms moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court.

Defendant appeared and said that he admitted having contracted the debt, amounting to £32, for rent and board and lodging in Johannesburg. Witness was now secretary of the Civil Service Club in Cape Town, and earned £25 a month. He was married, and was unable to make any payment to plaintiff. Witness was paying £8 a month upon other liabilities. He had made two payments of £2 a month to plaintiff since he came to Cape Town.

Decree granted, execution suspended pending payment of £2 a month, first payment to be made on the 1st June.

Defendant thereupon stated that he was leaving his position on the 31st July on account of this action having been taken against him. He had had a request from the committee of the club to resign.

Maasdorp, J.: The order must stand, and if you can't pay at the end of July you may apply for relief, and may surrender your estate.

tion, and I cannot say that that was an improper heaping up of costs. The plaintiff has withdrawn the action, and I think it is only fair that he should pay all the costs that had been legitimately incurred by the defendant. The order, therefore, will be that the costs of the application for commission, including costs of the present application, be paid by the plaintiff in the action, now respondent.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

MULLER V. LOVE. { 1907.  
( May 17th.

Executor—Jurisdiction—*Res judicata* — Master of Supreme Court.

*The plaintiff claimed in a Transkeian Magistrate's Court from the defendant, as executor, a sum of money alleged to be the proceeds of certain crops belonging to her and wrongfully paid into the estate and the defendant pleaded res judicata on the ground that the account furnished by the defendant had been approved and signed by the Master of the Supreme Court, and the Magistrate held that his Court had no jurisdiction, inasmuch as the defendant had received his appointment from the Master of the Supreme Court.*

*Held, on appeal, that the plea of res judicata was bad and the fact of the defendant having been appointed by the Master did not oust the jurisdiction of the Magistrate.*

This was an appeal from a judgment of the Resident Magistrate of St. Mark's, sitting at Cofimvaba, in an action brought by appellant against respondent, in his capacity as executor in estate Katrina J. Haller, to recover the value of a certain crop of forage and damages.

Mr. J. E. R. de Villiers was for appellant, Louisa Muller; Mr. McGregor was for respondent, John Thos. Love.

The summons claimed £50, value of a good crop of forage, with interest from date of reaping, plaintiff's lawful property, which defendant maliciously caused to be reaped, the forage being the yield of two bags sown by plaintiff while she was in charge of K. J. Haller's estate. There were other small claims for damages.

Defendant excepted that the matter was *res judicata*, by reason of the fact that the Master had confirmed the account in the estate.

The Magistrate, in his reasons for judgment, said that the executor had been appointed by the Master of the Supreme Court and no claim could be brought against him except through the Supreme Court. He upheld the exception to his jurisdiction with costs.

Mr. De Villiers said that there was no such thing as confirmation of account in a deceased estate. The matter could not have been *res judicata*, and it should be sent back to the Magistrate to be tried on its merits. Counsel cited *Liquidators Union Bank v. King's Trustee* (1 Juta, 101).

Mr. McGregor said that the respondent no longer held the position of executor. He had filed his account, he had been discharged from his appointment, and he was *functus officio*.

[De Villiers, C.J.: *Res judicata* seems to be a wrong term to use. The defence really is, what is called in English law, *plene administravit*.]

Mr. McGregor said that that was so. He cited *Brink v. Esterhuyzen* (1 Menzies, 473). He also submitted that the summons did not disclose any cause of action. Unless special grounds were shown, a party who had obtained benefits from the estate should not be allowed, after the administration had been closed, to rip up the whole of the administration.

Mr. De Villiers said there was nothing to show that there were no assets in this estate. It lay on the executor to prove that not only had he paid out all the assets but that he had no assets to pay any part of this claim. He cited *Liquidators Paarl Bank v. Roux and Others* (8 Juta, 205).

Mr. McGregor cited *Kotze v. Mostert and Another* (1869, Buch., 199).

[De Villiers, C.J.: The summons in this case is a somewhat peculiar one, and certainly the second, third, and fourth counts of the summons appear to be so vague that it would be impossible for any Court to give judgment upon them. In regard, however, to the first count of the declaration, I think, although it is very inartistically worded, the Court can ascertain what the plaintiff really meant. Her complaint is that whilst she was in charge of the estate of Katrina Haller, she had for herself and

on her own behalf sown certain crops, and that defendant, in his capacity as executor, had made use of that crop which she had sown, and had used the proceeds on behalf of the estate. Well, that would be a substantial ground of action. If she had lawfully sown the crop on her own behalf and the executor had possessed himself of the crop afterwards and reaped it, and paid the proceeds into the estate, then it would be an amount which she could recover from the estate. The defence is that the matter is *res judicata*, inasmuch as the account had been duly confirmed. Now, in my opinion, that defence wholly failed. The plea of *res judicata* does not apply at all; there had been no confirmation of the account, there may have been an approval by the Master, by his signing it, but there had been no such confirmation of the account as to make it a judgment of the Court. The Magistrate does not seem to have supported the plea as it stood. He did not treat the matter as *res judicata*, but his decision was that, inasmuch as the executor had been appointed by the Master of the Supreme Court, any action against the executor must be brought in the Supreme Court. Now, that, clearly, is a position that cannot be maintained. The executor, although appointed by the Master of the Supreme Court, can still be sued in any other competent Court in respect of debts owing by the estate. The Transkeian Magistrate would have had full jurisdiction to decide this case; at all events, the first claim which I have mentioned. Now, the only question is whether the plea might be taken to mean that the executor has fully administered and no longer has any funds belonging to the estate in his possession, but, reading over the plea carefully, I do not see how that can be inferred. It is quite consistent with the plea that he may still have sufficient funds in the estate to pay any other claims that were made. It is also quite consistent with the summons and with the plea that the plaintiff may have made a demand before the final liquidation of the account for the amount of this claim. The only doubt I had about the case is whether there is a sufficient *prima facie* reason for believing that the plaintiff will succeed on her first count. It is possible that the woman may have a good claim, and I do not wish by any judgment of mine to prevent her from asserting and making good that claim. The only course open, therefore, is that the Court should allow the appeal and remit the case to the Resident Magistrate to decide on the first count of the summons—because, as to the others, I should think they would not be brought forward—with leave to the defendant to amend the plea, if so advised, by plead-

ing that he has fully administered the estate, without knowledge of the plaintiff's claim, and that he has no funds as executor to meet such claim, defendant to pay the costs of appeal, but all other costs, including costs already incurred in the Resident Magistrate's Court, and to be incurred, to abide the result of the decision of such Resident Magistrate's Court.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION.

1907.  
May 21st.

Mr. De Waal moved for the admission of Willem Daniel Bosman as an attorney and notary.

Application granted and oaths administered.

BROWN V. WARD AND CO.

Mr. Louwrens moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

LEWIS V. DAVIS.

Mr. Toms moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court.

Defendant appeared and said that he admitted having contracted the debt, amounting to £32, for rent and board and lodging in Johannesburg. Witness was now secretary of the Civil Service Club in Cape Town, and earned £25 a month. He was married, and was unable to make any payment to plaintiff. Witness was paying £8 a month upon other liabilities. He had made two payments of £2 a month to plaintiff since he came to Cape Town.

Decree granted, execution suspended pending payment of £2 a month, first payment to be made on the 1st June.

Defendant thereupon stated that he was leaving his position on the 31st July on account of this action having been taken against him. He had had a request from the committee of the club to resign.

Maasdorp, J.: The order must stand, and if you can't pay at the end of July you may apply for relief, and may surrender your estate.

## ADLER V. STAPLES.

Dr. Greer moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £40, together with £8 2s. 7d. taxed costs. Counsel said that defendant had pointed out certain property, which, he said, would realise £70, but which had been sold, and had only realised £7 odd, of which about £3 had been absorbed by expenses, leaving due £35 12s. 8d. on the judgment.

Defendant said that only a portion of the goods had been sold by the plaintiff. There were fixtures in the possession of the plaintiff, and also two vases, which he found were still on plaintiff's premises.

The matter was ordered to stand over until later in the day to enable defendant to inquire into the position of the property, which he claimed to have left with plaintiff.

Defendant later on gave evidence, and said that he had formerly had an interest in the Germania Hotel. The only things he had seen in the premises to-day were two vases which had cost him ten guineas. He was out of employment, and was unable to make any offer. He had lately been in German South-West Africa, where certain debts were owing to him.

The Court declined to make an order.

## HOFFMAN AND CO. V. COOKE.

Dr. Greer moved for a decree of civil imprisonment upon an unsatisfied judgment of the Resident Magistrate's Court, Woodstock, for £59 15s., with £1 10s. 10d. taxed costs. The Messenger of the Court had made a return of *nulla bona*.

Defendant said that he admitted the debt, but was without means. The only property he had was a little furniture. He formerly had an hotel business, and had contracted the debt for goods supplied. The furniture might realise £20. Witness owed £400 to other creditors. He thought that he ought not to give up the furniture to this creditor so long as he had other creditors. Witness had a salary of £16 13s. 4d., and was employed as a commercial traveller. He had to support a wife and three children.

By Dr. Greer: The reason why the return of *nulla bona* was made was, he supposed, because his wife had moved from the house where she had been staying. He was away in the country at the time. He thought he would be able to pay 10s. a month.

Maasdorp, J.: A decree will be granted, execution to be suspended upon payment of £1 a month. If at any time it is found that you cannot pay, you must consult your legal adviser to see by what means you can get relief. For the present you must pay £1 a month; you admit you have

some property and you earn a salary. The first payment must be made on the 1st of next month.

## GEDDES V. GALLOWAY.

Dr. Greer moved for a decree of civil imprisonment upon an unsatisfied judgment of the Magistrate's Court, Cape Town, for £7 5s., with £2 7s. 4d. taxed costs.

Defendant appeared, and said that she admitted the debt, but was unable to make any payment. Witness was married without community of property. She did not know why the plaintiff had not sued her husband. The judgment debt arose out of medicine supplied by plaintiff, who was a chemist. Witness's sister had made an offer of £25 a month to all the creditors, the total amount of witness's debts being £520 or £300. Mr. Geddes refused to accept the offer.

By Dr. Greer: Her sister had received a large bequest under her father's will. Witness was living at Turf Hall, Wynberg. Her husband had no means.

Maasdorp, J.: It appears that this lady has no means. Why steps were not taken against the husband I don't know. I am not aware, however, that that would make any difference, because it appears that he also has no means. There will be no order.

## ILLIQUID ROLL.

INSOLVENT ESTATE ALLY V. ( 1907.  
KRIEL, ROUX AND CO. ( May 21st.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £29 16s. 9d., amount due by defendant as part contribution towards the liquidation expenses of the estate.

Order granted.

## NIEUWSTADT AND CO., V. GADOW.

Mr. Louwrens moved for judgment under Rule 329d for £30 6s. 4d. for goods sold and delivered, with interest and costs.

Order granted.

## MICHAU AND DE VILLIERS V. THERON.

Rule 329d—Debt not yet due—  
Liquidated demand.

Mr. J. E. R. de Villiers moved for judgment under Rule 329d for £12 6s. 9d., fees due for professional services and moneys disbursed, and for £175, with interest from the 1st August, 1906, being the balance of purchase price of certain property in the division of Fraserburg, for which the plaintiffs became sureties for the defendant to the seller. The defendant had, the sum-



mons alleged, broken the conditions on which the plaintiffs had become sureties, inasmuch as he had mortgaged the property without first obtaining their consent. Plaintiffs wanted some indemnity. Counsel (in answer to the Court) said that the debt would not become due until the 1st August next; but the plaintiffs were, he submitted, entitled, as sureties, to protect themselves even before the debt became due. He cited Voet (46, 1, 34), and Van Leeuwen (Kotze's Trans., 2, 4), and submitted that the demand had been sufficiently liquidated to entitle plaintiffs to their discharge from suretyship or to some indemnity.

Maasdorp, J.: The only question the Court has to decide here now is whether the plaintiff can proceed under Rule 329d, which provides that, where the defendant is in default after the summons has been served upon him, in certain cases the plaintiff need not proceed further to file declaration, but can pray for judgment upon the summons. But it is said that that can only be done in case his claim is for a debt or for a liquidated demand. The question, therefore, would arise here whether, upon the face of the summons, it is alleged that a debt is due, or that he is entitled to make a demand upon some liquidated amount. Now, there is no allegation in the summons which would substantiate such a position, and all the Court can say now is, not that the plaintiff is not entitled to some relief under the circumstances, but he has taken the wrong course in proceeding under Rule 329d. If he thinks he has a claim against the plaintiff, he can proceed further in the ordinary course. Judgment will be given in the first claim for £12 6s. 9d., with costs.

#### PROVIDENT LAND TRUST V. FYNE.

Mr. Russell moved, under Rule 330, for leave to sign judgment against plaintiff (Fyne) for not proceeding with his action within the time stipulated by Rules of Court.

Order granted, with costs.

#### REHABILITATIONS.

Mr. Roux applied, under section 117 of the Insolvent Ordinance for the discharge of Charles William Sproule Boggs.

Granted.

Mr. P. S. T. Jones applied for the discharge from insolvency of Samuel Baris.

Granted.

#### GENERAL MOTIONS.

*Ex parte* BADENHORST. } 1907.  
May 21st.

Mr. Benjamin moved for leave to petitioner, as guardian of his minor daughter, to mortgage certain property situate in Colesberg, to enable repairs and alterations to be effected, and to pay costs of transfer duty, etc. Petitioner had waived his usufruct to the estate. Counsel read a report by the Master on the application.

Maasdorp, J.: It is quite clear that the Master disapproves of the proposal made by the applicant in this matter. He is the usufructuary of this property, and it is his duty, under ordinary circumstances, to keep the property in repair. Nothing appears upon the affidavits to explain his neglect to have done so in the past, and it would seem that the child would obtain no benefits by the steps which it is here proposed to take and, as is suggested by the Master, the applicant would be relieved of the responsibilities of the usufructuary, and still retain the full benefit of the property if the prayer, as made here, is granted, and nothing more is provided for. There is not sufficient information before the Court to grant this application, and there will be no order.

#### STEER V. THOMAS.

This was an application to make absolute a certain rule *nisi* interdicting respondent from disposing of his interest in certain property pending an action, to be instituted by applicant to recover £237 18s., balance of account.

Mr. Benjamin was for applicant; Mr. P. S. T. Jones was for respondent, who consented to the rule being made absolute, conditionally on the applicant proceeding with his action without delay.

Mr. Benjamin said that the declaration had now been drawn.

Rule absolute, costs to be costs in the cause.

#### FEDERAL SUPPLY AND COLD STORAGE CO., LTD., V. OFFICIAL LIQUIDATOR, BUFFALO SUPPLY AND COLD STORAGE CO., LTD.

Mr. McGregor (with him Mr. P. S. T. Jones) moved for leave to appeal to the Privy Council from a judgment given by the Chief Justice and Mr. Justice Hopley, for respondents for £1,635 and £1,707, less £4.

Mr. Burton (with him Mr. J. E. R. de Villiers) appeared for respondents, to consent to leave being given.

Mr. Justice Maasdorp said that the usual order would be granted.

Mr. McGregor said he took it that the usual order meant that execution would be stayed on proper security being given by the applicants.

Mr. Burton said that that was where he joined issue with his learned friend, because he submitted that the execution should issue, and that respondents should give security.

Mr. McGregor said that the matter was in the discretion of the Court, and that the simpler course would be for execution to be stayed on security being given. In this case they had on one side the liquidation of a moribund concern. He cited *Reiners, Von Laer and Co.'s case* (9 Juta, 266).

Mr. Burton submitted that the usual course had been for execution to issue, and for security to be given by the party in whose favour judgment had been given. There were circumstances in this case which especially made it desirable that the usual course should be followed. Applicants admitted on the pleadings liability for practically one-half of the debt.

Mr. McGregor having been heard in reply,

Maasdorp, J.: Under Rule 39 it is quite within the discretion of the Court, upon good grounds being shown either way, to order, upon leave to appeal being given, either that execution should issue or that execution should be suspended. Now, as a rule, the order takes the form that execution shall issue, the plaintiff having obtained his judgment is, under ordinary circumstances, entitled to execution, and the Court may leave that ordinary course to be pursued, or it may stay the hand of the successful party, but it is, as a matter of fact, the case that, generally speaking, the execution is issued, and the applicant receives the necessary security from the successful party in the Court below. I do not think that any good reason has been shown why the plaintiff in this case should not be allowed to issue execution. It is pointed out that if funds were paid over to the defendant, who is the respondent in this matter, and is the liquidator of a company that is being wound up, those funds could not be made use of with safety by the defendant. Well, that is a question for the respondent to consider. The only thing that the applicant is entitled to is to be properly secured, and I suppose it will be seen that proper security is given in this case. Leave to appeal is granted, execution to issue, and respondent to give security. As to the question of costs, I think, when these applications are before the Court, the question is generally raised one way or the other what shape the order of the Court should take as to the issue of execution. Although there may not be any specially strenuous opposition raised, still, as a rule, the question is raised for the consideration of the Court. Conse-

quently, the shape this order takes is practically, I consider, the usual shape, and the usual order will be granted, i.e., that the costs of this application be costs in the cause.

*Ex parte DOLD.*

Mr. Payne moved for leave to the Registrar of Deeds to amend the petitioner's name in certain deeds of transfer, mortgage bond, etc.

Order granted as prayed.

*Ex parte THERON.*

Mr. De Waal moved for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond hypothecating property in the town of Beaufort West. The original bond had disappeared from petitioner's office under mysterious circumstances.

Rule granted, returnable on the 12th July, and to be published once in the "Beaufort West Courier" and the "Cape Times."

*Ex parte ESTATE HARE.*

Mr. J. E. R. de Villiers moved, on the petition of the executor dative, for leave to mortgage certain property in Cradock, in order to effect necessary repairs. It was estimated that a loan of £250 was required.

[Maasdorp, J.: In these applications very often it does not seem to be remembered that the person who has a life interest has a duty to keep the property in repair.]

Mr. De Villiers: The usufructuary consents that the interest should be deducted from the rent.

Leave granted as prayed to raise a loan of £250.

*Ex parte SCHMIDT.*

Mr. J. E. R. de Villiers moved for an extension of the return day and for an order for substituted service of a certain edict calling upon applicant's wife to show cause why he should not sue her for a decree of restitution of conjugal rights. Counsel read an affidavit, from which it appeared that efforts to serve the citation personally upon respondent in Glasgow, Scotland, had failed. Respondent's sister knew where she lived, but refused to disclose her address.

Return day extended until the 15th August, service to be effected upon Mrs. Dittrich (respondent's sister), and one publication to be given in the "Glasgow Herald" and the "Gazette."

*Ex parte BROWNELL.*

Mr. Russell moved, in the petition of M. W. Brownell, for leave to sue *in forma pauperis* and by edictal citation

her husband, Alonza Aaron Brownell, for restitution of conjugal rights, failing which a decree of divorce. Petitioner said that her husband was believed to be at present in North-West Canada, having deserted her in 1903.

Petitioner appeared, and said that she was employed at Worcester as a dress-maker at a salary of £6 a month. She was without means to institute an action. Respondent left her without making any explanation.

Mr. Russell said that he was prepared to certify.

Rule nisi granted, returnable on the 17th September, calling upon respondent to show cause why the petitioner should not be granted leave to sue him *in forma pauperis*, and leave to sue by edict granted, returnable on the 17th September, personal service if possible, failing which, one publication in "Gazette" and a Canadian paper to be mentioned later.

*Postea* (May 22nd).

Mr. Russell applied for an addition be made to the order to the effect that the publication in a Canadian newspaper be made in the "Calgary Herald."

The Court directed that substituted service in Canada be made in the "Calgary Herald."

*Ex parte* ATTWELL.

Dr. Greer moved for an order declaring petitioner of sound mind and capable of managing her own affairs, and superseding the appointment of Mr. J. E. N. Roos as curator of her property. Petitioner had been discharged from the Valkenberg Asylum as recovered. An order had been granted on the 11th May, 1905, declaring her of unsound mind and incapable of managing her own affairs, and appointing Mr. Roos as curator of her property.

Order granted as prayed.

*Ex parte* ESTATE CONNOR.

Mr. Long moved, on the petition of the executors, for the appointment of a *curator ad litem* to represent two imbecile sons of the testator in an application by their brothers (Thomas and John Connor) for leave to mortgage landed property in the division of Somerset East.

From the petition, it appeared that the late Mrs. Connor, who died at Somerset East, bequeathed her farm, situate in the division of Somerset East, to her two sons, Thomas and John, on condition that they supported and maintained their two brothers, Mathew and Morris, and did not dispose of the farm without making due provision for the said brothers. There was a deficiency in the movables of £1.774 10s. 6d. In the event of a sale of the farm, there

would not be a sufficient balance from the proceeds to enable Thomas and John to maintain their brothers, and they therefore proposed to raise a mortgage on the property.

Maasdorp, J.: The brothers should be parties to the application. Without saying anything as to the nature of the application which is intended to be made, the Court will appoint George Magnus Stahl, as *curator ad litem* for the purposes of the application to represent Mathew and Morris.

*Ex parte* ESTATE NEL. { 1907.  
May 21st.

Will (mutual-Massing-Fiduciary heir—Usufructuary—Transfer—Deeds Office practice.

*N. and his late wife, married in community, made a mutual will by which each instituted the survivor as joint heir with the children of the marriage. there was only one child, a minor. On the death of the survivor a certain farm, part of the joint estate, was to pass to the child. N. now asked for transfer of the whole farm into his own name in order that he might pass transfer to a third person who had purchased all his rights therein.*

*Held, (1) that N. was entitled to transfer of his own half share, subject to the reversionary rights of the child being recorded on the Deed of Transfer (2) That the question of transfer of the quarter share bequeathed to himself as fiduciary heir, not having been raised, the Court would give no decision thereon. But (semble) it is the practice of the Deeds Office to allow transfer to a fiduciary, but not from him to any third person. (3) That transfer could not be given to N. of the remaining fourth share, bequeathed to the child, of which N. had only the bare usufruct: and hence the application in its present form must be refused.*

Mr. Close moved for an order authorising the Registrar of Deeds to pass transfer of certain property in the division of Ladismith, in the estate Nel,

in accordance with certain powers of attorney granted in favour of Johannes P. C. Nel by his late wife. Counsel stated that the survivor wished to get transfer passed to him as executor and individually, in order to pass transfer simultaneously to one Solomon, who had purchased his rights in the property from him. The Registrar wished to record as against the transfers the fact that the survivor had ceded his rights to the purchaser. He was prepared to allow the transfer to the survivor as a fiduciary heir, but the survivor wished to go further, and at the same time as he got transfer, he wished to transfer to Solomon. The only child of the marriage was a daughter, aged 20 years. Counsel read a report by the Registrar of Deeds, setting out his attitude at some length.

[Maasdorp, J.: What is it you ask for? Transfer out and out of the whole property to the fiduciary?]

Mr. Close: Yes, subject to the terms of the will.

[Maasdorp, J.: You want the whole of the properties transferred in both transfers?]

Mr. Close said that that was so. He contended that the child would be fully protected if the fiduciary were granted out-and-out transfer, subject to the terms of the will.

[Maasdorp, J.: That would take the child's portion away from her.]

Mr. Close submitted that there could be no prejudice to anyone in case the survivor were given transfer out and out. He cited *In re Zondach's Will* (19 S.C., 24), and sections 2 and 4 of Act 5, 1884.

Maasdorp, J.: In this case it appears that the applicant made a joint will with his wife, who is now deceased, and under that will each institutes and appoints the other as joint heir with the children. It appears that in this case there is only one child. There is a further provision in the will that, upon the death of the survivor, the landed property shall pass to the child. Now, the result of this would be that in a certain farm, which forms part of the estate, half the property would still belong to the survivor. To the other half the survivor and the child are made joint heirs, and, upon the death of the father, the whole of the farm is to pass to the child. As to one quarter, consequently, the father having been made an heir, is now in the position of a fiduciary heir. With regard to the other quarter, the child is the heir, and the father is the usufructuary. There are, therefore, three parts of this farm standing in different relationships to the property of the applicant. As to half, he is full owner of the property, of a quarter he is fiduciary heir, and of the remaining quarter he is only usufructuary. He wishes to obtain transfer of the whole of this farm

into his own name, and it appears that, under the circumstances, no difficulties will be raised in the Registry of Deeds Office to allow such transfer to pass to him. Without entering into the question as to what right the father might have to get transfer into his own name of that portion to which his child has been made heir and of which he is only usufructuary, I may say that, so far as the father himself is concerned, the Registrar of Deeds states that there will be no difficulty in passing transfer to him, having all the rights upon the property recorded in such transfer. The question is not now whether, if any opposition is made to that portion which the child is entitled to and of which the father is only usufructuary being required for purposes of transfer to the father, the Court would allow such a transfer to pass—as I say, that question is not now raised, and the Court, therefore, expresses no opinion upon it. But the applicant in this matter contemplates, after he gets transfer of this property, to pass transfer to a third party, who has purchased all his rights in the property. Now, with reference to his own half share, there may have been no difficulty in respect of his dealing with it by means of transfer, with the rights upon it being recorded in the office of the Registrar of Deeds. With that portion of which he is fiduciary heir there might or might not have been difficulty, but I certainly think that as far as the child's share is concerned, it is quite clear that he is not the owner—he is merely the usufructuary—and he is not entitled by transfer to pass ownership to a third party, when he himself is not entitled to such ownership, and that would be the effect of a transfer of the property to the purchaser of his rights. It would appear in the Registry of Deeds Office, if transfer were allowed, that the ownership in a certain farm has been transferred to this purchaser, and that would include one quarter of the farm, in which the seller himself had no right of ownership. This application can, therefore, not be granted, because it involves that difficulty which I have mentioned; it would involve the transfer also of the child's share, which, in my opinion, cannot be effected. The Registrar of Deeds goes further, and it may be that that is the correct position—that, even with regard to the property of which he is fiduciary, though he is allowed to obtain transfer in his own name, it is not the practice of the Registry of Deeds Office to allow transfer to be passed to any third person, but if rights are acquired in respect of such property those rights would be registered in the Registry of Deeds Office in such a way as to protect such rights. How those rights are to be protected, and what the effect would be of any deed that might hereafter be registered, it is not



for the Court now to express an opinion, but the application, as it is made now, must be refused in so far as it has reference to the transfer of the property to the purchaser of the applicant's rights.

[Applicant's Attorneys: Herold and Gie.]

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

JANSEN V. VAN DER MERWE. } 1907.  
May 22nd.

*Servitus viae*—Non user—Change in course of river—Interference with natural flow of water—Damage to neighbour's property.

This was an application to make absolute a certain rule nisi interdicting the respondent from going on to applicant's property at Bethesda, district of Graaff-Reinet, and proceeding with certain works in raising the river bed, and causing damage to the applicant's furrow and land.

It appeared that the applicant is the owner of the farm Wiljebosch, and the respondent owns the adjoining farm Leeuwvlei. Respondent had commenced certain works in the tributary adjoining applicant's farm so as to enable him to use a road from his farm to the Bethesda-road railway station, notwithstanding applicant's remonstrances that these works would interfere with his furrow and render his land liable to damage from flood waters. It was clear that the road in question had not been used for some years, no repairs having been carried out since a freshet washed the road away and changed the course of the river. Respondent's position, as disclosed on the affidavits, was that the works he proposed to carry out would not be prejudicial to applicant's rights.

Mr. Burton was for applicant, Johannes Jochimus Jansen; Mr. McGregor appeared for respondent, Jacobus Johannes Bennie van der Merwe, to show cause against the rule.

Mr. McGregor said that apparently respondent did not admit that the owner of Leeuwvlei was entitled to this road.

[Maasdorp, J.: I think for the purpose of this application that might be taken.]

Mr. Burton: We assume that he is entitled to the road.

Mr. McGregor said that the respondent, if he were entitled to a road, must be entitled to a road he could travel by. That road was traversed by a certain stream. In 1901 a freshet came which intercepted the road. Respondent had a right to repair. It could not be that as a result of the flood he had lost his road. He had had a road to the railway station. In his repairs the Court watched that he did not do damage to his neighbour. Voet on Servitudes (8, 4, 16) pointed that out. Counsel cited Maasdorp's Institutes (pp. 118-990).

[Maasdorp, J.: That is very clear. You are entitled if you have that road to put it in such a state that you may use it. The only question is whether, in doing so, it would not be necessary in certain circumstances to get the consent of the owner as to exactly what might not be done, and not take it upon yourself to do exactly as you please.]

Mr. McGregor: The applicant has taken a *non possumus* attitude throughout.

[Maasdorp, J.: What do you want a deviation for?]

Mr. McGregor: Applicant does not take up the attitude that the work shall be done in a certain way. We say we have satisfied the Court on these affidavits that we are doing it in a way that is most helpful to him. Counsel submitted that applicant's consent was not necessary, but the respondent must do the work in such a way that it would not cause unnecessary and gratuitous damage to the land. Applicant had not taken up a fair attitude; he had evaded the point, and had made an attempt to secure a technical victory, which would give him a great advantage in a matter of really big substance between the two farms, viz. the closing of the road. Counsel cited Voet 43, 19, 2, *Assman v. Rautman* (12 S.C., 279), and *Steyn v. Zeeman* (20 S.C., 221).

Mr. Burton said that he did not see how the applicant could have acted more fairly than he had done. Applicant was never consulted about these works; he was never given an opportunity to say what he would do. He declined to accede to a deviation. The next thing was that he received a notice from respondent that he was going to erect certain works upon the river bed. Respondent had had a drift, he must use that drift as he had used it before, but he had never at any time had any sort of construction in the river bed by way of forming a causeway or a roadway. Respondent wanted to make a street through the river in the same condition, as he said, as the streets in Graaff-Reinet. He wanted to put in works 6 feet high to give him a causeway across this stream. Respondent



had hitherto had a servitude of a drift, but he had never had a causeway. He was now proposing to provide something that he had never previously had.

Mr. McGregor having been heard in reply,

Maasdorp, J.: It appears from the affidavits that have been put in that the respondent, who is the owner of the farm Leeuw Vlei, is entitled to the use of the road running across the farm of the applicant to the Bethesda-road Railway Station. Some years ago, during the heavy rains, the road, where it passes through the river, was washed away, and the course of the river was partially diverted there. After that the road was impassable at that spot for a considerable time. It is admitted on the part of the respondent that this occurred in the year 1901. There are statements in the affidavit that it is for a longer period that this road has been disused, and that for a considerable period it has been in such a state that it was not fit for use. It is not contended on behalf of the applicant that the respondent is not now still entitled to use that road. A non-user for the period from 1901 or longer has not been set up as actually destroying the servitude over the property along that road but still this non-user becomes of considerable importance. In this matter, it would seem that during the time that this drift has been left in a neglected condition that the banks of the river on the right side, where the lands of the applicant lie, have been gradually worn away, until they have assumed a very considerable height, and not only that, but as the bank of the river was wearing away, the water followed the bank, and has therefore considerably deviated from its original course. The difficulty the respondent has now to contend with is this, that after the lapse of years, he finds that the course of the river has been somewhat altered, and the formation of this high bank on the road in the river has made it absolutely impassable, and rendered it necessary that very extensive works should be made in order to render it passable again. This neglect, therefore, has considerably altered the nature of the locality there, and it now becomes necessary to enter upon the construction of the road, so as to make it passable. It will be necessary to construct very extensive works, which may or may not seriously affect the applicant's property, and the difficult question, therefore, now arises, whether what the respondent now proposes to do is of such a character that it will seriously affect the property of the applicant. The affidavits seem to be mainly directed to that point. On behalf of the applicant, a number of persons have made affidavits to establish the view that if the work should be carried out in the manner in which it is now being done by the respondent that they will seriously

some years ago, and he wished to restore that surface by making a substantial causeway of masonry. Now, it is quite clear that when such causeways are constructed in the bed of a river they may have extensive effects on the bed of that river in scouring it out, because of the manner in which it caused the water to flow over the embankment, and that may have a serious effect on the bed of the river and on the banks in the immediate neighbourhood. I am not satisfied that this extensive work, which has been undertaken without consulting the applicant, is of such a nature that it is not likely to cause damage to the applicant, as is alleged by those who are supporting with their affidavits the cause of the applicant. Now, the change of the river has caused a flow along the curve of the present bank, and the applicant now claims the right to alter the course of the river. As the river has run for some years, it has made a course for itself around this curve, and the alteration made by respondent caused the water to impinge upon quite a different part of the bank, on the applicant's side; who alleges that this alteration, throwing the direct impact in that way, is causing a serious change in the bank on the opposite side, and I am quite satisfied from the plan put in by one of the witnesses for the respondent that that is the case. The respondent is interfering with the ordinary course of nature in wearing away the bank and interfering with the course the river has taken for this past six or seven years, by this causeway which he has put up, thus throwing the water with great force in quite another direction, and from the plan which he has put in one finds the natural result on the opposite bank, which is of soft material, being worn away. That alone establishes this position, that the alterations which the respondent is making are having some serious effect on the property of applicant. The respondent is not entitled to construct any works which will be injurious to the applicant. It does appear to me that the applicant on his part has not been prepared to make sufficient concession in order to enable the respondent to effect works which might be necessary for him to restore his servitude, but if he has been unreasonable the respondent can compel him by legal means to take a reasonable course. The respondent having himself in a high-handed manner undertaken works which he is not entitled to do without the consent of the applicant, must be stopped from proceeding with the work further. Now, it seems to me that the very gentlemen who have come forward to give their opinion as to what should be done may be very useful friends in advising the parties hereafter in the course to take in establishing and preserving their rights on both sides. It is by going to arbitration only that

affect the lands of the applicant by throwing the water against the bank in a manner in which it has not been accustomed to flow. From the respondent's side we have the opinion of a number of witnesses that, so far from the alterations now being made being injurious, they will be beneficial to the applicant. The only thing I can say is, that after reading all the affidavits, I am not satisfied on the opinion there given in view of the conflicting statements there expressed that the work will not be of verious detriment to the applicant. If the respondent wishes to establish that position he will have to do it in some other form. If he has the right which he wishes to assert, he will have to establish that right by proceeding at law in another way. To my mind the course he is taking will be of very serious import, whatever it may be. He proposes to construct a very high embankment in the bed of the river, which appears to be of very soft material, from the manner in which it was washed away in the past. It has been reduced to a depth of six feet, lower than it was the matter can be settled. No litigation in Court can put a final settlement on the point. Whatever litigation takes place in this court, the matter will have to be referred to some independent man of skill and experience in these matters. I think the position is this: That the respondent is entitled to exercise his rights of servitude if they can possibly be exercised by making structures which, without damaging the applicant, will restore this drift. Upon arbitration it may be found that at this very spot, without damage, the drift may be made, or it may be found that it cannot be there made, but that it can be made in the immediate neighbourhood. I think I can express the opinion which will not be a final opinion, because I do not know the course they may take, that if the drift cannot be made at this particular locality then in law it may be made in the immediate neighbourhood, as something must be done to allow the servitude to be exercised by respondent. The rule was made absolute, with costs.

*Ex parte* ESTATE SLABBERT.

Mr. Howes moved for an order authorising the Registrar of Deeds to register certain mortgages against the estate property. It appeared that the late Johannes Slabbert in August, 1905, obtained leave to mortgage the property for £250, but died before a mortgage was passed. The executrix in February last applied for leave to mortgage the property in a sum of £363 5s. 7d., in order to liquidate the estate debts. She had, it seemed, been under the impression that she could also avail herself of the leave formerly given by the Court

to mortgage the property for £250, and raise a mortgage for the combined sums. The Registrar, however, declined to sanction this proposal, and petitioner applied for a supplementary order authorising a mortgage to cover the amounts mentioned in both applications, as well as costs of this application. The matter was recently before Mr. Justice Buchanan, and was referred to the Registrar of Deeds for report. The Registrar now said that he saw no objection to the application.

Order granted as prayed.

*Ex parte* ESTATE  
MEINTJES.

1907.  
May 22nd.  
June 10th.

Will (mutual) — Massing — Usufructuary — Sale of portion of the inheritance — Usufructuary's debts.

*The late M. and his wife, the present applicant, married in community, made a mutual will, providing, inter alia, that in the event of M. predeceasing her she should, so long as she should not remarry, enjoy the use and usufruct of the entire joint estate as her own absolute property with power to sell and dispose of the movable and immovable property and to purchase other property in lieu thereof. Should she remarry, the administration of the estate was to pass to her co-executor and co-administrator who was to pay over to her the rents and profits of the joint estate and, if need be, he might in his discretion sell and dispose of the landed property . . . and on her death was to transfer the property to the children of the marriage, subject to any fidei-commissum. Mrs. M. might impose by will. She had not re-married, and there was one son, issue of the marriage, now a major. The applicant contended that it was only in the event of her re-marriage that the son would inherit the estate, and she now applied for leave to sell certain of the landed property in order to pay certain debts contracted for her own maintenance and in respect of certain accommo-*

*dation notes signed by her for her son. The son consented to the application and the applicant was willing to renounce her usufruct.*

*Held, that as she was only a usufructuary of an estate which had been massed, and as no rights had, as yet, vested in her son under the will, the Court had no power to allow anything to be taken out of the corpus of the joint estate, even with the son's consent, in order to pay the aforesaid debts.*

This was an application on behalf of the executors of this will of the late Buyert Meintjes, and of his only son, leave to sell part of the estate property, of which Anna S. Meintjes, the widow, held the life usufruct, in order to pay the debts of the estate. Anna S. Meintjes waived her right to the usufruct of the estate. By the terms of the mutual will of Buyert Meintjes and Anna Meintjes, it was provided that "in the event that the testator shall be the first dying of us, then the survivor, the said Anna S. Meintjes, shall, so long as she shall not remarry, have and enjoy the use and usufruct of our entire joint estate, property and effects as her own absolute property, with power to continue the farming operations of the joint estate, and to sell and dispose of the movable and immovable property, and to purchase other property in lieu thereof, and to administer the joint estate in such manner as she may deem meet, but in the event of the said A. S. Meintjes entering into a second marriage her disposal and control of the joint estate shall cease and determine, and the joint estate shall forthwith be vested in and be assigned and set over to and be claimable by the secretary for the time being of the Midland Fire Insurance and Trust Co. (altered in a codicil to the secretary of the Graaff-Reinet Board of Executors) . . . in trust . . . that he shall administer the said joint estate, and if need be in his discretion sell and dispose of the landed property . . . and also in trust that he shall receive the rents and profits of the joint estate . . . and apply the same for the use and benefit of A. S. Meintjes for her natural life . . . with this proviso—that the said A. S. Meintjes shall and may retain the use and occupation and usufruct of the dwelling-house and certain two erven at Pearston . . . and on the decease of the said A. S. Meintjes, then upon further trust that the trustee shall pay, assign and transfer the property . . . to the lawful issue . . . of

the said A. S. Meintjes in equal shares, subject to any entail of *fidei-commisum* which the said A. S. Meintjes may make or direct by will. And in default of any such lawful issue or descendants her surviving, then to the heirs of us the testators one-half to the heirs of the testator and the other half to the heirs of the testatrix, unless the testatrix shall otherwise direct."

Mr. McGregor moved.

Mr. McGregor, in argument, cited *Zondach's case* (19 S.C., 19), *Castleman v. Stride's Executors* (4 Juta, 28), *Brown v. Richard* (2 Juta, 314), *Cloete's case* (5 Juta, 59), Voet 36, I., 54, and 56, and Van der Keessel, Theses, 372, 374, and 375.

*Cur. Adr. Vult.*

*Postea* (June 10th).

Maasdorp, J.: Burgert Meintjes and Anna Meintjes, who were married in community of property, made their last will on 26th of September, 1893, by which they directed, amongst other things, that in the event of the testator being the first dying, the survivor, Anna Meintjes, so long as she shall not remarry, shall have and enjoy the use and usufruct of the entire joint estate, property, and effects as her own absolute property, with power to continue the farming operations of the joint estate, and to sell and dispose of the movable and immovable property, and to purchase other property in lieu thereof, and to administer the joint estate in such manner as she may deem meet. But in case she should re-marry, the administration of the estate is taken out of her hands and placed in the hands of her co-executor and co-administrator, who is nevertheless to pay over to her all rents, issues, and profits of the joint estate, while she continues to enjoy the usufruct of certain of the immovable property. The will further provides that upon the death of Anna Meintjes, the properties held under the trust shall be transferred by the trustee in full and free property to the lawful issue of Anna Meintjes or their lawful descendants by representation. It was contended, on behalf of the petitioners in this case, that under the terms of the will the widow had full power to dispose of the property, and that it was only in the event of her marrying again that she lost that power. And, further, it was contended that it was only in that event that the power to administer passed into the hands of the co-administrator, who, upon her death, was to transfer the property to her heirs. It was argued that if she did not re-marry the trust would not pass into his hands, and he could not transfer to her heirs, and the conclusion drawn from this was that if she did not marry again the clause of the will appointing her

issue heirs under the will would not come into operation. But it is quite clear that the will after massing all the property of the joint estate, conferred upon her only the usufruct of that property, and while she is allowed to administer the estate as she may deem meet, she is not allowed to diminish it. She is expressly directed, should she sell any of the property, to buy other property in lieu thereof. This is not a case in which the free disposal of the estate is left to the survivor, with directions as to the disposal of anything that might remain over upon her death. The usufruct having been left to the widow, it is natural to expect that the will would proceed to dispose of the joint estate when she died, and that is what, in my opinion, the will actually does. It provides that the whole of the joint estate, as administered by the widow, or her co-administrator, shall in the event of her death, whether she shall have married again or not, be transferred to her lawful issue or their descendants by representation. In 1893, Burgert Meintjes died, leaving him surviving the widow and one son, Johannes Meintjes. He adiated under the will, and has ever since enjoyed the usufruct of the joint estate in terms of the will. She now alleges that she has incurred debts in connection with the estate, and for his maintenance, amounting to £1,800, and she applies for leave to sell certain of the landed property in the estate in order to pay off this debt, offering at the same time to renounce her usufruct. In whose favour she is prepared to renounce her rights is not stated, but it seems to be taken for granted by all the parties to the petition that her son Johannes is heir to the property with some vested rights, and that upon his becoming a consenting party to these proceedings, all difficulties are removed. The co-executor in his affidavit states that Johannes Meintjes is the sole heir under the will; and Johannes Meintjes in his affidavit also claims the position for himself. As a matter of fact, no right is now vested in him under the will, and in case he dies before his mother, no rights will become vested in him, but others may then inherit the estate. The Court cannot, even with the consent of Johannes, give such a direction respecting the disposal of the property as will injure the future heirs. The Court may allow the usufructuary to be reimbursed for expenses already incurred in the preservation of property belonging to the estate, or allow her funds out of the estate for expenses to be incurred for the preservation of such property, but that is not the application here. A vague statement is made that owing to heavy expenses in the administration of the estate, including her own maintenance, she has become indebted in the sum of £1,800. As a general rule, a

usufructuary is herself responsible for ordinary expenses connected with the usufruct, and must take her maintenance out of the profits. There is nothing here to show that the expenses and maintenance in this case are such as the Court will allow to come out of the capital of the estate. The petition in this case is dated as far back as July, 1906, and the indebtedness as to which she asked for relief was then £1,800, but it now appears from the affidavit of the co-executor and of Johannes that it is intended to raise enough money to pay off the sum of £3,000, the balance of about £1,200 being made up of a debt incurred in respect of certain accommodation notes signed by the widow for the accommodation of her son Johannes. It is clearly beyond the power of the Court to allow anything to be taken out of the capital funds of the joint estate for the payment of that debt. The Court will make no order in this case.

[Applicant's Attorneys: Dempers and Van Ryneveld.]

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1907.  
} May 28th.

Mr. Pohl moved for the admission of Louis Reginald Page Fennell as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Griquatown.

Mr. W. Porter Buchanan moved for the admission of Oloff Marthinus Smuts Bergh as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Malmesbury.

## PROVISIONAL ROLL.

SUTCLIFFE V. BARRON.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent. From the petition, it appeared that Sutcliffe alleged that defendant owed him £289 for wages, tram fares, and interest, Sutcliffe having been employed by defendant as a painter on day wages. Defendant was a builder and contractor, of Woodstock. Applicant claimed a preference over other creditors. He alleged that defendant was hopelessly insolvent, and that it



was in the interests of the creditors that his estate should be sequestrated.

Mr. W. Porter Buchanan (for defendant) opposed the application, and read an affidavit by his client, who denied that he was insolvent. He entered at some length into the position of his affairs, which it appeared, had for some time been administered under the control of a committee of inspection on behalf of the creditors. It was against the interests of the creditors, especially those who were concurrent, that his estate should be sequestrated. The greater part of the assets would be sacrificed in case of a forced sale. Counsel also put in a declaration by a number of the creditors, representing bonds amounting to £21,000, that the sequestration of the estate would be prejudicial to the interests of the creditors. He read a further affidavit by Mr. Orpen, of E. R. Syfret and Co.

Mr. Roux read a replying affidavit by applicant's attorney.

Mr. Buchanan said that the application was brought under the Act 38, 1884. Applicant must conclusively prove that the estate of the defendant was insolvent, and that it would be for the benefit of the creditors that the estate should be sequestrated. In this case a majority in number and value of the creditors said that it would not be for the benefit of the creditors that the estate should be sequestrated. Furthermore, sequestration would not be in the best interests of the applicant himself, because all the available assets would go to the mortgagees, and the applicant and the other concurrent creditors would get nothing.

[Hopley, J.: What are you all holding on for? Waiting for better times?]

Mr. Buchanan said that that was so. Counsel went on to point out that there was nothing to show that defendant had no disposable assets to meet this claim. He submitted that it had not been clearly proved that the defendant's estate was insolvent. What was behind the whole thing was the applicant's mistaken impression that he had a preference over the other creditors.

Hopley, J.: This is an application founded on Act 38, 1884 (section 3). The summons alleges that the defendant is insolvent, and that it would be for the benefit of his creditors that his estate should be sequestrated, and those are really the points that the Court has to consider. Now, it seems to me, on looking into the affidavits, that there can be no doubt that at the present time this estate is insolvent. It is admittedly unable to pay the claims upon it, it is doubtful whether the mortgagees are getting their full amount of interest, and, if they are not, sums of interest, and large sums of interest, must be accumulating against the estate, thus making its position worse. It is perfectly clear that the concurrent creditors, although they are nominally

secured by a general mortgage bond, are not able to get anything at all, and have not for over a year received anything out of this estate, and it is forcibly put upon paper by the gentlemen who are managing the estate, and who say, in writing to the present plaintiff, that if they persist in his action, they will not be able to pay him anything, and he will probably lose the whole of his claim. If that means anything at all, it must be taken to mean that the estate is insolvent. It is suggested, however, that there is a "corner" for this estate which may be turned at some future time. It may be a sanguine view to take, and people, in their own interests, are justified in looking into the far future, but when it comes to a matter before the Court, it appears to me that the only sane view that the Court can take is to look absolutely at the present time. One cannot speculate as to what may happen in the future, matters, instead of getting better, may get worse, we have had so many bitter lessons of hoping and hoping, and on the present valuation, it seems to me that the estate is actually insolvent. The only other question is, is it for the benefit of the creditors that the estate should be sequestrated? It is shown that, on the present-day valuation, there is only a small deficit, £300 or £400, on this large estate. It would be for the benefit of the creditors to utilise the present times, and probably, although they would not get 20s. in the £1. still, according to Mr. Buchanan's argument, they would get something like 17s. or 18s. Are the creditors to wait for ever? It may be all right for the bondholders to sit on their bonds, as it were, but the unsecured creditors are not supposed to wait indefinitely, and if this estate be so good, and there be only this small deficit, it will, at all events, be for the benefit of these creditors that there should be speedy realisation of these assets, so that they may get whatever they can out of the estate. Their waiting longer may jeopardise their claims. I think that both the necessary portions of the 3rd section have been satisfied, that it has been proved to my satisfaction that the estate is insolvent, and that it would be for the benefit of the creditors that it should at the present moment be sequestrated and realised, so that they may get whatever they can out of it. Final order granted as prayed.

#### BOTHA V. DE KLERK.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £500, with interest from the 1st July, 1906, less £80 paid, bond due by reason of non-payment of interest and notice having been given; counsel also applied for the property hypothecated to be declared executable.



Mr. Roux appeared for defendant, and opposed the application.

Plaintiff is the late owner of the farm Haasjeskraal, district of Sterkstroom, and defendant is an attorney and auctioneer, of Sterkstroom.

Affidavits having been read,

Mr. Roux, in argument, submitted that plaintiff should be ordered to go into the principal case.

Hopley, J.: In this case I think there should be provisional sentence. It is not denied that the defendant owes £500 on a mortgage bond, and that he would be liable for the amount, less £80, which it is admitted that he has accounted for, but for a certain agreement which he alleges was made in February of this year, whereby the plaintiff agreed not to sue him if he fulfilled certain conditions, i.e., if he settled a certain action that was then pending between the parties in the Supreme Court, which has been done, if he paid the interest up to date, which may or may not have been done, and if he paid off the principal, an amount of £100. Now, he has not done this except on paper. He has not brought any sum in hand and said "Here is the £100 and here is the interest that I promised to pay," but he affects to have done it, and he alleges that he has done it by showing that there were these figures omitted from previous accounts. Now the whole of the defendant's case, as far as the due fulfilment of these obligations is concerned, hinges upon the question whether or not he is entitled to a sum of £150 13s. 9d. for commission for the sale of the plaintiff's farm, which he had undertaken in 1905, and which he carried through. He alleges that this farm was put into his hands for sale, and to this plaintiff then and there agreed, irrespective of anything else that he might get in the way of commission out of anybody else, to pay at the rate of 2½ per cent. on the purchase price of the farm. Plaintiff says he did put this matter into defendant's hands, and that he understood that 2½ per cent. was the auctioneer's charges for selling immovable property, but he also says that he understood, and that it was agreed, that all such commission should come out of and be paid by the purchaser, whoever he might be, and in this the plaintiff is corroborated by the fact that the conditions of sale and purchase clearly set forth that the auctioneer's charges must be paid by the purchaser, and corroborated by the fact that the purchaser (Mr. Peacock) did pay the auctioneer's charges of 2½ per cent., and further corroborated by the fact that in the first two lots of accounts between the parties, which must have been written up from the ledger, none of this charge was brought up against the plaintiff in the present case. It would be a most unusual, and, it seems to me, a monstrous idea, that an

auctioneer, in this case an attorney acts as an auctioneer, as is often the case in the country, should try and get double commission, that is, 2½ per cent. from the purchaser and 2½ per cent. from the seller, that he should by way of an afterthought, when he is accounting for moneys and hard pressed by the seller, discover that, although he has been paid 2½ per cent. by the purchaser, as agreed upon, he is also entitled to come with a charge against the seller of the property. I think the probabilities are altogether against him. If he thinks he can establish a case of that kind, the onus would be very strongly upon him to establish anything of the sort; he has his remedies, he can still go into the principal case, but it seems to me that I should give provisional sentence and declare the property executable, with costs against defendant as prayed.

PAARL AFRICAN TRUST V. BASSON.

Mr. Pohl moved for provisional sentence on a mortgage bond for £750, with interest from the 1st July, 1906, and insurance premiums, less £25 18s. paid on account, bond due by reason of the non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

HITGE V. ARCHER.

Mr. Wallach moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

S.A. PRODUCE WINE AND BRANDY CO. V. TARR.

Mr. W. Porter Buchanan moved for provisional sentence on an acknowledgment of debt for £90 18s., due by failure to pay instalments as stipulated, with interest and costs.

Order granted.

ILLIQUID ROLL.

ROYAL HOTEL CO., LIMITED } 1907.  
V. WATSON AND CO. } May 28th.

Mr. Van Zyl moved for judgment under Rule 329d for £40, rent of premises situate in Plein-street.

Order granted.

POWER V. FORRESTER.

Mr. W. Porter Buchanan moved for judgment under Rule 329d for £15, rent of a certain bottle store in Harrington-street, Cape Town, and £30, money advanced, with interest and costs.

Order granted.

CLAREMONT MUNICIPALITY V. VON  
HOLDT.

Dr. Rainsford moved for judgment under Rule 329d for £59 11s. 2d., less £30 paid on account for rates, with interest and costs.

Order granted.

## REHABILITATION.

Mr. Roux applied, under the 117th section of the Ordinance, for the discharge from insolvency of Marthinus Jacobus Nel.

Granted.

## GENERAL MOTIONS.

*Ex parte* RHENISH MISSIONARY  
SOCIETY.

Mr. Marais moved for a certain rule nisi to be made absolute, authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond, the original bond having been destroyed by fire.

Rule absolute.

## BORCHARDT V. DILLON AND OTHERS.

Mr. Roux moved for a certain rule nisi to be made absolute calling upon respondents (three in number) to show cause why the proceeds of the sale of a certain cart belonging to petitioner should not be interdicted in the hands of one Marcus, an auctioneer, pending an action to be brought by petitioner.

Rule absolute, costs to be costs in the cause.

*Ex parte* LOUW.

## Ante-nuptial contract—Donation.

*By an ante-nuptial contract L. had given to his future wife a half share in the farm M. The sale of this farm to him having been afterwards cancelled, the Court now granted leave to substitute the farm Z. in the antenuptial contract, saving the rights of all creditors up to the date of the registration of the so amended contract.*

Mr. M. Bisset moved for an order authorising the amendment of a certain donation in an ante-nuptial contract in favour of petitioner's wife by the substitution of a certain farm for a share in another. Petitioner's wife consented to the amendment prayed for. Louw had been unable to fulfil his obligations

so as to secure transfer of a certain farm in the district of Albert, half share in which was settled by him on his intended spouse under the ante-nuptial contract. The sale of this farm to petitioner had been cancelled, and he now proposed to substitute a farm in the district of Aliwal North. Counsel having been heard in argument on the facts.

Hopley, J.: This is, as far as my experience goes, an unprecedented application. It would appear that the petitioner was married about the beginning of this year, having, under an ante-nuptial contract, given to his wife half of a farm which he had purchased for slightly over £1,000. This purchase he seems to have been unable to fulfil, and after the marriage the sale to him was cancelled, so that he has not fulfilled the obligations which he undertook in the ante-nuptial contract, namely, the ante-nuptial donation of the half of this farm, Margaret's Vale. He now wishes to rectify the position, and do the right and equitable thing, as far as possible, by giving the lady whom he married on those conditions, something exactly equivalent, or as near as may be, to the landed property which he gave and settled upon her by ante-nuptial contract. It appears that he owns in the adjoining district of Aliwal North a small farm called Zuurbron, which is worth just about £650, but is encumbered to the extent of £150, thus leaving a net value of just about the amount of the value of half of Margaret's Vale, and he wishes to substitute his farm Zuurbron for the half share of Margaret's Vale in the ante-nuptial contract. It is obviously the fair and proper thing for him to do, and I think the Court should help him to effect this object, nor do I, as between the petitioner and the world at large, saving only the creditors, see that there can be any objection on the part of anybody to petitioner fulfilling his contract in this way. I think, therefore, that the Court should help him to place the farm of Zuurbron in the ante-nuptial contract as if it had been placed there originally, instead of half the farm Margaret's Vale, which it is not possible for him now to deal with. The Court will order that the substitution be made as prayed, saving, however, the rights of any of the creditors of the petitioner, who may be his creditors now and up to the time of the registration of this contract. After the registration of the contract, of course, the creditors must look after themselves. It will then become the farm of Mrs. Louw. An order will be granted substituting the farm Zuurbron for and instead of the half-share of Margaret's Vale, as a donation from petitioner to his wife prior to marriage, with all reservations in favour of any creditors up to the date of registration of the contract as amended.

*Ex parte* CELLIERS AND OTHERS.

Mr. Douglas Buchanan moved for the appointment of a *curator ad litem* to represent one J. S. Celliers in an action to have him declared unfit to manage his own affairs, and a curator appointed of his property.

Order granted appointing Basil Jones, of Robertson, as *curator ad litem* of the respondent, and J. P. Celliers as *curator bonis*, in the interim, summons to be returnable on the 11th June.

BATE AND CO. V. BRITISH STEAM LAUNDRY LTD.

Mr. Wallach moved for an order for the winding up of the respondent company, the removal of John B. Hobday from the office of voluntary liquidator, and the appointment of J. M. P. Muirhead as official liquidator, with the powers under the 149th section of the Companies Act, 1892. Petitioners said that they had a claim against the company for £88. They had no security for this claim. On the 14th February last the company resolved to go into voluntary liquidation, and appointed J. B. Hobday, accountant, St. George's-street, to be liquidator. The assets of the company had been sold by Hobday for £350. Hobday had in March last left for Durban, Natal, and had not since returned. Certain attachments had been made of the furniture in his office.

Rule nisi granted, calling upon the said company and the said Hobday to show cause why the voluntary liquidation of the company should not be annulled, and why (1) the said Hobday should not be removed from the office of liquidator; (2) the said company should not be wound up by this Court; and (3) Mr. J. M. P. Muirhead should not be appointed liquidator, and it was further ordered that the said J. M. P. Muirhead be the provisional liquidator, with power to collect all amounts due to the company.

*Postea* (May 29th).

Hopley, J. said that he had omitted to make any directions as to publication of the rule. There would, of course, be personal service on the voluntary liquidator, Hobday. The rule must also be published once in the "Cape Times."

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

DU PLESSIS V. MASTER, { 1907.  
SUPREME COURT. { May 29th.

This was an application for an order directing the Master to issue letters of administration confirming petitioner in her appointment as tutrix of the minor children by her marriage with the late A. C. Lombard.

Mr. Benjamin was for petitioner; the Master appeared in person.

Mr. Benjamin said that the question raised in this case was whether it was necessary for the Master to issue letters of administration confirming the petitioner in the appointment under the will as tutor of the children, or whether, as natural guardian, it was competent for her to act as tutrix. The Master, it appeared, considered that it was unnecessary to issue letters of administration, inasmuch as she would be natural guardian of the children. The minors were entitled to certain property from the estate of their grand-parents. Petitioner's first husband died on the 16th December, 1904, and on the 28th February, 1906, she entered into a second marriage. Counsel went on to say that the provisions under which Mrs. Du Plessis thought it was necessary that she should apply to the Court were embodied in sections 2 and 3 of Ordinance 105, 1833. He cited Voet 26, 4, 2, and 26, 4, 4.

The Master (in answer to the Court) said that, in case a woman re-married, she was not entitled to be tutrix. Petitioner had herself become a ward. In such cases a tutor should be appointed from the male relatives. The matter was raised with the Law Department about eleven years ago, but no decisions of the Court were available. The Law Department at that time mentioned Grotius, 1, 7, 11, and Van Leeuwen, 1, 16, 11. He added that when he wrote to the petitioner, he was not aware that she had entered into a second marriage.

Mr. Benjamin said he had hitherto understood that the Master's objection was not to the petitioner acting as tutrix, but simply to the issue of letters of administration. On the question of a woman's right to act as tutrix in the event of re-marriage, he cited Maasdorp's Law of Executorship and Guardianship (p. 92), *Greby v. Wiid* (3 Menzies, 73), *Van Rooren v. Werner* (9 S.C., 425), *Van der Linden*, 1, 5, 1, *Van der Keessel*, 122, *Grotius*, 1, 7, 11, *Schorer*, Note 33 (*Maasdorp's Trans.*, p. 384).

Hopley, J., suggested to counsel that in all the circumstances it might be desirable to withdraw the application, leaving it open to have

some person or Board that the Master approved appointed as tutor to the children, together with the applicant. He added that he did not wish to disturb what had been the practice of the Master's Office for a long time.

Mr. Benjamin acquiesced.

The Master (in answer to the Court) said that the course he would suggest would be that application should be made to the Master to convene a meeting of maternal relatives of the minors for the election of a tutor.

[Hopley, J.: Then you would join her with this tutor?]

The Master: Not necessarily. We could, if she likes, but it is not customary to do so. There would be no objection if a tutor dative is appointed, and he likes to take the responsibility. He would have to give security. Your lordship will observe that this is not property coming from the parents, but from the grand-parents of the minors, over which the mother would have no control except she were tutrix.

Mr. Benjamin said that he would advise applicant to adopt the course suggested by the Master.

[Hopley, J.: By consent, the matter will stand over, and then you can withdraw it entirely if you come to the arrangement which the Master thinks is the proper one, or you can mention it again if the lady persists.]

Mr. Benjamin: After the expression of opinion from the Master, I think the best course would be to adopt your lordship's suggestion. In case the matter is not mentioned again, I would ask your lordship to direct that the costs of this application come out of the minors' property.

Hopley, J.: I think this is a *bona fide* application, and it is in the interests of the minors that the point should be settled. If the matter is settled without again coming before the Court, costs may come out of the estate of the minors.

#### DU PISANI V. DIVISIONAL COUNCIL, WILLOWMORE, AND DIEDERICKS.

**Divisional Council Act (40 of 1889)—Rejection by Magistrate of duly nominated candidate.**

*A Magistrate as returning officer at a Divisional Council election has no power to reject a duly nominated candidate even if he has reason to believe him to be ineligible but must proceed as directed by Secs. 4, Subsec. (b) 56 and 71 of Act 40 of 1889.*

*A candidate need not resign any office of profit he may hold under the Crown before nomination but only before election.*

This was an application upon notice calling upon the Civil Commissioner of Willowmore and Jacobus Johannes Diedericks to show cause why the said Diedericks should not be declared to have been improperly elected or appointed a member of the Willowmore Divisional Council for the Rietfontein ward, and why the Civil Commissioner should not be directed to take proceedings to have a fresh election taken.

From the applicant's affidavit, it appeared that he held office as Field-cornet in the division of Willowmore, and was also in charge of a small post office. A vacancy had occurred in the Divisional Council for the Rietfontein ward. Nominations were called for, but none were forthcoming. Then the Civil Commissioner called for nominations a second time, and applicant and Mr. Diedericks were nominated before the day fixed. Applicant had determined to resign the offices in question so as to enable him to qualify for membership of the Council, and on the 18th January he went in to Willowmore for the purpose of resigning the offices. On his arrival, he found that the Council was sitting, that the Civil Commissioner had at that meeting declared Mr. Diedericks duly elected, and that the latter had taken his seat. Deponent had since ascertained that the Civil Commissioner had endorsed the following note on his nomination paper: "Person nominated is a Field-cornet and postmaster; ineligible under section 30, Act 40, 1889." Applicant said that he was aggrieved by the Civil Commissioner's action, and that it was his intention to remove his disqualification and stand as candidate if again nominated on a fresh election being ordered.

An affidavit by the Civil Commissioner was also read, in which he explained the reasons of his action, and said that he acted conscientiously under the belief that he was correctly interpreting section 30 of Act 40, 1889.

Mr. Upington for the applicant. No appearance for respondents.

Mr. Upington submitted that the Civil Commissioner had gone wholly wrong in the course he had pursued on two grounds, viz.: (1) That the applicant was not disqualified for nomination by the fact that he held the two offices, and (2), even if he were ineligible, the C.C. had not followed the procedure laid down in the Act. Counsel quoted sections 28, 29, 30, 34 (b), and 35 of the Divisional Councils Act (No. 40, 1889), and submitted that, so long as a candidate resigned his place or office of profit



under the Crown before he was elected, or before he became a Councillor, he was entitled to be nominated whether he held that office or not at the time of nomination. Furthermore, the C.C. had no power, without any procedure whatever, to disqualify a candidate. He should have taken the proceedings set out in sections 56 and 71. A fresh election should, counsel submitted, be ordered.

Hopley, J.: This is an application on notice to the Civil Commissioner of Willowmore and to Mr. Diedericks, who appears to be using and exercising the rights and duties of a Divisional Councillor there at present, to show cause why his election should not be declared to have been improperly made, and why it should not be set aside, and also to show cause why the respondents should not pay costs of this application. It would appear that the present applicant and Mr. Diedericks were, after an abortive call for nominations, on a second call for nominations for the Divisional Council, duly and properly nominated as candidates for the Divisional Council for their ward. At that time Mr. Du Pisani was a Field-cornet, which is an office under the Government, and was also a postmaster of a small country office, having a small emolument in the said district. He was, therefore, in terms of the Act, incapable of being a Councillor or sitting as a Councillor so long as he held these offices. But there is nothing in the Act that I know of which says that anybody, so long as he holds such offices, is incapable of being nominated for office as a Divisional Councillor. Mr. Du Pisani says it was his intention to qualify himself by resigning the two offices that he held in time for the election, and he goes further, and says that he was actually on his way—in fact that he did go—into Willowmore to resign these offices so as to put himself on the right side of the provisions of the law for the purpose of election for his ward. On his arrival, however, he found that the Magistrate had peremptorily struck off his name from the nominations, and, moreover, had declared his rival, Mr. Diedericks, duly elected, and he found that Mr. Diedericks was sitting and attending the meeting as a member of the Council, and he says that Mr. Diedericks has ever since been exercising the functions of a Councillor. In taking this course the Magistrate was wrong. Section 34 (sub-section b) of Act 40 of 1889, says that "although the Civil Commissioner may deem a candidate to be ineligible, he shall nevertheless receive the said nomination, and make a record in writing of such reception, and his reasons for deeming the candidate to be ineligible." That is all he can do. Now, if he had done that in this case, his reason would have been that Mr. Du Pisani was hold-

ing offices under the Crown. That reason would, before the date of the election, have vanished, because Mr. Du Pisani would have resigned these offices, and he would then not have been ineligible as a Councillor. The Magistrate, however, by his precipitate action, in striking him off and declaring his rival elected, put it out of his power to qualify himself, and consequently he is left no course but to petition this Court to have the proceedings set aside. The 71st section sets forth what should have been done if Mr. Du Pisani had not resigned his offices in time; if he had not resigned and had been ineligible under the Act, and if in good time objection had been taken, then certain procedure would have had to be taken as set out in the Act, but the whole of that procedure has been rendered nugatory by the action of the Magistrate. It follows that the relief asked for must be granted in the present case, so as to allow the Divisional Council Act as it stands to be worked. An order will be made, declaring the election of Mr. Diedericks to have been improper, and setting aside that election. As to costs, it seems that the Magistrate, though mistaken, was acting *bona fide*, and the person to suffer in such a case is the candidate, Mr. Diedericks, who was improperly placed in the position in which he has been placed, and for whose removal it has been necessary to come to this Court. The respondent, Diedericks, will, therefore, be ordered to pay the costs.

#### GENERAL MOTIONS.

*Ex parte* INSOLVENT ) 1907.  
ESTATE WARD AND CO. ) May 29th.

Mr. Lawrence moved, on the petition of certain creditors, for the appointment of A. T. Hennessy as provisional trustee of the insolvent estate of Thomas Henry Ward, trading in Cape Town, as Henry Ward and Co.

Order granted as prayed.

*Ex parte* LIQUIDATORS REYNOLDS' VEHICLE AND HARNESS FACTORY, LTD.

Mr. Russell moved for an order authorising the petitioners to enter into a compromise with Tolston Murray Rawbone, one of the contributories. Notice of the application had lain for inspection at the office of the liquidators and publication had been made as directed. No objection had been raised.

Ordered that the compromise be sanctioned.

*Ex parte* PINNOY.

Mr. Watermeyer moved for leave to petitioner to sue by edictal citation one John Anderson Dristig, or Distrig, for



provisional sentence on a mortgage bond for £110, hypothecating certain property in the township of Molteno. Respondent had been last heard of in Johannesburg in 1898. Interest on the bond had not been paid since 1892.

Leave to sue by edictal citation granted, citation returnable on the 11th July. Personal service, failing which, one publication in the "Times of the Frontier" and the "Government Gazette."

#### *Ex parte* THEUNIS.

Mr. W. Porter Buchanan moved, or the petition of the executor and executrix, for leave to raise a loan of £50 upon the security of landed property in Caledon-street, Cape Town, to enable petitioners to take cession of a certain mortgage bond of which deceased had become surety and joint principal debtor.

Hopley, J.: It is clear that this estate is liable for the amount of the bond, and that there is not enough property, besides the Caledon-street property, which is specially bequeathed to the minor Magdalena Sarah Perus, to meet the amount of the bond, and the estate will have to find funds out of this specially bequeathed property. It is true that the estate is really only surety for a man called Neil Perus, but the bondholder prefers to go against the executors of the estate for his money, rather than against Perus, the co-principal debtor, leaving the executors to recover from Perus after having paid the bondholder. There seems to be no way of protecting the estate, or keeping the minor's property free from this charge, which, it is hoped, will be a temporary advance, and it seems, therefore, in the best interests of everybody, to grant an order as recommended by the Master. It is, therefore, ordered that the executors be allowed to raise £60, which sum shall be handed to the Master, and disbursed as may seem to him necessary for the purposes of the estate.

#### *Ex parte* MYLES AND WIFE.

Mr. Benjamin moved for leave to petitioner to register an ante-nuptial contract, excluding community of property. The parties were married in Cape Town on the 19th November, 1906. The first petitioner had been in the Colony since 1899, and the second petitioner arrived here from England a few days before the marriage. They had been in ignorance as to the state of the law. Counsel cited *In re Houghton* (15 S.C., 8), *Ingall's case* (20 S.C., 323), and *Fricker's case* (2 C.T.R., 312).

Hopley, J.: It appears that the Court has granted similar applications on similar lines, previously, and we cannot distinguish the present application from *Houghton's case* (15 S.C., 8). *Ingall's*

*case* (20, S.C., 323) also seems to be very much on the same lines as the present case. Here the parties expressly state that they never intended to marry in community of property, and the intention was, in fact, that they should be married as if by ante-nuptial contract, in this country, excluding community of property and the marital power. Therefore, in accordance with previous decisions, it is ordered that a notarial contract in terms of annexure "a" to the petition be drawn, and that it be registered, saving all rights of creditors of either of the parties prior to the date of such registration.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

REHABILITATIONS. { 1907.  
June 1st.

Mr. Wallach applied, under Act 38, 1884, for the rehabilitation of Isaac Cohen.

Granted.

#### *Ex parte* WORDON AND PEGRAM, LTD.

Mr. P. S. T. Jones moved for an order approving of a certain minute adopted by the petitioning company in the following terms: "That the capital of Wordon and Pegram, Ltd., henceforth is £20,000, divided into 20,000 shares of £1 each, instead of the original capital of £60,000 divided into 60,000 shares of £1. At the time of the registration of this minute the sum of £1 shall be deemed to have been paid upon each of the said 20,000 shares." Petitioners stated that on the 14th May last the Court, on petition of the company, made an order confirming reduction of the capital to 20,000 shares of £1 each. Thereafter the said order, together with the minute of meeting of the 8th May, was tendered to the Registrar of Deeds for registration, when it was pointed out that a minute approved by this Court, in terms of section 41 of the Companies Act, No. 25, 1892, was required. The aforesaid petition contained the necessary information required to be inserted in the minute referred to in section 41 of the Companies Act, and petitioners caused to be supplied to the Registrar of Deeds a certified copy of the said petition, together with a certificate under the hand and signature of the managing director, setting out that

the 20,000 shares of £1 each in the reduced capital were fully paid up. Upon such information being supplied, the Registrar of Deeds had granted a certificate under section 41, in terms of copy annexed, marked "c," from which it would be observed that the following words had been deleted: "And a minute approved by the said Court, and containing the particulars specified in the above section." For all practical purposes the said certificate of the Registrar might be sufficient, but petitioners desired to fully comply with the provisions of section 41, and to obtain the approval of the Court of a minute to be filed with the Registrar of Deeds, and annexed to and made part of the memorandum of association.

Order granted as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

#### APPEAL CASES.

REX V. PHILLIPS. { 1907.  
June 3rd.

Transkeian liquor proclamation  
—Native—Permit—Glass.

*A Transkeian proclamation enacted that no intoxicating liquor shall be supplied to a prohibited person unless he should produce a permit signed by a Magistrate authorizing the bearer of such permit to obtain such liquor and specifying the quantity and description of such liquor. A native chief, being a prohibited person, obtained a permit from a Resident Magistrate to purchase a glass of brandy and purchased from the appellant a half pint of brandy in addition to a small glass-full, described by him as a mouth-ful and a half. The appellant having been convicted of a contravention of the proclamation;*

*Held on appeal, that inasmuch as the quantity supplied was not more than could be contained in a good sized glass the proof of such contravention was insufficient.*

This was an appeal upon notice to the Attorney-General against a decision of the Court of the Resident Magistrate of Mount Fletcher. The appellant (James Henry Wildemere Phillips) was charged on the 30th April with contravening the Proclamation 104 of 1903 and section 30 of Proclamation 2 of 1907, being an amendment of the former. He was sentenced to pay £50, or undergo a term of imprisonment for two months, with hard labour, all liquor in the possession of the accused to be forfeited, with no renewal of the licence for a period of five years.

The appeal was brought on the grounds that the decision was not supported by the evidence, and was contrary to law. The section under which the accused was charged reads as follows: "No intoxicating liquor shall be sold, given, or supplied or delivered by the holders of any such licence, or by any other person, to any prohibited persons as hereinafter defined, unless he shall produce a permit signed in duplicate by a magistrate, authorising the bearer of the permit to obtain such intoxicating liquor, and specifying the quantity and description of such intoxicating liquor." For the first offence, the penalty was a fine not exceeding £500, or in default, six months' imprisonment, and for a second or subsequent offence, the offender was liable to imprisonment, with hard labour, for a period of not less than one month and not exceeding six months. The charge was that James Henry Wildemere Phillips, European, was guilty of contravening the Proclamation, in that, about April 23, 1907, near Mount Fletcher, the accused, being a licence-holder for the sale of intoxicating liquor, supplied, or caused to be supplied, through his barman in his employ, certain intoxicating liquor—half a pint of brandy—to a prohibited person, a native named Moiketsi, who did not produce a permit signed by a magistrate authorising him to obtain the liquor. The attorney for the defence in the Court below put in certain preliminary objections, which, however, were overruled. The accused annexed a permit given to the native to obtain one glass of F.C. brandy, but it did not specify the quantity, and the accused, it was contended, was not responsible for the omission. The appeal on the merits were two-fold: (1) That there never was a completed sale, and (2) that if there was, the terms of the permit were sufficiently wide to cover the quantity of liquor that was actually sold,

Mr. Upington was for the appellant, and Mr. Howel Jones appeared for the Crown.

[De Villiers, C.J.: What is meant by a glass?]

Mr. Upington: That is defined by the Crown witnesses, including the Magistrate, as being a mouthful and a half.

[De Villiers, C.J.: It depends upon the size of the mouth, then.]

That is what one feels, my lord. How can one define what the size of a glass is? I think it is necessary to state the quantity.

[De Villiers, C.J.: The evidence shows that he got a glass.]

A small one, with which he was dissatisfied.

[De Villiers, C.J.: Then he got half a pint, and you say that the word glass is too vague. Would a tumbler contain more than he ought to have got or less?]

That I really could not say.

[De Villiers, C.J.: The half pint would not be more than a tumbler full.]

I should say a good-sized tumbler would contain more. It really is a somewhat difficult thing to say where so vague a description is given in a permit that there has been a contravention.

[De Villiers, C.J.: What did the Magistrate give him that permit for? Was he ill?]

No, it will be shown on the record there are various permits annexed. He has had a quantity as much as a bottle and a half, and just a short time before this.

[De Villiers, C.J.: The penalty is a terrible one.]

Yes, a most severe one, and therefore I would submit in order to convict a person under this Act, it is necessary that the Magistrate should give some definite measure, and then the licence holder could be held to that. It simply states one glass of F.C. brandy, and brandy is not necessarily to be taken in a wine-glass.

[De Villiers, C.J.: Supposing he got a large tumbler of brandy, it would be more than he had?]

Yes, it would probably be a pint. This is only half such a quantity, and that is, as I say, one of the substantial grounds of appeal. Of course, one has to direct the attention of the Court to the fact that a contravention of this section is absolutely ruin to the man. There is also a certain amount of dispute as to whether the transaction was ever concluded. The liquor in the bottle did not pass into the possession of Moiketsi.

[De Villiers, C.J.: He had paid for it.]

Yes, according to him, he had, but the barman said Moiketsi was fumbling with his pocket. Where there is a criminal offence involving such a severe penalty there must be a

clear and substantial infringement of the penal statute. The object of the penal statute, I take it, would be that the man could not get the liquor. In order to render a person liable permits should be issued setting out the quantity by some known method. The size of the mouth and the capacity a man has for swallowing liquor is far too vague. Persons have been known to drink a glass of beer without taking a breath. Counsel, in conclusion, submitted that the Legislature intended that the Magistrates should make use of some well-known method of measurement, so that a person should not unwittingly contravene the section. Nothing would be simpler than to specify the quantity.

Mr. Jones said the point had entirely been raised by the agent in the case and not by the defendant or his barman. It was never suggested by the barman or the accused himself that Moiketsi did not get everything he was entitled to. He had had a permit for a glass of liquor, and he had that, and the sale of the bottle was a distinct transaction. It was well known by the Magistrates what a glass of liquor meant. If the accused was in doubt as to the quantity specified, he should have refused the glass in the first instance. He put himself in the position of a person who knew exactly what was meant.

[De Villiers, C.J.: What do you say is a glass?]

For brandy, I should have thought a liqueur glass would be a glass.

[De Villiers, C.J.: The liqueur glass would be less than a mouthful and a half.]

They probably mean a wine glass.

[De Villiers, C.J.: Why not a liqueur glass?]

I take it there is a common meaning given to the term glass for brandy. In these permits I take it everyone knows what is meant. A glass probably about the size of an ordinary sherry glass.

[De Villiers, C.J.: Not a tumbler?]

I should not think so. I take it if Moiketsi had got less than he was entitled to he would have refused it.

[De Villiers, C.J.: Is the native a chief?]

Yes, I believe so.

De Villiers, C.J.: The accused was found guilty of a contravention of the Proclamation of 1903, and he was sentenced to pay £50, or, failing payment, two months with hard labour, and further, on this conviction, *ipso facto*, all liquor in the possession of the accused was declared forfeited and also his liquor licence, and no renewal allowed to be granted in respect of these premises for a period of five years. What actually took place was this: The man Moiketsi, who seems to be a native chief, had received from Mr. Brownlee, the Magistrate, a permit to purchase a glass of brandy. That permit was given under the 30th section of the Proclama-

tion, which says that "no intoxicating liquor shall be sold, given, or supplied, or delivered by the holder of any such licence, or by any other person to any prohibited persons as hereinafter defined, unless he shall produce a permit signed in duplicate by a Magistrate, authorising the bearer of the permit to obtain such intoxicating liquor, and specifying the quantity and description of such intoxicating liquor." The quantity filled in the permit here was a glass. The chief first got apparently a small glass, which he says was only a mouthful and a half, and then he got in addition to that half a pint of brandy in a bottle. And this was held to be a contravention of the Act, for which a severe penalty is specified. I cannot agree with the counsel for the appellant that there had not been in the present case a delivery of the brandy to Moitekisi. The Magistrate was justified in coming to the conclusion upon the evidence that Moitekisi had paid the money and that the barman had placed the half-pint of brandy before him, so as to enable him to take it away if he chose. To all intents and purposes, in my opinion, there had been a delivery, and if the appeal had been entirely upon this point I should certainly dismiss it. But the further question still remains whether there is clear proof in the present case that more liquor was supplied to Moitekisi than he was entitled to receive under this permit. The counsel for the Crown has mentioned the case of a bottle. In the case of a bottle he says it would be perfectly clear what was meant. I am inclined to believe that the term bottle has a fairly definite meaning, and no difficulty would have arisen in the present case if a bottle had been authorised to be purchased. But a glass of brandy was authorised, and it is impossible to know what size of glass was intended to be covered by the permit. The Magistrate was bound under the proclamation to specify the quantity, but he specified the quantity in such vague terms that it would have been quite impossible for the appellant to know the precise quantity which he was justified in giving. A glass may mean anything from a liqueur glass to a large beer glass or a soda water glass. It appears that this chief had on several previous occasions received permits from the Magistrate for the purchase of brandy, and on some occasions he had even received a permit to purchase a bottle and a half of brandy. The accused may have thought that in the case of this man he would be justified in placing the largest possible construction upon the word glass. The quantity sold was not large; it was a small glass and half a pint. Now, it would not take such a very large glass to hold all the liquor that would

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be contained in this small glass, and in this half-pint. The proclamation is a very stringent one, the penalties are very severe, and a court of law should be perfectly satisfied that there has been a distinct contravention of the Act before being justified in finding a person guilty. It is the Magistrate's own fault if he gave a permit which is so exceedingly vague. Under all the circumstances, I am of opinion that there is not sufficient proof in the present case of a contravention of the proclamation. Consequently the appeal will be allowed, and the conviction quashed.

STADLER V. SCHAIFF. { 1907.  
{ June 8rd.

### Pledge — Delivery — Execution.

*A writ of execution having been issued against a judgment debtor, the appellant paid the amount due and the debtor executed a pledge in his favour of a stack of unthreshed wheat. Thereafter appellant threshed out the wheat and removed it to his own adjoining land, leaving some on the land of the debtor.*

*Held, that, in a subsequent execution against the same debtor, the messenger was not entitled to seize, as part of the debtor's property, the threshed wheat removed to the appellant's land.*

This was an appeal from a decision of the Court of the Resident Magistrate of Gordonia, held at Keimoes. It appeared that the appellant had claimed certain 40½ bags of wheat attached by the Messenger of the Resident Magistrate's Court in satisfaction of a judgment in favour of the respondent against one Nicolas M. Smit, sen. The Magistrate declared the wheat executable, and ordered the claimant to forthwith deliver it or pay the value thereof at the rate of £1 7s. 6d. per bag.

Mr. De Villiers for the appellant. Dr. Greer for the respondent.

Counsel said the Magistrate had devoted almost the whole of his reasons to knocking down a case which was never set up by the appellant. The Magistrate was at great pains to show that this stack of corn was not the property of Smit (jun.). Now that was not contended by the appellant, who had never set up that case. He stated most clearly in his evidence that the corn-stack belonged to Smit (sen.), the execution debtor. Counsel submitted that



his client was at least entitled to the thirty-four bags. On the question of the landlord's hypothec, counsel referred to Justice Maasdorp on *Institutes of Cape Law* (vol. 2, p. 265), and *In re Stillwell* (1, Menzies, p. 537).

Dr. Greer said there was no such delivery in this case as to render the pledge effective. The possession to be effective must have been continuous, and it was clear that the wheat was left in the possession of Smit (sen.). As to the point raised by his learned friend of the landlord's lien being effective, even though the property was attached in execution of a debt, the position of the claimant was that the whole of the stack belonged to Smit (sen.).

De Villiers, C.J.: It would appear in this case that there were two executions against the judgment debtor. On the occasion of the first execution, the present claimant paid the money, the amount of the execution debt, and the execution debtor then executed a pledge in favour of the claimant for the amount of the money so advanced to him, the property pledged being a stack of unthreshed wheat. The claimant thereafter proceeded to thresh the wheat, and when he had nearly finished the threshing, there was a second execution, and the question now is whether any portion of the threshed wheat belongs to the claimant or whether it belongs to the debtor. The Magistrate admits that on the occasion of the second execution, a certain proportion of the threshed wheat was removed some little distance from the bulk of the stack, and that it was upon land belonging to the claimant. Now, in my opinion, it is perfectly clear that there had been delivery to the claimant as a pledge of the 34 bags of wheat, which he had threshed and placed upon his own land. As to the remainder, it is not perfectly clear, and I do not think the Court need now enter into the question as to the right of the claimant as the lessor of this property. The whole of that portion of the evidence is exceedingly doubtful. The lessor himself was not the owner, and the evidence upon that point is very vague, and, therefore, I do not wish to base my judgment on that. I am satisfied as to the 34 bags of wheat that there had been delivery to the plaintiff. The result, therefore, is that the appeal must be allowed, with costs in this Court and the Court below, and judgment entered as follows: It is declared that 34 out of the 40½ bags wheat removed by the claimant are the property of the claimant, and that only the 6½ remaining bags of wheat are executable.

*Ex parte VOS.*

Parliamentary voter—Registering officer—Claim to be registered as voter—Provisional list.

*The Registering officer in P. Fieldcornetcy omitted the name of the petitioner from the list of voters framed by him although such name appeared on the then existing list and the petitioner omitted to lodge with the Registering Officer his claim to have his name inserted within the time required by Act 9 of 1892.*

*Held that, whatever power the Revising Officer might thereafter have to rectify the omission, the Supreme Court could not compel the Registering Officer to insert the name.*

This was an application as a matter of urgency, for an order authorising the Registering Officer for Prieska division, Frans Willem Steenekamp Duncker, to place the petitioner's name on the Voters' Roll for 1907, and authorising the Revising Officer, James Harris Veale, to allow such addition with costs against the Registering Officer.

The petition of Henry de Luke Vos set out that petitioner was a justice of the peace for the division of Prieska, a member of the School Board for the Fiscal Division of Prieska, and an executive member of the Chamber of Commerce of Prieska. When the Registering Officer for Fieldcornetcy No. 1 of the division of Prieska was compiling the list of qualified voters for the division of Prieska, petitioner, on four different occasions, approached him, and instructed him not to omit his name from the roll, to which he replied that petitioner need not worry as it would be all right. On one occasion, petitioner offered to send him a written application to have his name put on the voters' roll, to which he replied, that it was unnecessary, as he based his list on the old roll. On the 27th April last, petitioner was subpoenaed as a witness in a case to be heard before the Supreme Court. On the 3rd May, 1907, he left for Cape Town, and only returned on the 14th May, and he was, therefore, unable to ascertain whether his name was on the voters' roll or not before the time within which applications for enrolment would be entertained was closed. Petitioner was the owner of three properties, and a tenant of two further properties, all of which were situated in the village of Prieska. Petitioner was registered in the voters' roll for 1905, No. 124, as qualified to vote in the election of members of Parliament, as would appear from the voters' roll annexed. Petitioner's status had not changed since the compiling of the roll for 1905, and the only reason petitioner could give for the omission of



his name from the present roll, was wilful and gross negligence on the part of Frans Willem Steenekamp Duncker, the Registering Officer, and petitioner craved leave to refer to sections 4, 5, 7, 9, and 12, as instructions to field-cornets, or other persons, who might be appointed registering officers under the provisions of Act 14, of 1887, Act 9 of 1892, Act 19 of 1893, and Act 48 of 1899, for the purpose of the registration of voters in the several electoral divisions of the Colony. Petitioner's name did not appear on the list of omissions, as would appear from the list annexed, and he prayed leave to refer to terms of section 12, instructions to Registering Officers. Petitioner had applied to the Revising Officer to allow his name to be placed on the voters' roll, but the Revising Officer stated he had no power to do so.

Mr. Wallach moved.

Counsel said that by section 7 of the Act 48 of 1899 it was the duty of the Registering Officer to insert all names of voters who were on the old register, with the exception of those who were dead or otherwise disqualified, and according to the old register Mr. Vos appeared as a voter, but his name did not appear on the new provisional roll, and by section 9 it provided: "That the Registering Officer shall frame separate list of the persons referred to in section 7 of the Act, and shall write opposite the name of such person his reasons for excluding his name from the said provisional list." The petitioner's name did not appear in this list either. The petitioner interviewed the Registering Officer and also the Civil Commissioner, who stated that he had no power to add petitioner's name to the final list. The Registering Officer led him to believe that his name would be on the voters' list. The only course open to the petitioner was to come to the Court and ask for an order directing the Registering Officer either to place his name on the provisional list or to make an order on Mr. Veale to allow Mr. Vos to appear and show cause why his name should not be placed on the final list on the 12th inst. Under the 20th section of the Act the Registering Officer was liable to a penalty for wilful or gross negligence. Counsel would like an expression from the Court as to whether the Magistrate could add the petitioner's name to the final list.

*Cur. Adr. Vult.*

*Postea* (June 5th).

De Villiers, C.J.: This is an application by the petitioner, who claims to be entitled to have his name placed on the voters' roll for the year 1907, and he moves for an order instructing the Registering Officer, Duncker, to place his name on the voters' roll for 1907, and authorising the revising officer to

allow such addition, with costs, against Duncker the Registering Officer. The ground of the application is that the name of the petitioner was upon the list of voters framed for the year 1905, and under Act 48 of 1899, section 7, it was undoubtedly the duty of the Registering Officer to insert in the list the names of all persons on the existing register of voters within his field-cornetcy except the names of such persons who, on the day upon which the registration of voters shall commence, are dead, or do not reside or earn salary or wages in the said field-cornetcy, or do not possess the qualification required by law, or are subject to any disqualification. Then, by another section—the 9th—the Registering Officer is directed to frame a separate alphabetical list of the persons referred to in the sub-section that I have just alluded to, and to write opposite the name of each such person his reasons for excluding such person from the provisional list, and to post and affix such list at the same time, and place as the provisional list is required by law to be posted and affixed. It appears in the present case that the Registering Officer did frame such separate alphabetical list of persons whose names had been omitted, but the name of the petitioner does not appear there, from which I gather that it must have been a clerical omission on the part of the Registering Officer in not mentioning the name of the petitioner. And this view is confirmed by a telegram which has been placed in my hands. I directed inquiries to be made as to what was the answer of the Registering Officer to the petitioner as to the reason of the exclusion. In the telegram Duncker says, "Clerical error, forgetting Vos's name." Now, the question is whether this is a case in which the Court would be justified in giving a direction to amend this error. The Act gives no authority to the Court to make any amendment of this kind, and the Act 9 of 1892 expressly lays down what steps should be taken by a person whose name does not appear on the list framed by the Registering Officer. It is his duty to send in his claim to the Registering Officer. Apparently petitioner has not done that; he has not sent in the claim in the time allowed by law. His reason for not sending in his claim is that he understood from the Registering Officer that his name would be included, and that he left for Cape Town as a witness in a case, and he assumed that his name would appear on the list; but when he returned he found his name was not there, and that it was then too late for him to send in his claim. Now, either the petitioner is entitled to send in his claim, in which case he may still do so, or he is too late, in which case, if the Registering Officer has not the power to insert his name, this Court has not the power. The Court has no larger powers than those conferred upon

it by the Act, and it is certainly the policy of the Act to require that any person whose name is omitted should send in his claim in time. The absence of the petitioner from Prieska is not a sufficient excuse. My opinion is that if once the Court were to allow such an amendment in one case it would soon be overwhelmed with applications from persons who neglected to do their duty. It continually happens that people do not send in their claims in time, through negligence or otherwise, and I do not think the Act contemplated that the Court should have power to relieve such persons who thus omit to do what the Act contemplates that they should do. It is not in my opinion a sufficient excuse for petitioner that he happened to be in town, because he ought to have appointed someone in Prieska to attend to the matter. In the petition, the petitioner suggests that the Registering Officer was influenced by malicious motives in not registering his name. Well, that may be so, or it may not be so. If there was malice in the matter, probably the petitioner would have his action against the Registering Officer for maliciously omitting his name. I express no opinion on that. But that does not relieve the petitioner from his duty of seeing whether his name is upon the list, and of filing his claim within the proper time. It is by no means clear to me that the time has elapsed. If the time has not elapsed yet, petitioner can send in his claim; but if the time has elapsed, I am afraid this Court has no power to relieve the petitioner. For these reasons, I am of opinion that there should be no order upon the petition.

Mr. Wallach (for petitioner) asked if the Court would give any direction to the Civil Commissioner, as the revising officer, with regard to the placing of the name on the final list. Counsel referred to section 18.

De Villiers, C.J., said it must be clearly understood that his decision was not to the effect that the Civil Commissioner had no such power under the Act when it came before him. That was a totally distinct matter. On the 12th of June, the matter would come before the Civil Commissioner, and it was entirely open for him to decide.

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HARMENING V. GAFNEY. { 1907.  
June 3rd.

This was an appeal from a judgment of the Resident Magistrate of Mataliele in an action brought against Carl

Harmening by Gerrard Stewart Gafney to recover two sums amounting to £20 13s. 6d. for grazing of cattle, and mealies and forage supplied.

From the record it appeared that plaintiff had had certain cattle belonging to defendant to graze at the farm Springs. He claimed £16 11s. for grazing, at the rate of 3s. per head per month for large stock and 2s. for calves, which he said was the rate agreed upon. He also claimed £4 2s. 6d. for mealies and forage supplied to the cattle. Defendant, in his plea, said that the rate agreed upon was 2s. per head for large stock and 1s. for calves, and that the winter feeding was to include mealie stalks and turnips. He said he did not agree to pay anything extra for mealies and forage supplied, nor was there any allegation in the summons that he did so. He also said that plaintiff neglected to feed the cattle as agreed, and that, in consequence of his negligence, nine head died. Defendant claimed in reconvention £90, value of the cattle that died, and £1 paid on account by defendant to plaintiff. Plaintiff, in his plea in reconvention joined issue on the rate of payment, and admitted that winter feed included mealie stalks and turnips. He said that no price was agreed upon for mealies and forage, but these were supplied at defendant's special request. He denied the allegations of negligence, and denied liability for damages. It had, he said, been expressly stipulated that he (plaintiff) should take no risk with regard to any of the cattle. He admitted having borrowed £1 from defendant, for which he was liable.

The Magistrate, in his reasons for judgment, said that the weight of evidence seemed to be in favour of 2s. per head. He allowed for grazing £11 3s. 11d. For mealies supplied he allowed £2 8s., and for forage 15s., and gave judgment for a total sum of £14 11s. 11d., with costs. The Magistrate added that he considered that plaintiff took reasonable care of the cattle, and gave them all reasonable attention. He failed to see how plaintiff could be held liable for any loss through death. All he undertook was to give them grazing and feeding. He stipulated, further, that he would not be liable for any animal that died directly or indirectly through poverty. It had been shown that the cattle were in a half-dying condition before they went to plaintiff's farm. Absolution would be granted on the claim in reconvention.

Mr. M. Bisset was for appellant; Mr. Benjamin was for respondent.

Mr. Bisset submitted that the Magistrate should have made a deduction of 7s. 9d. on account of calves instead of allowing 2s. per head for the whole of the stock. A sum of £1, which was admittedly due to defendant, should have been allowed as a credit. Although this

item was mentioned on the pleadings, the Magistrate made no reference to it. No amount should have been allowed for the extra feeding claimed, for inasmuch as (a) no proof was given of the amount of mealies and forage supplied, and (b) it was not alleged that any agreement was made as to extra payment. Plaintiff admitted that on the 15th October his winter food was exhausted, and he could not charge for winter food after it had been exhausted, and also for the extra food. Counsel submitted that on the claim in reconvention his client was entitled to succeed. There was evidence enough, on plaintiff's own admissions, to establish gross negligence on his part, resulting in the death of nine head of cattle.

Mr. Benjamin (in answer to the Court) said that plaintiff had all along admitted his liability for the £1 which he borrowed from defendant.

Maasdorp, J.: I do not think in this case any reasonable ground has been advanced for bringing this case in appeal, or for the Court interfering with the finding of the Magistrate. It is one consolation to think that the defendant appears to be a man who is well able to take care of himself, and that he has not merely blindly incurred the costs of appeal through the advice of his legal advisers. The only real point upon which there is any direct conflict of evidence was decided by the Magistrate in favour of the defendant. It appears that the plaintiff in charging for the grazing of the cattle claimed 3s. a head per month, whereas the defendant alleged that for the larger beasts only 2s. was due. The Magistrate upon that point found that the defendant was correct, and refused the plaintiff's claim. It seems that an agreement was entered into between the plaintiff and defendant under which the plaintiff agreed to receive upon his farm a certain number of the defendant's cattle for grazing, and it was part of the agreement that the defendant's cattle should get winter feeding. That seemed to amount to extra feeding being given to the cattle of mealie stalks, turnips, and hay. The substance of this agreement clearly is that the cattle were to be allowed grazing on the farm, and were also to receive such feeding as could be obtained from the plaintiff's own land, that mealie stalks, turnips, and hay from the plaintiff's own land should, as far as available, be supplied to the cattle. Plaintiff appears on the finding of the Magistrate to have carried out this agreement in all respects, but it seems that, after the cattle had been on the place for some little while, it was found that the grazing was getting rather scanty, and that what is called winter feeding was beginning to fail. It is said this was directly brought to the notice of the defendant, and he was told that it might be advisable to remove his cattle. He

applied that it would be no use taking that step, because there was no other place to which he could take his cattle. It seems that in all the neighbourhood there the country was in such a state that the defendant could not improve his position by removing his cattle from the plaintiff's land, and that seems, to my mind, to prove that the defendant's cattle got everything off the plaintiff's land that they were entitled to, or that the lands could at that time furnish. At the same time the plaintiff inquired from defendant whether it would not be as well that he should supply the cattle with some mealies and forage, and the defendant consented to this. This clearly amounts to an agreement between the plaintiff and defendant that something more should be done for the cattle than came within the terms of the original agreement, and undoubtedly the parties intended that this further supply of food to the cattle should be paid for by the defendant. The Magistrate has found that that is the case, and he has allowed the plaintiff a certain sum in respect of the mealies and forage upon which he fed the cattle. Here, again, he somewhat reduces the plaintiff's claim. It is said that there is no positive evidence as to the correct amount of forage and mealies supplied, but it seems to me that it would have been difficult, when feeding apparently the cattle of the plaintiff and defendant jointly, to go within a narrow margin of exactly what was supplied to the defendant's cattle. A reasonable estimate has been made, and the Magistrate has accepted it, and I see no reason for differing with the Magistrate on his finding in that respect. The Magistrate, as a result, allowed the plaintiff £14 11s. 11d. in respect of his claim, which was £20 13s. 6d. There is a claim in reconvention by defendant for losses suffered by him through the death of some of his cattle upon plaintiff's farm. Under all the circumstances which have been narrated in this case, it is quite reasonable to expect that without any default on plaintiff's part some of the cattle might die. The country was in such a state and the poverty of the cattle was so great that some losses might naturally be expected without any fault on plaintiff's part. The Magistrate has found pointedly that there was no negligence or breach of contract on the part of plaintiff. The plaintiff himself during that period lost a number of cattle under similar circumstances to those under which defendant's cattle died. The defendant, as I have already said, was fully aware of the poor condition of the feeding on plaintiff's land after his cattle had been there some little while, and he might have removed them. I do not advance that as a ground upon which plaintiff should not be held liable for negligence, if, after that, there was negligence, but I advance it as a reason for saying that under all

the circumstances the plaintiff had done his best, because the defendant, though he might have done so, could find no better way of obtaining grazing for his cattle. Under all the circumstances of this case, I come to the conclusion that no objection to the Magistrate's finding on the claim in convention or on the claim in reconvention has been established. It has been pointed out that there was a sum of £1, which was admittedly due by plaintiff to defendant, and the Magistrate made no allowance for it. I am quite sure if the Magistrate's attention had been called to it the matter would have been properly dealt with, and it has also been said, and I expect it would have been the case, that if respondent's attention had been called to it he would have settled that item with the defendant without coming into this Court. But, under the circumstances, the £1 which is admitted to be due by plaintiff to defendant must now be allowed to him, but the finding on that item cannot form any ground for allowing the appellant costs in this case. The judgment will be varied by allowing defendant £1 on his claim in reconvention, the judgment in other respects to stand, and appellant to pay costs in appeal.

#### DAWOOD V. MAHOMED.

This was an appeal from a judgment of the Resident Magistrate of Wynberg in an interpleader action brought against appellant by the respondent to have certain movables declared executable.

It appeared that the respondent sued under the Small Debts Recovery Act, 1905, for £18 15s., against Ally Dawood, of West London, and one Machodam, also of West London. The summons was served upon Machodam and also upon Ally Dawood (the present appellant) in his absence. Machodam sent back the summons and no appearance was entered in the Magistrate's Court. The messenger of the Court subsequently went to West London and attached certain goods in the shop of Ally Dawood, in Church-street, which appellant said was his shop. It appeared that Ally Dawood, the real defendant, had called himself Ally Ishmail. The Magistrate declared that the goods attached were executable.

The appellant, in his evidence in the Court below, denied that he was the debtor. He said he was away at the Paarl when summons was served. Machodam sent the summons back. Witnesses were called who deposed to knowing the other Ally Dawood, who was known also as Ally Ishmail, and who, it was contended, was the debtor.

The respondent, Mahomed, said that judgment was given against the real debtor, Dawood, and that the goods attached belonged to him. When he (re-

spondent) dealt with the debtor the latter had shops in Rosmead Avenue and West London. The two were in partnership, and removed the goods from one shop to the other.

Mr. W. P. Buchanan for appellant. Respondent in person. Mr. Buchanan having been heard on the facts,

Maasdorp, J.: In this case the Magistrate's Court had to decide whether goods, which were taken in execution in the case of Mahomed against Dawood, belonged to the defendant in that case, or to the appellant before this Court. If the goods belonged to the appellant, they would not be executable under the judgment. Evidence has been called to prove that the shop in which these goods were attached has been carried on for a considerable time by the appellant, and that the landlord of this shop dealt with the appellant, and received his rent from the appellant. He only knew the appellant under the name of Ally Dawood as his tenant, and he knew no other person as having any interest in the shop. The traveller of Messrs. Wiener, who did business with the appellant, states that whenever he transacted business at that shop it was with the appellant himself and no other, and that he did not know the defendant in the case of Mahomed and Dawood as a party to the business he did there. This shop, before it was taken over by the appellant, was in charge of a man named Desai, who had also hired it from the same landlord. Desai says that, in selling this business, the business was transacted with the appellant and with no other person. We have, therefore, very strong evidence of persons, directly doing business with the appellant, at West London, that the whole of that business was transacted with the appellant and no other. The only evidence to contradict this is of a very doubtful character. It is the evidence of the plaintiff himself. I do not say his evidence is of a doubtful nature as to his credibility, but it is doubtful as to its effect. He gives evidence that he dealt with the defendant, against whom he made his claim, at Kenilworth, and that he has never been to the shop of the appellant in this case, and he apparently knows nothing about the nature of the business carried on there by the appellant and the relationship existing between the appellant and the defendant. The appellant states that after the defendant came to West London, he entered into his employment as a paid servant, and there is no evidence to contradict that statement. The weight of the evidence seems to be wholly in favour of the appellant in this case, who claims this property. The Magistrate himself says that as far as credibility is concerned, he would have accepted the evidence of the European witnesses, but that the evidence does



not seriously affect the result of this case. Well, these European witnesses were the landlord, who had let the shop to the appellant, and the traveller of Messrs. Wiener and Co., who did business with the appellant, and, I think, that is the clearest evidence that could possibly be given that the business was carried on by the person who owned the property in the shop. If the statements of the European witnesses can be taken as reliable, we have evidence that at the time the judgment was given against Dawood, the appellant was in quiet possession of these goods in a shop hired by himself, and the burden of proof would, therefore, be thrown upon anyone else who claimed this property. On the whole, I think that if there had been doubt, the doubt should have been given in favour of the appellant, but it seems to me that, considering the weight of evidence, there can be no doubt that the appellant in this case is the owner of the property in question, and that the property is, therefore, not liable to execution. The appeal will be allowed, with costs, including the costs in the Magistrate's Court, and it will be declared that the goods are not executable in the case of Mahomed and Dawood.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PIQUETBERG DIVISIONAL.) 1907.  
COUNCIL V. JACOBS. (June 4th.)

Mr. W. P. Buchanan, for the plaintiff, moved for judgment in terms of a consent paper. The action was for ejectment from certain land and buildings.

Judgment entered in terms of the consent paper.

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GOODMAN V. WEINSTEIN.

This was an action to recover £31 10s., balance of wages for three months alleged to be owing by the defendant to the plaintiff, and £300 damages alleged

to have been caused by reason of the defendant having falsely and maliciously given information on oath which caused the arrest of the plaintiff.

The declaration set forth that the plaintiff was Lewis Goodman. The defendant was a baker carrying on business at Cape Town. In January the defendant engaged the plaintiff to work in delivering bread, and as a collector, at the wage of £8 a month and commission. In March, 1907, defendant dismissed him, and swore an affidavit alleging that plaintiff had embezzled the amount of £1 6s. 11½d. In consequence of this, plaintiff was arrested on the 25th March, and tried by the Magistrate, the case being dismissed in April.

The defendant, in his plea, stated that he had tendered £13 17s. 6d., being wages at the agreed rate of £6, less £10 2s. 6d. paid on account. He said the plaintiff was not employed as a collector. He denied that the dismissal was wrongful or unlawful. He denied any malicious intention in swearing the affidavit, and denied, further, that the plaintiff had sustained any damages.

Dr. Greer was for the plaintiff; defendant appeared in person.

The defendant said he wanted the case postponed, as he had been told by plaintiff's attorney that he would not go on with the action unless he was satisfied defendant had sufficient money to meet the costs, in case defendant lost the case.

[Maasdorp, J.: The case has been set down, and must go on.]

The plaintiff said he gave up a restaurant at Salt River to enter defendant's service, gave evidence detailing the circumstances. He said that defendant threatened that if he did not give him a clear receipt, he would have him arrested for theft. Witness said he could not be arrested, as he had stolen nothing. Defendant said he would give him twenty minutes' notice. Next day witness went to his attorney, who sent a letter of demand for the wages. Three days later witness was arrested, and brought to the police station, where he was kept under arrest for some time. He was charged that day with theft by means of embezzlement. He was remanded, and released on bail, and after hearing the evidence for the prosecution, the Magistrate dismissed the charge.

Dr. Greer: Did you ever rob defendant?

Witness: No, never.

Were there any grounds for the accusation?—None at all.

In further examination, witness said he had lost his business, which he had carried on at a profit of about £12 a month. He had paid about £5 to an attorney for defending him in the Magistrate's Court.

Defendant cross-examined the witness with a view to showing that the wages



agreed upon were £6 a month, plus breakfast and supper.

Further evidence was called for the plaintiff, after which Dr. Greer closed his case.

The defendant said that when he taxed plaintiff with having robbed him, plaintiff offered to give him a clear receipt if witness would let him off, but witness refused to do so, saying that he had been robbed of £30 or £40, and that he could not let him off on those terms, as he had so many drivers who might do this. The defendant said that the plaintiff was engaged at £6 a month, and he produced books in support of this, showing payments made.

In cross-examination, the defendant said it was not usual to pay drivers commission. He admitted having said to plaintiff: "Bring me a clear receipt and clear." Plaintiff said he would do so. Instead, he sent a letter of demand, upon receipt of which witness went and swore the affidavit. Defendant denied that he went to plaintiff's attorney to try and get the case settled.

Corroborative evidence was called on the defendant's behalf.

After hearing Dr. Greer in argument,

Maasdorp, J.: In this case the plaintiff claims from the defendant payment of wages for four months at the rate of £8 a month. He also claims certain commission upon sales, which he contends the defendant had agreed to pay him. The defendant tenders payment of wages for four months at the rate of £6 a month. The question between the parties is, therefore, whether the wages were at the rate of £8 a month, together with the commission, or only £6 a month. Upon this point I may briefly say that the weight of evidence is most decidedly in favour of the defendant. The terms of the contract are briefly set forth in a folio of defendant's books containing the items of wages from time to time paid to the plaintiff, and it seems to me that the books are very properly and correctly kept. Reference to the book would prove that the agreement was that plaintiff should receive £6 a month wages, but defendant's evidence is further corroborated by three witnesses, who state that at an interview with the plaintiff when difficulties arose between the parties, the plaintiff said he was only entitled to £6 a month. At that rate, for four months, he would have had to receive £24. That would be reduced by the payment on account of £10 2s. 6d., leaving a balance in the plaintiff's favour of £13 17s. 6d., which amount was tendered by the defendant. There is a further claim by the plaintiff for £300 damages in respect of an injury done to him through the defendant

having maliciously prosecuted him in the Magistrate's Court for theft. The plaintiff alleges that this prosecution was instituted without reasonable and probable cause. The defendant denies the absence of reasonable and probable cause, and upon the whole of the evidence, I am satisfied that there was reasonable and probable cause for the charge made by the defendant. The fact that the Magistrate found that the evidence placed before him was not sufficient to continue the prosecution further, does not conclusively establish that there was no reasonable and probable cause, because it very often happens that a man may have reasonable and probable cause upon information which he is in possession of, and which he has obtained after diligent inquiry, which information would establish some reasonable cause for a charge being made, even if it may subsequently be discovered that the charge is unfounded. His lordship briefly reviewed the evidence, and said: Under all the circumstances, I think there was reasonable and probable cause for the defendant instituting the prosecution, and the plaintiff must fail upon this ground also. Judgment will be given for the plaintiff for £13 17s. 6d., defendant to pay costs up to the 9th April (the date of the tender), the costs thereafter to be paid by the plaintiff.

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX. V. HENDRICKS. { 1907  
June 4th.

Splitting of criminal charge.

*Two or more charges cannot be brought in respect of crimes arising out of one and the same act, or out of a connected series of acts.*

Hopley, J.: The case of *Rex v. John Hendricks*, heard before the A.R.M. of Cape Town, came before me as judge of the week, in which the accused was charged with the crimes of (1) theft, and (2) malicious injury to property.

It would appear that the prisoner was in the act of stripping a roof of lead for the purpose of theft, when he was interrupted, and he thereupon tried to escape with only a small piece of lead in his pocket, the damage done to the roofing being considerable.

The Magistrate found him guilty of both the theft of the small piece of lead and malicious injury to property for

damage he had done to the roof. But it is clear that the act was a single act, and had been done, not for the purpose of damaging the property at all, or from any malicious intention of damaging the owner of the property, but with the intention of stealing, and, therefore, upon the evidence, it is plain that there was no malicious injury to property, and that the second charge of which the prisoner was convicted, and also sentenced, was not sustained. That portion of the conviction must be quashed, and the conviction for theft alone is confirmed.

The Magistrate sentenced the accused to three months for the theft, and one month for the malicious injury to property—four months in all.

I think that the splitting up of a single act, or a connected series of acts, into several charges, the effect of which would be to increase the jurisdiction of the Magistrate, and enable him to inflict a heavier punishment than is allowed by his ordinary powers, should not be allowed, and on that ground also I should have had something to say, but I think it is not necessary for the purpose of the present case to do more than say that the evidence does not warrant the second conviction of malicious injury to property.

### ADMISSIONS.

Mr. Lewis moved for the admission of Morris Alexander as a translator.

Application granted, and oaths administered.

Mr. Benjamin moved for the admission of Willem Frederik Sieberhagen as an attorney and notary. Counsel called the Court's attention to the fact that, although the articles were entered into on the 1st June, and applicant had served the full term of three years, the contract was not ratified by his guardian until a few days later.

Hopley, J.: It would, of course, have been more proper, formal, and desirable for the guardian to sign the contract of service at the time of its execution, but only a few days elapsed before he ratified the contract, which was clearly for the benefit of the minor, and as the minor has served the full three years under that contract so ratified, the ratification may be taken to date back to the real signing of the contract, and the service may be taken to have been concluded in the proper form. Guardians in future need not be lax on account of this decision; they ought to be there at the time of the execution of the contract. Under the circumstances, the applicant will be admitted.

Application granted and oaths administered.

### PROVISIONAL ROLL.

#### PRICE BROS. V. DE KLERK.

This was an application for provisional sentence on a promissory note for £198 6s., with interest from the 4th April, 1907, and costs.

From the affidavits, it appeared that plaintiffs had carried on business with one G. J. Fourie as auctioneers, and had held a sale of stock at Molteno on the 4th January last. Defendant, who resides in Aliwal North district, bought stock, and gave the promissory note sued upon. His defence was that he sold part of the stock to one Oelofse for £123 10s., and that the latter gave him a promissory note for the amount. This note he (defendant) handed to Price Bros. and Fourie, who agreed to collect it and appropriate the proceeds in reduction of his indebtedness. Defendant also said that he sold to Mr. Fourie 30 lambs at 20s. each, and that it was agreed that £30 should be written off the promissory note sued upon. He was prepared to pay the balance of £44 16s. Plaintiffs traversed these allegations.

Mr. M. Bisset was for plaintiffs; Mr. Roux was for defendant.

Having heard Mr. Roux in argument on the facts:

Hopley, J.: In this case plaintiffs come with a liquid document showing the claim which they made against defendant. Defendant comes with what his counsel says is a probable, plausible, and likely story, a simple story as to how a very large amount of this claim has been settled. But when one examines the affidavits as to his statements, the affidavits contradicting him, it is clear that he is mistaken as to the course of the transactions which he wishes to set up in answer to the claim now made by the plaintiff. He says that this promissory note has been met to a large extent by another promissory note for £123 10s., but when that is examined, it is not found to be the case. To begin with, the whole of the £123 10s. promissory note was not for the benefit of the defendant himself. A large part, about £40, was for the benefit of his brother. This promissory note, which had been got from one Oelofse, was handed over to Fourie, not for the purpose, they themselves say, of being compensated against the large promissory note of £198, but for the purpose of being discounted. Had the note been discounted, and the money got into Fourie's hands, it is quite possible that defendant may have tendered his share of that promissory note, and given it in reduction of the £198 note now sued upon, but there was an unsuccessful attempt to negotiate this note, and no cash was returned. Price Bros. never got any benefit from it, and it was handed back to the people who had been acting for defendant in

this matter, so that it is wrong on his part to say that there was a settlement of this note, and that Price Bros. got the benefit of this settlement. The history of the note shows that it was handed back after an unsuccessful attempt to raise cash upon it, and that thereupon Oelofse handed over, not to Price Bros., but to the De Klerks, the defendant's brother, and the other De Klerk, who was acting for him, certain stock to cover the amount of his promissory note, and if he settled that note at all, it was settled to the De Klerks, and not to Price Bros. The amount of £30 for the alleged sale of some wethers is also a matter which does not seem to me to concern Price Bros. It is true that there was an exchange of stock between Fourie and defendant, and that the wethers, Fourie says, were not worth 20s., but 16s. 6d. In these circumstances, it seems to me that the defence set up against the promissory note must *prima facie* fail, and that there should be provisional sentence as prayed, with costs.

#### ESTATE KAISER BROS. V. HOESCHEN.

Mr. Close (with him Mr. Roux) moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £120 and costs.

Defendant appeared in person.

Mr. Roux read an affidavit filed by defendant, in which he entered at length into his affairs, and stated that it was impossible for him, in his present circumstances, to settle the debt.

Defendant said that he had offered the plaintiffs £2 a month. He produced a statement of accounts of the Cycle Trade and Supply Co., of which he said he was manager.

Mr. Close cross-examined the defendant with regard to his relationships with certain businesses, and with the object of showing that his statements were unreliable. Counsel submitted that the defendant had not discharged the onus of showing that he had no means. His story was inconsistent and improbable.

Decree granted, execution to be suspended on payment of £10 a month, first payment to be made on the 1st July, with leave to applicants to apply for a variation of the amount.

Hopley, J., said that defendant admitted that he received a salary of £30 a month, and he must, if necessary, live in a less pretentious style.

#### GOODCHILD V. MCHUGH.

This was an application for provisional sentence on a second mortgage bond for £165, with interest from the 1st January, 1907, bond due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

Defendant's affidavit was to the effect that he purchased for £475 a house at Green Point, the understanding being that the purchase price would be payable as rent. The bond was granted on the 1st August, 1905. Deponent said that he had been misled as to the terms of the bond. He thought the bond would continue in force so long as he paid the half-yearly instalments of £10 off the capital and the interest.

Plaintiff's answering affidavit stated that he had no intention at the time he granted the bond of availing himself of the clause that enabled him to give notice, but circumstances had since compelled him to call up the bond. Plaintiff's attorney said that the terms of the bond were clearly explained to the defendant at the time he gave the power of attorney.

Mr. P. S. T. Jones for plaintiff. Mr. Lewis for defendant.

Mr. Lewis submitted that plaintiff was not entitled to call up the bond so long as the defendant paid the instalments and interest. He cited *Muller v. Watermeyer* (15 C.T.R., 430), and submitted that provisional sentence should be refused. Plaintiff assured defendant that the bond would not be called up so long as he paid the instalments and interest. The only term in contemplation between the parties was that the bond should be payable by instalments. Defendant was at a great disadvantage on account of his sight. Counsel did not suggest that there was fraud in the transaction, but he said there had been a serious misunderstanding between the seller and the buyer.

Hopley, J.: This seems to be a case of some hardship against the defendant, and I wish that I could see my way to give anything in the way of relief by saying that I cannot order provisional sentence, but, as far as I can see, the document which he signed is not so strongly contradicted by all the evidence on affidavit as to make it advisable for the Court to put the parties to the further expense of going into an action to establish the right of the plaintiff to recover his money at this stage. I have no doubt that at the time the defendant bought the property he thought that as long as he paid off the yearly instalment of £20, and was regular with the interest on the purchase amount, he would be allowed to remain in possession of his house, and that no notice would be given to him under either of the bonds. But I cannot see that it was made part of the actual contract between the parties; on the contrary, the mortgage bond distinctly stipulates that, on three months' notice being given, the purchaser might pay the whole of the amount of the second bond, or, on the other hand, the seller might demand that the whole of the amount should be paid. Now, it is difficult to see how

the defendant, even though he were a layman, should not have his attention strongly brought to this condition in the bond when it was read over to him, as it is admitted it was, by Mr. De Villiers (the attorney). At all events, the power of attorney contains the same clauses, and his attention must have been called to this, so that one cannot see what he could have thought of such a condition other than its real meaning. He signed the power of attorney, he admits that he signed it, and the only excuse that he can now put forward is that he has long sight, and that he had not his spectacles with him. It is clear from the conversation which has been referred to in the affidavits that he had the terms in his head. No doubt the plaintiff had no intention at the time of selling the defendant up. I am sorry that the plaintiff has thought it necessary to change his attitude, that he now must demand the whole of this money, but, apparently, the bond which he holds entitles him to do so, and there must be provisional sentence, with costs, as prayed.

Mr. Lewis applied for a stay of execution for two months.

Hopley, J.: I have every sympathy with the defendant, but I do not see any special reason for staying execution.

MOLLER V. WILKINSON.

Mr. Marais moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WENSELS AND CO. V. VENTER ( 1907.  
AND ESTATE LATE VENTER. ( June 4th.

Service of summons — Deputy Sheriff—Domicile—Forum.

*V. formerly domiciled at Vryburg, had for the last three years resided at F. in the O.R.C., and the Court found as a fact, that he was domiciled there. He still remained executor of a certain estate within this Colony. He had been summoned to show cause in the Supreme Court why a provisional order of sequestration granted against him should not be made final. Instead of serving this summons as directed by Section 17 of the Insolvent Ordinance, the Deputy Sheriff of V. went to F. and brought the summons to V's notice.*

*Held, that the service was bad, that the fact of V. being executor of a Colonial estate did not subject him to the jurisdiction of the Colonial Courts and that his proper forum was the Supreme Court of the O.R.C.*

This was an application to make final a provisional order for sequestration of the joint estates of defendant and his late wife.

Mr. Upington was for applicant; Mr. Benjamin appeared on behalf of Rosenblatt and De Beer to oppose. Mr. Benjamin's clients are creditors of the defendant, W. D. Venter, and had had a sum of £57 odd in the hands of the petitioning creditors attached *ad fundam jurisdictionem*.

Having heard counsel in argument,

Hopley, J.: There seem to be considerable difficulties in granting a final order in this matter. To begin at the point which Mr. Upington has just been arguing upon, a matter which crops up in the very initial stage of the procedure—that is, whether the defendant has been properly summoned in this case. The 17th section of the Ordinance deals with the mode of service of these summonses in compulsory sequestration, and it sets forth that the petitioning creditor shall summon the debtor to show why his estate should not be adjudged to be sequestrated, and the service of process shall be made in the same manner as is or shall be by law provided for the service of any other process of the said Court, provided that if any debtor has been forty days absent from his usual place of residence or business within the Colony, copies of the said summons shall also be affixed upon the outer door of the Supreme Court, and inserted in the "Government Gazette" of the Colony. Now, it is admitted on all hands that this debtor has been out of the jurisdiction of the Courts of this colony, and away from Vryburg, which was his ordinary place of residence, since, I think, 1904, and therefore considerably more than forty days. His ordinary place of residence would seem to be Fouriesburg, Orange River Colony, and if he were to be summoned in this colony at all in insolvency proceedings I should take it that it would have to be shown that he was still subject to the jurisdiction of the Courts of this colony, and had not changed his domicile, and then the process should be served in the same way as it should be served in other cases, as the section provides, and in this case either the defendant is a *peregrinus*, at the present moment living in a foreign jurisdiction, or he is still subject to the jurisdiction of this Court. If the former,



then he ought not to be summoned in Vryburg, nor ought the service of the Deputy Sheriff of Vryburg to have any avail against this foreigner. If the latter, if he is still subject to the jurisdiction of the Courts of this colony, then service ought to be made at his last known place of residence, or last known place of business in this colony, by the Deputy Sheriff, at such last known place of residence or business. That course has not been pursued. The last known place of residence of this man is, I suppose, still in existence; no service was made there by the Deputy-Sheriff of Vryburg. On the contrary, Mr. De Kock, knowing probably his Fouriesburg residence, went over the border, and brought personally to the notice of the defendant the steps that were being taken in this Court; in fact, served that paper in a foreign jurisdiction. In doing so, he was acting wholly beyond the scope of his jurisdiction. He was *functus officio* as soon as he got beyond the borders of this colony; he was merely a private individual when he entered the Orange River Colony, and the order that he had in his hands was merely an ordinary piece of paper. He brought this, it is true, to the knowledge of the defendant, and the defendant, it is said, knows quite well of these proceedings. That may very well be, and one must, of course, agree with the quotation which Mr. Upington has made from Van Zyl, in which he says the main object of the summons is to bring it to the knowledge of the person who is to be affected thereby, but, on the other hand, one must look at the matter from another point of view, and see whether such a person was in the circumstances bound to take any notice of it whatever. He may say: "I will not take the slightest notice of it; they have no jurisdiction over me." Well, if he chose to take that position, he was perfectly entitled to do so, and, to apply a practical test as to whether that is so or not, let us suppose that the order was made final to-day, and there would be a Cape Colony sequestration of this estate granted. Supposing a trustee is appointed, probably somebody in Vryburg, suppose that, thereafter, he goes into the courts of the Orange River Colony and asks for recognition of his position as trustee, and asks for permission to administer assets in the O.R.C., and suppose on that occasion the defendant were to appear, and say, "I was never served, a person calling himself the Deputy Sheriff of Vryburg came to my house in this colony, and served a piece of paper upon me, and I took no notice of it, and I am not an insolvent, properly speaking, at all." It would be very difficult for the Courts of the O.R.C. to say that that man was properly insolvent, so that they

could give effect to the application of an officer of this Court. It is not a mere matter of technicality. As far as that goes, I do not think the provisions of the law have been complied with, and in matters of summoning for sequestration of estates, the provisions of the law have always been strictly construed by this Court. This man, having left the Colony, and domiciled himself elsewhere, it does not follow that because he happens also to be the executor of an estate in this colony, this colony thereby has jurisdiction over his affairs. If one could get over the difficulty of the service, the next difficulty I see is ought he (the defendant) to be summoned at all in this colony for the sequestration of his estate? As far as I can see, everybody admits that his actual habitation, at all events has been for some three years, in the O.R.C., and there seems to me to be very little doubt that he has gone there for the purpose of remaining. As far as I can see, he is living permanently in Fouriesburg. I am by no manner of means satisfied that the proper place to have sued him for sequestration of his estate would not have been the O.R.C., where he resides. Then there is a further difficulty, and that is, as the learned judge pointed out in the note he made on the papers, this is an application under the 3rd section of the Act 38, 1884, and therefore the Court has to consider two matters: (1) whether the defendant is insolvent, and (2) whether it is for the benefit of his creditors that this estate should be sequestrated. There is no doubt about the actual insolvency at the present moment of this estate, although one cannot be absolutely sure about that, because it is said there is an expectancy of a considerable inheritance. But if this estate is insolvent, and this inheritance, or expectancy, is not worth £240 or thereabouts that he owes, is it for the benefit of the creditors that the estate should be sequestrated? It seems to me it may be possibly for the benefit of the defendant himself, and the petitioning creditor in this case seems to have been acting very much in the interests of Venter all along, and had advised him to surrender his estate. I do not see how, in any case, if there is only £57 odd in the estate, it would be for the benefit of the creditors really that this estate should be sequestrated. It is not difficult to see that the whole of the £57 odd would be swept away in costs and charges, without any of the creditors getting a single penny out of the estate. It may be for the benefit of Venter himself to have his estate sequestrated, but I cannot see that it would be for the benefit of his creditors to have it done. As to the petitioning creditors' position in this matter, it is quite possible that they might have the interests of Venter at heart more than the general body of creditors, or they might wish



wish to check Rosenblatt and De Beer in the assertion of their claim. In that case, it is not an object which this Court should assist. In all the circumstances, it seems to me that the provisional order must be set aside with costs.

[Attorney for applicant: J. E. Bernard. Attorneys for opposing creditors: Not on record.]

ROSENBLATT AND DE BEERS V. VENTER

Mr. Benjamin moved for provisional sentence on two promissory notes for £29 1s. and £13 7s., with interest and costs.

Order granted.

MORREES V. VISSER.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

FINDLAY V. GODFREY.

Mr. Sutton moved for provisional sentence on a mortgage bond for £300, with interest from the 1st July, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

FRIEDLANDER BROS. V. SINDLER.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £240, with interest from the 16th December, 1902, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

DALEY V. HAAK. { 1907.  
June 4th.

Mr. Pohl moved for judgment, under Rule 329d, for three sums of £30, £12 15s. and £2 3s. 6d., rent of premises and money advanced.

Order granted.

SMIT V. NEL.

Mr. Long moved for judgment, under Rule 329d, for costs of certain summons demanding transfer of property.

Order granted.

BEARD V. BEARD.

This was an action for restitution of conjugal rights, failing which, a decree of divorce, on the ground of defendant's malicious desertion.

Mr. Close was for plaintiff; defendant did not appear.

Plaintiff said that she was married to defendant in London, England, in 1892. The marriage was not a happy one. Her husband was a stockbroker at the time she was married to him. In 1902 defendant came out to South Africa at a few days' notice. He did not ask witness to accompany him. Defendant had visited England twice since 1902, but he had not requested her to join him. He had contributed nothing towards her support. Witness came to the Colony in March last. There was one child of the marriage, now eleven years of age.

Decree of restitution granted, defendant to restore conjugal rights to plaintiff on or before the 20th June, failing which, to show cause, on the 4th July, why a decree of divorce should not be granted, with costs, and plaintiff declared entitled to custody of the child of the marriage.

GENERAL MOTIONS.

PINNOY V. DISTRICT. { 1907.  
June 4th.

Mr. Van der Byl applied for an amended order as to publication of the citation in this matter.

The Court directed that the citation should be published in the "Albert Times," instead of the "Times of the Frontier."

*Ex parte* CARR.

Mr. Marais moved for leave to petitioner to sue her husband in *forma pauperis*, and by edictal citation, for restitution of conjugal rights. Respondent was believed to have gone to German South-west Africa. Counsel said that he was prepared to certify *probabilis causa*.

Rule nisi granted, calling on respondent to show cause why leave to sue in *forma pauperis* should not be granted, and leave granted to sue by edictal citation, citation and rule returnable on the 6th August, with leave to serve *intendit* with rule, personal service, if possible, failing which, one publication in the "Cape Times Weekly."

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

INDUSTRIAL LIFE ASSUR-  
ANCE CO., LTD., V. { 1907.  
ESTATE OF FELIX. } June 5th.

Life insurance — Condition —  
Lapsed policy—Waiver.

*It was a condition of a life policy that 35 days should be allowed for payment of renewal premiums, the directors of the Insurance Company reserving the right as they should think fit, to waive any forfeiture incurred by breach of such condition. The insured was in default for three and a half months, after which weekly payments were made by him and accepted by the Company but subject to the approval of the directors. Finally the directors refused to approve of these payments, and the money was returned to the mother of the insured who had made them on his behalf.*

*Held that, on the death of the insured, his executor was not entitled to claim the amount of the policy.*

This was an appeal from a judgment of the Resident Magistrate of Cape Town.

It appeared that in the Magistrate's Court the present respondent, Petronella Felix, in her capacity as executrix in the estate of the late Albert John Felix, sued the Industrial Life Company for a sum alleged to be owing upon a certain insurance policy, dated in September, 1905, effected on the life of A. J. Felix, who died on the 28th October, 1906. The sum of 12s. plaintiff alleged she had received as a loan from the insurance company's agent, and she claimed the amount of £18 4s., less this sum. The plea was that the policy became void in June, 1906, in consequence of the non-payment of premiums. Upon application for renewal, the arrears of premiums were accepted by the company's agent, subject to approval by the Board of Directors, who declined to approve of the application, the arrear payments being refunded. The Magis-

trate gave judgment for the amount claimed. The grounds of appeal were that the policy lapsed on the 11th June, and there was no revival; and, further, that on the 10th October, 1906, the plaintiff accepted the return of the premiums by the inspector, sent to her for that purpose on behalf of the company, and that she therefore acquiesced in the cancellation of the policy, if there had been any renewal. The case had been before the Supreme Court on appeal on a former occasion, and was then remitted back to the Magistrate to take the evidence of the plaintiff on certain points. (17 C.T.R., 244.) The Magistrate now stated that the evidence given by the plaintiff and her daughter differed materially from that given before, and that his judgment, if it could be altered, would now be for the defendant, with costs.

Mr. Bisset was for the appellant company; there was no appearance for the respondent.

De Villiers, C.J.: It was one of the conditions of the insurance that 35 days should be allowed for payment of the renewal premium, and another condition was that any forfeiture incurred by breach of the foregoing condition might be waived by the directors, and on such terms as they shall think fit. In the pass-book which the insured had from the company, entries were made, and each page of the pass-book was headed thus: "Thirty-five days are allowed after the due date for payment of premium, after which, the policy was to be considered lapsed. Application for renewal of lapsed policies will, however, be considered on liberal terms." It would appear that between the 10th of May and the 31st of August no premiums were paid. Premiums were payable weekly, so that more than 35 days had elapsed between the payments of the premiums. An application was made to the company, on behalf of the insured, for revival of the policy, notwithstanding the lapse, and this application was considered. Subsequently premiums were accepted, but there was an endorsement on the pass-book that it was subject to the approval of the Board of Directors. Now, that approval never was given, and therefore it is impossible to hold, as the Magistrate seems to have held, that there was a waiver on the part of the company of the condition. The condition never was waived, and the policy remained a lapsed policy. Subsequently the money which had been paid was returned to the mother of the insured, and she seems to have accepted the money and to have given a receipt for it. Under all the circumstances, I am of opinion that the Magistrate was wrong in holding the plaintiff to be entitled to recover, and that there should be judgment for the defendant in the Court below. The judgment of the Court,

therefore, is that the appeal is allowed, with costs in this Court, and judgment entered for the defendant company, with costs, in the Court below. I am bound to add that it is the duty of attorneys who are engaged in a case to be present in Court or to have a representative present to answer questions arising in the course of the case. In the present case the Court wished to know whether there had been service of the notice of set down, but there was no one present to give the information. It is now stated that there was service, but then it is added that it was supposed at the time that respondent would appear and would be represented in court, and that that was the reason why no affidavit of the notice of the set down was served. Well, that may be a good reason why such affidavit was not produced, but it is no reason why the attorney could not be in court to assist counsel and to assist the Court in case any question arises. The appellant's attorney, therefore, will not be entitled to any fee for appearance in court to-day.

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

REX V. CHRISTIAN. { 1907.  
June 5th.  
Magistrate's criminal jurisdiction  
—Act 18 of 1873, Sec. 2,  
Sub-sec. 1 and Sec. 4.

Maasdorp, J.: There is a case which came before me from the Resident Magistrate of Oudtshoorn, the case of Andries Christian, in which the accused was charged with contravening sub-section 1 of section 2, Act 18 of 1873, in that, having entered into a contract of service with Mr. Serfontain, he neglected to commence the service at the stipulated time. He pleaded not guilty, and was found guilty and fined in £2, or six months' imprisonment, with hard labour. The Magistrate now explains that in passing that sentence he was under the mistaken impression that he was dealing with section 4 of the Act and that being under that impression he exceeded his jurisdiction in passing that sentence. Under the section mentioned in the charge, the maximum punishment for a first offence is a fine of £1, or 30 days' imprisonment, with hard labour. The sentence will therefore be altered to one of £1, or 30 days' imprisonment, with hard labour.

MPAKADO V. KEMLO.

This was a case in which the appellant (then defendant) had been sued by the respondent for money lent

and interest, which he charged at the rate of 60 per cent. In the course of the hearing an objection was taken as to the two documents put in that there ought really to have been provisional procedure, and with respect to the documents the point was also taken that these documents ought to have been stamped, and there was a plea on the general issue.

The Magistrate, the Resident Magistrate of Kentani, was not satisfied as to the payments having been made by the defendant, and gave judgment for the plaintiff in the amount of £19 6s., with interest, and also compound interest.

Mr. McGregor was for the appellant, and Mr. J. E. R. de Villiers was for the respondent.

Counsel submitted that the compound interest could not be allowed. The plaintiff gave his evidence, but unfortunately he did not bring his books. The defendant was apparently an illiterate man, and he could only speak generally. The question was whether the evidence was so satisfactory as to justify the Court in giving judgment for any amount. There was one item which the Magistrate could check, and on that he found against the plaintiff. In such a case of high interest it was most unsatisfactory, that the books were not produced, and the case was a fair one for absolution from the instance. Counsel submitted that two promissory notes were put in, and the documents for revenue purposes should have been stamped, and that compound interest could not be allowed.

Mr. De Villiers having replied on the different items in the account,

Maasdorp, J.: In this case the plaintiff in the Court below sued the defendant for £21 8s., for money lent, together with interest due, and the items constituting this debt were all set forth fully in the account annexed to the summons. The defendant pleaded the general issue, and it appears that his defence is not clearly set forth in the plea, that he put before the Magistrate. His real defence was that he had paid the debt. The Magistrate inquired into the case, and he came to the conclusion that certain items were due, and that certain payments were made. What exactly the ground of appeal in this case was did not appear, but it was a general appeal upon the merits of the case, and amongst other things it is quite clear that the finding of the Magistrate as to the payments that were made was questioned, and that was certainly one of the grounds of appeal, and it apparently was the main ground. Upon that the Court cannot interfere with the finding of the Magistrate. The result he came to as to the items that were due and the payments that were made is based upon the evidence supporting that finding, and the Court must

allow that to stand. But it appears that the plaintiff, in making out his account, had charged what apparently is compound interest. That question was raised in the Court below in the cross-examination of the plaintiff by the defendant's agent, and the Magistrate, in dealing with the question, it is now admitted, found that the plaintiff was not entitled to charge compound interest, and he set about dealing with the figures upon the ground that only simple interest was to be allowed, with the result that in conclusion he ascertained that the sum of £19 6s. was due. It is pointed out that he could not have arrived at that figure if his calculation was correct upon the basis that only simple interest was to be charged, and it is now admitted that the amount—the correct amount—if simple interest was charged upon the different items from time to time, and allowance made for payments from time to time, that amount would have been £13 14s. 6d. The object of the Magistrate is admitted to be to allow the plaintiff only simple interest. It was contended in his calculation he seems to have allowed compound interest, and what exactly the figures were which he dealt with does not now appear. On the side of the plaintiff, it is contended that if certain allowance is made for an item which was struck out of the account upon the admission of the parties, the Magistrate's calculation would be wrong. But it is argued that though the amount was struck out, that for the purpose of appropriating payments in this account it could have been allowed. It is impossible for me to follow that argument, and this account must stand on its own basis, and if a certain item is struck out, that item cannot be made use of for the purpose of appropriating payments, and so reducing the amounts paid off, and in that respect increasing the capital remaining due. As I say, whatever the Magistrate's calculation may have amounted to it was upon the basis that it was only simple interest being charged. Now, the question is whether, in rectifying the Magistrate's error, the Court ought to allow the appellant's costs in this case. It seems to me that that ground of appeal was not in contemplation of the parties at all at the time. It was not understood quite how it was that the Magistrate arrived at the amount that he fixed upon, but it was presumed that it was because compound interest was charged. It is now found that compound interest was not charged. The fact remains that if the calculation is incorrect, it must be rectified. The Magistrate's calculation was consequently wrong in the amount of £5 11s. 6d. Now, it seems to me that if that had been brought by the appellant to the notice of the respondent in all probability he would have consented to the

amendment, but, on the other hand, it is quite clear that the respondent came to the Court to support a claim which is now found to be incorrect, and which he himself could have ascertained the appellant, could have ascertained when he came into this Court to support the claim he was not entitled to. Both the parties are to blame in coming to this Court, which merely means the rectifying of figures in the Magistrate's judgment. The appeal will be allowed, and judgment entered for the plaintiff for £13 14s. 6d., each party to pay his own costs of appeal.

#### VAN DER WESTHUIZEN V. MULDER.

This was an appeal from a decision of the R.M. of Prince Albert, in which judgment was given for the plaintiff for £3 19s. 9d. for goods sold and delivered. The goods consisted of bread and buns, which were supplied to Miss Stripp, who afterwards married the defendant, Van der Westhuizen, who undertook to pay, but subsequently refused. The Magistrate, after hearing the evidence, held there was a guarantee on the part of the defendant. The plaintiff refused to supply the bread without cash, and the defendant told the plaintiff to supply the bread, and to look for him for payment. The defendant, in his evidence, denied that he ever gave such an undertaking.

Dr. Greer was for the appellant, and Mr. Van Zyl was for respondent.

Counsel having been heard in argument on the facts,

Maasdorp, J.: The plaintiff sues the defendant for bread and buns supplied, and for work done by her to and on account of Miss Stripp. It is stated in the summons that the defendant promised that he would meet Miss Stripp's indebtedness to the plaintiff. This account runs from March, 1906, to February, 1907. In August, 1906, Miss Stripp was married to the defendant, and after that the purchases put in the account are entered against Mrs. Van der Westhuizen. There are therefore two sets of items, the one for goods supplied and for work done before Miss Stripp was married to the defendant, and the other for goods supplied and work done after the marriage. It is alleged in the summons that the defendant undertook to pay for any bread supplied to Miss Stripp and any work done for her. The plaintiff herself has given evidence, from which it appears that when she refused to give Miss Stripp any further credit the defendant came forward and guaranteed this payment, or rather took the liability upon himself, and she says that was done in the presence of her husband and sister. She is corroborated by her sister and her husband, and the statements made by these three



witnesses are believed by the Magistrate. On the part of the defendant we have only his denial. Under the circumstances it would have been reasonable to expect that his wife should have been put in the witness box to corroborate his statement. She was not called, and that circumstance is very unfavourable to the case of the defendant. There is no denial of her indebtedness. It is not disputed that the bread was supplied to her and the work done for her. In fact, it is not a matter which could have been disputed by the defendant, and for that purpose it would have been necessary to call Mrs. Van der Westhuizen herself. It must, therefore, be taken that it has been satisfactorily proved that the goods were supplied and the work done, and I am satisfied that the defendant came to some such arrangement as that stated by the plaintiff. The appeal will be dismissed, with costs.

### THIRD DIVISION.

[Before the Hon Mr. Justice HOPELEY.]

JACOBSON V. SCHILLER. } 1907.  
June 5th.

Mr. Wallach moved for judgment under Rule 319 in default of plea, for £95, balance of account for cash lent and advanced, with interest *a tempore moræ* and costs.

Judgment as prayed.

*In re* HEX RIVER VINEYARD CO., LTD.

Mr. Struben presented the liquidators' report, and applied for the usual order. Counsel (in answer to the Court) said that this was a preliminary report in a voluntary liquidation, and that it was not the practice to order publication.

Order granted, as is usual in official winding-up. Publication once in the "Cape Times" and "S.A. News."

*In re* EAST LONDON DAILY NEWS PRINTING AND PUBLISHING CO. (IN LIQUIDATION).

This was an application by the official liquidators of the East London Daily News Printing and Publishing Co., Ltd., for confirmation of their second report.

Dr. Greer appeared for applicants; Mr. W. Porter Buchanan appeared for H. Ries and Co. and the partners in that firm, to oppose their being placed on the list of contributaries in respect of 1,000 shares.

Dr. Greer said that certain affidavits had been filed by Messrs. Ries, and it would be necessary that the applicants should have time to reply to those affi-

davits. The report had duly lain for inspection as directed by the Court, and the only opposition raised to it was that by Messrs. Ries. Under the circumstances, he suggested that the Court should confirm the report except such portions as referred to Messrs. Ries, viz., in paragraphs 6 to 24 inclusive. In regard to those portions, he should have to apply for a postponement for two or three weeks to enable replying affidavits to be filed, or, if the parties were so advised, an action might be brought to settle their respective rights. Of course, if no agreement were arrived at, then the matter would have to be dealt with on motion.

Mr. Buchanan: There is great objection to an action being brought now.

Hopley, J., said he thought it was the invariable practice to settle matters of contributories on motion.

Mr. Buchanan said he thought it depended whether the facts could be sufficiently set forth on affidavit. He added that he did not raise any objection to a postponement.

Dr. Greer then proceeded to call the Court's attention to the other principal features of the report. He said that the liquidators had sold the machinery, plant, etc., as authorised to Messrs. Davis and Son, of Natal, for £3,600, less £6 10s. allowed for damaged type, and £40 paid to Mr. Rose for supervising the plant while the offer was under consideration. The liquidators went on to say that as to the liability, if any, attaching to the provisional directors for the irregularities in the formation of the company, more particularly as regards the deficiency of capital properly subscribed for, they were advised that the provisional directors were protected by the terms of the prospectus. With regard to the liability of E. K. Fletcher (the promoter) for shares and otherwise in connection with matters referred to in the report, they had every reason to believe that he was not worth pursuing, and that his whereabouts could not be ascertained. The liquidators next dealt with Mr. M. J. Ries's claim for £6,480 for damages for breaking the lease of the premises. When the premises were surrendered, the lease had still nine years to run at £60 per month. Mr. Ries claimed full rent for the unexpired period. He had since offered, without prejudice, to accept £1,000 in settlement of his claim, and the creditors had decided to offer him, without prejudice, £500 in full settlement. Counsel said that, since the report was prepared, Mr. Ries had accepted this offer. Continuing, he said that the liquidators criticised Mr. Ries in that he sat as a director while the tender of his wife of the premises was considered and accepted, though he did not appear to have voted. Certain variations were made in the tender. "In each case," the liquidators observed, "Mr. M. J. Ries is described



as not voting, but we feel that it is hardly likely, considering the important variations in the tender, all in his favour, that he was not actively engaged in promoting his own interests." They also pointed out that Fletcher received an advance from the company of £500 to be set off against commission he may earn on advertisements and subscriptions he may obtain. He only earned £278 2s., leaving a deficiency of £221 18s. The question as to how far the directors could be held liable for this advance of £500 was under consideration by the liquidators. Sanction was also asked to compromises effected with the late editor, and two machinists and stereotypers, who had been engaged on contracts. In their account the liquidators had allowed for payment of the landlord's claim in full, and they recommended that a dividend of 4s. 9d. in the £ be paid to concurrent creditors, leaving a balance in hand of £278 2s. 1d. Counsel pointed out that, in view of the fact that the landlord's claim had been settled for £500, there would be a still larger sum available for distribution. The liquidators also applied to the Court to fix their remuneration, and urged that they should be allowed 5 per cent. on the assets realised to date, viz., £237 12s. 6d. The failure of the company was attributed to (1) insufficiency of working capital; (2) the somewhat lavish expenditure in machinery in excess of the requirements of the districts to be served; (3) want of management, too much of the business being entrusted to the promoter Fletcher.

The Court confirmed the report, save paragraphs 6 to 24 inclusive, which must stand over, pending any action to be taken by the liquidators or by the firm of H. Ries and Co., and the various partners of the said firm, to settle the question of their liability, the liquidators' remuneration to be fixed at 200 guineas.

#### *In re* GRAND JUNCTION RAILWAYS.

Mr. Upington moved for confirmation of the third report of the official receivers. Counsel drew the Court's attention to the publication in the "Times" (London). It appeared that an account had been received from the "Times" for three publications, but only one copy of the paper had been received.

Hopley, J., said that there seemed to be no reason to doubt that due publication had been made.

Mr. Upington said that there was a motion on the list for admission of the firm of J. E. and S. Spencer to rank and receive a dividend in respect of their claim. That matter was not dealt with by the report, but the receivers raised no objection to the application of J. E. and S. Spencer. The receivers, in the course of their report, stated that a sum of £109,770 was avail-

able for immediate distribution, and they asked for authority to pay a further dividend of 5s. in the £, making 11s. in the £ to date. They also recommended that J. E. McNellan, for £80 15s., and E. Hazelhurst and Co., for £428 6s. 4d., be admitted as creditors, and that they be paid the dividend already awarded, and be included in the list of creditors, and that they (the receivers) be allowed remuneration at the rate of 2½ per cent. on the amount received since the filing of the second account.

The report was confirmed, and an order made in terms of the receivers' recommendations.

#### *Ex parte* HILL AND GRAND JUNCTION RAILWAYS.

Mr. M. Bisset moved for an order admitting the firm of J. E. and S. Spencer to rank and receive a dividend in respect of their claim of £750 against the Grand Junction Railways. Judgment had been obtained by the firm against the petitioner as receiver in the High Court in England.

Order granted accordingly.

#### GENERAL MOTIONS.

#### VELKORISKY V. VELKORISKY. 1907. June 5th

This was an application for an order upon respondent to pay £1 a month to his wife, from whom he had been judicially separated, for maintenance of the child.

Dr. Greer was for applicant; respondent appeared in person.

Applicant said that since the order was made in March, 1906, respondent had not contributed anything towards the maintenance of the child. She was unable to continue to maintain the child, and respondent was in a position to pay maintenance.

Respondent, in an affidavit, said that he was quite unable to pay anything towards the maintenance of the child.

Dr. Greer cross-examined respondent as to his means.

Hopley, J., said that he could not make an order on the present application.

#### *Ex parte* CONNOR.

Mr. Long moved for an order authorising the executors in the estate of the late Mary Connor to raise a further mortgage on certain property in the division of Somerset East, in order to pay estate debts. The property was left by testatrix to two of her sons, subject to the conditions that they should maintain and support two of their brothers, who are of weak intellect, and that they should not sell

or dispose of the farm. The *curator ad litem* of the two imbecile brothers consented to the application. The two legatees also consented.

Order granted as prayed.

*Ex parte* KOK.

Mr. Sutton moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* ADAMS.

Mr. Lewis moved for leave to petitioner to sue his wife, Georgina Adams, *in forma pauperis* for divorce on the ground of adultery.

Rule nisi granted, returnable on the 18th June.

*Ex parte* BULL.

Mr. Lewis moved, as a matter of urgency, on the petition of Joshua Edward Bull, medical practitioner, of Uitenhage, for release of applicant from arrest on payment of the arrear instalments in the matter of *Coulton v. Bull*, and the costs of the arrest. Applicant had previously been placed under arrest, and had been released on payment of £3 a month. He paid the instalments regularly until last month, when he failed to pay the money, because a certain cheque he had depended upon did not come to hand.

Ordered that applicant be released on payment of the arrears and the costs of arrest, original order to stand subsequently, with leave to telegraph the order.

*Ex parte* SMITH.

Mr. Van der Byl moved, on the petition of Hendrik Smith, of Saron, who had been employed as a handy man by the Imperial Cold Storage, Limited, at a farm in the Tulbagh district, for leave to sue the respondents *in forma pauperis* for £2,000 damages. Petitioner said that he was seriously injured by a threshing machine owing to the negligence of respondents or their servants. He had been refused relief in the Magistrate's Court on the ground that the case did not come within the scope of the Workmen's Compensation Act, No. 40 of 1905, inasmuch as the injuries were sustained in agricultural work. Counsel said that his learned friend, Dr. Greer, who had been briefed in this matter, was prepared to certify.

Rule nisi granted, returnable on the 19th June.

*Ex parte* ESTATE OLIVIER.

Mr. Toms moved for leave to the executors to invest the sum of £5,049 18s.

11d. on mortgage of certain immovable property. The matter had previously been before the Court, when Mr. Justice Laurence directed that a sum of £4,250 be invested on first mortgage and that the balance be paid into the guardians' fund. Petitioners asked for leave to invest the whole amount, and said that such a course would be in the interests of the minors. The Master was in favour of the application, subject to the grandfather of the minors, J. P. Hugo, becoming surety for the payment to the minors on attaining their majority.

Order granted in terms of Master's report.

*Ex parte* CALITZ.

Mr. Toms moved for leave to petitioner to sell certain estate property in the district of Oudtshoorn, the proceeds to be invested in landed property at Swellendam.

Order granted authorising petitioner to sell the properties as prayed, and with the proceeds to purchase landed property, for the benefit of the children, such as may be approved of by the Master.

KEEGAN V. HERBSTEIN.

Mr. Pohl moved for the removal of this case to the ensuing Circuit Court at Graaff-Reinet.

Ordered to be removed accordingly.

*Ex parte* MALONEY.

Mr. P. S. T. Jones moved for leave to petitioner to sue her husband, Alfred James Maloney, by edictal citation for restitution of conjugal rights. Petitioner resided at Wynberg, and had not heard anything from her husband since 1905. Respondent was heard of a little time ago in Bradford, Yorkshire.

Leave to sue by edict granted, citation returnable on the 15th October, personal service, if possible, failing which one publication in the "Yorkshire Daily Observer" (Bradford).

*Ex parte* WARING.

Mr. Lewis moved for leave to petitioner, who resides at Salt River, to sue by edictal citation one George S. Sargent, formerly of Wynberg, and now of Boksburg, Transvaal, for a debt of £28 18s. 6d., and for attachment of certain property at Maitland and rents in the hands of Mr. McGregor.

Leave to sue by edict granted, citation returnable on the 26th June, landed property and rents collected by Mr. McGregor for the said Sargent to be attached *ad fundandam jurisdictionem*.

## INSOLVENT ESTATE NAUDE V. DURANDT.

Mr. Burton moved on the petition of Robert George Attwell, as sole trustee in the insolvent estate Naude, for costs incurred by applicant in certain application for an interdict in which he (Attwell) was respondent, and G. J. Cloete and the present respondent were applicants. Applicant also prayed for the removal of the interdict against a certain erf in the insolvent estate claimed by Durandt.

There was no appearance for respondent, who, it was stated, had intimated his willingness to have the interdict discharged.

Ordered that the interdict be discharged, and that the respondent (Durandt) pay the costs which he caused to be incurred in the matter, and also the costs of the present application.

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

CELLIERS V. FAGAN.      { 1907.  
                                    { June 6th.  
                                    { .. 7th.  
                                    { .. 8th.

Defamation—*Animus injurandi*—  
Privilege—Publication—Employment of copyist of defamatory matter.

*In an action for damages for causing a letter containing defamatory matter concerning the plaintiff to be read at a meeting of a Municipal Council of which the defendant was Chairman, it appeared that the letter was annexed to an affidavit prepared by the defendant to meet an application made by the plaintiff in the Supreme Court calling upon the Council and the defendant to show cause why the defendant should not be removed from the Council.*

*Held that, under the circumstances the presumption of animus injurandi was rebutted.*

*The letter read to the Council had been type written by the defendant's clerk.*

*Held, that the privilege which protected the defendant in having the letter read to the Council also protected him in the employment of a confidential clerk to copy the letter.*

This was an action for damages for slander in which Jacob Petrus Celliers, an attorney of Somerset West, sued Henry Allan Fagan, an ex-Mayor and enrolled law agent. The amount claimed was £2,000, and the slander was alleged to have been uttered on various occasions during the years 1906 and 1907.

The plaintiff's declaration was as follows:

1. Plaintiff is an attorney-at-law and notary public practising and residing at Somerset West, in the division of Stellenbosch; defendant is an enrolled agent practising and residing at the same place.

2. On or about January 21, 1907, defendant caused to be written and forwarded to plaintiff, who duly received it, a letter.

3. The statements in the said letter bearing reference to plaintiff were made by defendant falsely and maliciously.

4. Defendant has published the contents of the said letter to divers persons on divers occasions: more particularly to one Anna Hansen, to whom he dictated the said letter for the purpose of having the same typewritten on or about January 21, 1907; to the Councillors of the Municipality of Somerset West Strand assembled in meeting, to whom he read it on January 31, 1907, and February 1, 1907, respectively, there being present on the former occasion Councillors Haylett, Van der Merwe, Dorrington, Myburgh, and Loubser, and the Town Clerk, De Beer, and on the latter occasion Councillors Haylett, Gous, Louw, Dorrington, Myburgh, Loubser, Van der Merwe, and Abeg-glen; to one Johannes Wynand Louw Hofmeyr; and to one Jozua G. Hofmeyr, to whom defendant showed the said letter or a copy thereof on an occasion or occasions the dates whereof are unknown to plaintiff.

5. On or about January 30, 1907, and at Cape Town, defendant swore an affidavit in a certain matter of *Cairncross and Celliers v. Fagan*, and annexed thereto a copy of the letter referred to in paragraph 2, and thereafter filed the said affidavit and annexure with the honourable the Supreme Court, and

thereby falsely, maliciously, and without reasonable or probable cause repeated and published the contents of the said letter.

6. By reason of the publication of the false and defamatory statements under the circumstances referred to in the preceding paragraphs, plaintiff has suffered great damage in his credit and reputation and professional practice, and is entitled to claim in respect thereof the sum of £1,000.

7. On or about December 31, 1906, at Somerset West Strand and in the presence of one Carel Johannes Petrus van der Merwe, defendant falsely and maliciously uttered the following words of and concerning plaintiff, to wit, "I can tell you that Celliers is one of the biggest scoundrels. He humbugged Mrs. Louw, and he would have humbugged Mrs. Brink out of £300 if it was not for me, and you can tell him so from me."

8. On or about January 26, 1907, at Somerset West Strand, and in the presence of one Andreas Zacharias de Beer, defendant uttered the following words of and concerning plaintiff, to wit: "I have sent a letter to Celliers in the strongest terms possible telling him that he has done certain dishonest things, and if he did so again I would take steps to get him struck off the roll. Celliers knows that the letter was not typed by me but that I dictated it to my typist, and if my statements were not true he would certainly have sued me for libel, but instead he sent me a mildly worded letter in reply." (And after some further words, which it is unnecessary to insert herein, defendant continued): "Tell him" (that is to say, one Dorrington) "if he only knew what a blackguard and scoundrel Celliers is he would have nothing to do with him," whereby defendant meant that plaintiff had been guilty of dishonest conduct, that he had been guilty of conduct which rendered him liable to be removed from the roll of attorneys and notaries, and that he was a blackguard and a scoundrel; all of which words and imputations defendant uttered and made falsely and maliciously.

9. In or about the month of May, 1906, at Somerset West Strand, and in the presence of the said Andreas Zacharias de Beer, defendant falsely and maliciously uttered the following words of and concerning plaintiff, to wit, "You must be careful of Celliers, because he tried to swindle Mrs. Krynauw out of the purchase money of her property."

10. In or about the month of December, 1905, at Somerset West, and in the presence of one Johannes Rynhardt van Breda, defendant uttered the following words of and concerning plaintiff, to wit: "Ik is jammer om het te hoor jij zal nog verneuk raak bij di end. Ik zal jou nou iets vertel wat Celliers

gedaan het wat jij zelf zal beken gaat tegen hom. Een zeker man het aan Celliers geschrijf dat hij zeker erven moet verkoop tegen niet minder dan een zeker prijs en toen het Celliers naar Urtel gegaan en hij het aan Urtel gezeg, kijk die kerel wil die erven verkoop. Dit is zyn laagste prys. Koop jij die erven nou en verkoop dit dan weer en dan verdeel ons die profijt. Nou wat denk jij dan van een man wat dit kan doen," which words, being translated, read: "I am sorry to hear you say so; you will be ultimately swindled. I shall now tell you something that Celliers has done, which you yourself will allow goes against him. A certain man wrote to Celliers that he must sell certain erven for him at not less than a certain price, and thereupon Celliers went to Urtel and said, 'See this fellow wishes to sell these erven. This is his lowest price. You buy the erven now, and again sell them, and let us divide the profit.' Now, what do you think of a man who can act in such a way?" Whereby defendant meant that the confidence placed in plaintiff by the said Van Breda had been misplaced, and that he (Van Breda) would ultimately be swindled by him (plaintiff), and that plaintiff had abused, or had tried to abuse, for his own benefit, the confidence placed in him by a client in connection with the sale of certain land with which the said client had entrusted him. All of which words and imputations defendant uttered and made falsely and maliciously, but plaintiff obtained knowledge of the utterance thereof only during the currency of the present year.

11. By reason of the publication of the false and defamatory statements referred to in paragraphs 7, 8, 9, and 10 plaintiff has suffered damage in his credit and reputation and professional practice, and is entitled to claim in respect thereof the sum of £1,000.

Wherefore plaintiff prays: (a) Judgment for the sum of £1,000 and £1,000 respectively; (b) interest *a tempore moræ*; (c) such other and further relief as may seem meet; together with (d) costs of suit.

The following is the letter referred to in the declaration:

Somerset West, January 21, 1907.

J. P. Celliers, Esq., Attorney, Somerset West.

Sir.—The concluding paragraph of your letter of 17th inst. has been noted, also your remarks *re Du Plessis v. Arnold*, as well as those contained in some of your previous letters. Allow me to state that your malevolence is making you positively silly and unbearable. I often wonder when you are going to cease from letting your envy of an opposition business make yourself ridiculous. I should have sent you a full reply to the abusive and impertinent at-

tacks made upon me, but I doubt whether you are always responsible for the baseless fabrications contained in some of your letters. Either your malevolence stupefies you, or you are maliciously preparing the way for a repetition of the scurrilous tactics adopted by you in the matter of *Krynaue v. De Beer*. You are taking advantage of my well-known habit of ignoring calumnies of this nature from such sources. I simply write this to record my protests once and for all. You are constantly referring to the honourable profession you have adopted. My opinion is that some of your tactics are disgraceful and dishonouring to this profession. I am seriously considering whether the Law Society should not be placed in possession of the facts. We desire to carry on our business in a quiet and honourable manner. Had we worked for profit merely we would have accepted some of your suggestions to work "harmoniously." In our best interests and in the interests of our clients, we have found it incumbent on us not to accept your proposals, but to carry on our business in our own manner. I desire nothing better than to be left alone. I have once and for all come to the conclusion that if I want to study the interests of our clients, there must be no "private arrangements." Our methods are too different for us ever to try to work together. I do not intend taking the slightest notice of anything in your future correspondence apart from the subject matter dealt with. Let this letter serve as a reply to all your calumnies past and future.—Yours, etc. (signed), H. A. Fagan.

The defendant's plea was as follows:

1. Defendant admits paragraphs 1 and 2 of the plaintiff's declaration.

2. Defendant says that the letter referred to in paragraph 3 of the declaration is not defamatory, and otherwise denies the allegations in the said paragraph 3.

3. Defendant dictated to Miss Anna Hansen the terms of the letter referred to in paragraph 4 of plaintiff's declaration. The said Miss Hansen is the confidential clerk and typist of the firm of Fagan and Markotter, of which defendant is a member, and the said dictation was made to her in the usual and ordinary course of business of the firm aforesaid. Defendant neither made nor exhibited any communication in writing to Miss Hansen in connection with the said letter, nor did she see the said letter when complete as signed by the defendant. The defendant moreover says that in any event the communication by dictation to Miss Hansen was privileged.

4. On or about the 28th January, 1907, the present plaintiff, together with one Cairncross, instituted proceedings against the defendant and the Municipality of Somerset West Strand, with a

view to having the defendant declared incapable of sitting as a Councillor of the Municipality of Somerset West Strand, of which defendant was then the Mayor.

5. About the date stated in paragraph 4 of the plaintiff's declaration, the Councillors of the Somerset West Strand Municipality met and discussed in committee the position regarding the said proceedings wherein the Council of the Municipality of Somerset West Strand had been joined as respondent. The defendant (as it was his duty to do) in discharge of his functions as Mayor furnished the Councillors with full particulars of the charges that had been made and the steps that had been taken to secure further time within which to prepare the answering affidavits and to complete the defence. The defendant accordingly read to the Councillors present in committee aforesaid the notice of motion with the affidavits in support thereof furnished by the plaintiff and his co-applicant which set forth the allegations relied upon, and at the same time defendant also read a copy of the affidavit which he had filed in support of his application for additional time, to which was attached a copy of the letter forming the annexure to the plaintiff's declaration in this suit. Defendant claims that communications so made by him to the Councillors and to such of the officials of the Somerset West Strand Municipality as may have been present at the meeting were and are privileged.

6. Save as in the three previous paragraphs of this plea set out defendant denies the other allegations in paragraph 4 of the plaintiff's declaration, and specially denies that he showed the said letter or a copy thereof to Johannes Wynand Louw Hofmeyr or to Jozua G. Hofmeyr as in the said paragraph of the declaration mentioned.

7. Defendant admits that the said letter was annexed to an affidavit and filed in proceedings pending before this Honourable Court as in paragraph 5 of the plaintiff's declaration set forth, but denies the remainder of the allegations in the said paragraph. The defendant says that the affidavit to which a copy of the said letter was annexed was filed on behalf of and in support of the present defendant's case in the proceedings then instituted by the plaintiff, and defendant claims that the communication was privileged.

8. Defendant denies the allegations in paragraph 6 of the plaintiff's declaration.

9. In regard to paragraph 7 of the plaintiff's declaration, defendant admits having on an occasion at Somerset West Strand stated to Van der Merwe 'Celliers is a scoundrel, he humbugged Mrs. Du Plessis and would have humbugged Mrs. Brink out of £300 if it had not been for me.' Defendant says that



the communication was a privileged one, and made to a fellow Councillor of the Somerset West Strand Municipality in the course of a discussion relative to municipal affairs, and more particularly relative to the exchange of land with one Abegglen. These words were made use of by the defendant in self-defence and in answer to rumours known to be in circulation (which Van der Merwe on the occasion referred to discussed with defendant) and attributed to the plaintiff as an attack upon defendant's character and reputation and also upon him in his capacity as Councillor or Mayor of the Municipality of Somerset West Strand. Defendant believed that plaintiff was mainly responsible for such rumours. Defendant denies the other allegations in paragraph 7 of the plaintiff's declaration.

10. The words used by the defendant concerning the plaintiff set out in the preceding paragraph of this plea were not defamatory, and were spoken *bona fide*, and with reasonable belief as to their truth. The defendant further says that they were true and were spoken by him in the public interest.

11. For particulars of the facts and circumstances relied upon by the defendant as justifying the words used by him on the occasions complained of in the several paragraphs of plaintiff's declaration, the defendant begs leave to refer this Honourable Court to the annexure hereto, which he asks may be considered as included in this plea.

12. At the date mentioned in paragraph 8 of the plaintiff's declaration, Andries Zachariah de Beer was Town Clerk, and the defendant was Mayor of Somerset West Strand Municipal Council. De Beer reported to defendant that the official auditor of the Council, one Wade, was making extracts from the Council's books and from papers in the said De Beer's office apparently for the plaintiff's use, and that plaintiff came from time to time in order to check and verify such extracts, and added that plaintiff seemed to be taking advantage of Wade's position as official auditor to secure information upon which to base charges against the defendant. The Town Clerk inquired what attitude should be assumed by him towards such "spying." Defendant thereupon instructed De Beer to allow free access, and added that on several occasions the defendant had taken exception to the manner in which the plaintiff was acting towards him, and said that if the plaintiff was acting the spy in the manner De Beer suggested, then he (plaintiff) was a low blackguard, and should be struck off the rolls. Defendant says that the whole of the communication to De Beer was privileged and justifiable in the public interest.

13. The defendant otherwise denies the allegations in paragraph 8 of the plaintiff's declaration, and he specially

denies that save as above set forth he used the words in the form set forth in such alleged quotation, and he also specially denies that he sent the alleged message to Dorington.

14. Defendant denies the allegations in paragraph 9 of the plaintiff's declaration.

15. Defendant admits that at Somerset West on one occasion he had a conversation with Van Breda generally in the terms indicated in paragraph 10 of the plaintiff's declaration. Defendant, however, denies that he made use of the word "verneuk," and he also denies having spoken the first sentence of the alleged words quoted as having been uttered in Dutch. Defendant says that the said Van Breda was one of an election committee of certain candidates at the Parliamentary General Election of 1903 and 1904 at Stellenbosch, for which candidates defendant was an agent. The conversation took place during the period of and had reference to election matters, upon which Van Breda and defendant were engaged in common. Defendant repeated to the said Van Breda the purport of a statement which had been made to him by William Urtel, then and still a client of the plaintiff, in the *bona fide* and reasonable belief of the truth thereof. Defendant denies that the words he used were defamatory, and claims that the words were privileged. Defendant says moreover that action thereon is prescribed. Defendant otherwise denies the allegations in paragraph 10 of the plaintiff's declaration.

16. Defendant denies the allegations in paragraph 11 of plaintiff's declaration.

Wherefore the defendant prays that the plaintiff's action may be dismissed with costs.

The following was an annexure to the declaration, setting forth the particulars of the acts and conduct of the plaintiff, Jacob Petrus Celliers, referred to by the defendant, Henry Allan Fagan, in his plea of justification. (A) the reference to Mrs. Du Plessis was made in consequence of the following facts and circumstances:

1. During the year 1906 the plaintiff had been and was acting as attorney for Mr. A. P. du Plessis, senior, whose wife conducted his affairs. Plaintiff was also acting for Mr. A. P. du Plessis, junior, the son of Mr. A. P. du Plessis, senior, and the plaintiff was likewise acting for some of the creditors of the said A. P. du Plessis, junior. On plaintiff's advice and at a time when the plaintiff knew Du Plessis, junior, to be insolvent, he, plaintiff, arranged for and effected on April 2, 1906, transfer from the name of Du Plessis, junior, to that of Du Plessis, senior, of all the unmortgaged landed property then registered in the name of the said Du Plessis, junior.

2. The plaintiff before completing such transfer insisted upon and obtained pay-

ment from Du Plessis, senior, of the sum of £52 alleged to be due to the plaintiff by Du Plessis, junior, and also of a further sum of £178, stated to be due by the said Du Plessis, junior, to the Somerset West branch of the Standard Bank for which branch the plaintiff acts. These amounts of £52 and £178 were paid through Mrs. Du Plessis, senior, together with a further sum of £18 to cover expenses of transfer from Du Plessis, junior, to Du Plessis, senior. The purchase consideration for the transfer purported to be advances which had been made by the father to the son from time to time during a period extending several years back.

3. At the date of this transaction Du Plessis, junior, was indebted for advances made against three separate properties by three separate creditors, each bond containing the general clause, viz: (l) £450 to Miss Malan, for whom plaintiff acted and still acts as agent. (m) £100 to Miss Brounger, for whom the South African Association was agent. (n) £60 to the defendant.

4. Plaintiff knew of the existence of these mortgages, and was aware that the properties specially hypothecated were not sufficient to meet the mortgage debts, and that the effect of transferring the unmortgaged property must be to deprive the bond holders, who were not made aware of the proposed alienation, of the benefit of their general clauses. A month after the passing of the transfer by Du Plessis, junior, to Du Plessis, senior, the plaintiff advised and as the agent of Du Plessis, junior, secured the surrender of the estate of the said Du Plessis, junior, as insolvent.

5. Plaintiff thereupon tried to secure for himself the appointment as trustee of the insolvent estate of Du Plessis, junior, by endeavouring to induce one or more of the creditors to withdraw from their promise given to support the defendant's candidature for such trusteeship, and to transfer such promised vote to the plaintiff or to his nominee. The creditor thus approached having adhered to his promise, the plaintiff and defendant were elected joint trustees.

6. As a result of the defendant's investigation and inquiries the insolvent estate of Du Plessis, junior, on the 15th October, 1906, obtained an order from this honourable Court decreeing a forfeiture of the claim of Du Plessis, senior, against his son's insolvent estate, and ordering the re-transfer of the property conveyed to Du Plessis, senior, from Du Plessis, junior, on the 2nd April, 1906, and requiring him to deliver up the deed of transfer dated August 3, 1903, in favour of Abram Petrus du Plessis. Du Plessis, senior, had upon the advice of the plaintiff maintained that he was entitled to retain such deed as against his son Du Plessis, junior, owing to the omission of the

distinguishing designation "senior" or "junior" after the name of the transferee.

7. Mrs. Du Plessis, senior, eventually arranged a compromise whereby the judgment was satisfied by payments to the trustees which resulted in substantial dividends to concurrent creditors, whilst she and her husband sustained serious loss.

8. Defendant says that plaintiff's conduct was improper, and that he thereby caused Mrs. Du Plessis, acting for her husband, heavy loss. Neither the £52 nor the £178, nor the further losses sustained by the said Du Plessis have been repaid to Mrs. Du Plessis or to her husband, to whom she is married in community of property.

"B."—The reference to Mrs. Brink was made in consequence of the following facts and circumstances.

9. In 1903 plaintiff acted for the late D. J. Brink, and obtained as security for a debt from one Robert Gordon a mortgage bond for £700 over certain property at Somerset West. The plaintiff also acted for the late Brink in obtaining additional security in the form of a like bond for £700 passed by the said Gordon to cover the same debt. The plaintiff acted as the agent of the said Brink, and collected the half-yearly interest, and after the death of the said Brink he continued to act as the agent of the widow, Mrs. Brink.

10. The plaintiff likewise acted for one Charles Kershaw, the holder of a mortgage bond for £600, containing the general clause, but specially hypothecating only some of the landed property of the said Gordon. Early in the year 1906 Mrs. Brink transferred the management of her affairs to the defendant's firm, whereupon the plaintiff handed over the two bonds which had up till then remained in his possession.

11. The plaintiff acted for the debtor, Robert Gordon, and also for his brothers and sisters, all of whom were appointed heirs and entitled to substantial amounts from the estate of their late father.

12. Consequent upon the general depreciation in the value of land already prior to June, 1906, the landed property bonded was not worth sufficient to cover the mortgage debts owing by Gordon. In June, 1906, the roof of Gordon's dwelling-house was blown off, and by reason of his want of means he has been unable to repair the same, and the value of the security was thus further diminished.

13. The plaintiff, although aware that Gordon was then practically insolvent, on the 1st July, 1906, took an underhand cession of Gordon's only unburdened asset, namely, the claim upon his parents' estate. The cession purports to be in security for advances alleged

to be due to plaintiff, and was obtained without the knowledge of the other creditors of Gordon.

14. On the 17th September, 1906, Gordon was cited before the Resident Magistrate at Somerset West to show cause against a decree for civil imprisonment on a debt of £34. The plaintiff appeared and offered on behalf of Gordon £3 per month. Gordon stated on oath under cross-examination that beside the mortgage debts he owed his brother David £31, and that with this exception he only owed small amounts, and that he had to get £300 from his father's estate. The plaintiff, who was acquainted with the true condition of Gordon's affairs, made no correction of these statements, which were made in his presence.

15. Within a few days thereafter the plaintiff prepared Gordon's schedules, in which he brought himself up as a creditor for £121 4s. 6d., secured by the cession aforesaid. Gordon's surrender having been accepted, the plaintiff proved for his claim of £121 4s. 6d., and claimed to hold the said cession as security, which security he valued at £500. The cession aforesaid is being challenged on behalf of Mrs. Brink as an undue preference in fraud of creditors, of whom plaintiff well knew at the time that Mrs. Brink was one.

"C."—The plaintiff likewise acted improperly in connection with the assigned estate of one Ebrahim Arnold, as follows:

16. Ebrahim Arnold became insolvent in 1893, but omitted to bring up in his schedules certain landed property registered in his name, and situate in the village of Faure. In 1903 Arnold passed a covering bond for £300 in favour of the plaintiff, which mortgage purported specially to hypothecate the said land at Faure, together with other property which Arnold had secured since his insolvency in 1893. In the year 1906 Arnold assigned his estate for the benefit of his creditors. Plaintiff and defendant were appointed joint assignees. The plaintiff, although well aware that the land at Faure belonged to the creditors of the insolvent estate, and not to the creditors of the assigned estate of Arnold, pressed the defendant to allow the plaintiff to sell the premises at Faure and to apply the proceeds in reduction of the plaintiff's bond. Defendant declined to consent.

"D."—The plaintiff likewise acted improperly in effecting a transfer from Morkel to Du Plessis, jun., as follows:

17. At Somerset West, in the year 1903, the plaintiff, acting as auctioneer on behalf of Peter Morkel, knocked down certain erven to one Jardine for £64. Some time thereafter Jardine resold the same erven to A. P. du Plessis, jun., for the sum of £80, whereupon Du

Plessis, jun., paid £64 to plaintiff and £16 to Jardine, and transfer was effected through plaintiff's office direct from Morkel to Du Plessis, transfer duty being paid on £64 only.

"E."—The plaintiff also acted improperly and unprofessionally in connection with the passing of a covering bond by A. P. du Plessis, jun., to R. Warner and Co., for £150, as follows:

18. Shortly after the alienation to Du Plessis, sen., of the landed property on the 2nd April, 1906, as set forth in paragraphs 1 and 2 of this annexure, the firm of R. Warner and Co. approached plaintiff to obtain security from Du Plessis, jun., for a sum of about £100, due to the said firm.

19. The plaintiff failed to inform R. Warner and Co. that the said Du Plessis, jun., was to plaintiff's knowledge in insolvent circumstances, but offered to procure from the said Du Plessis, jun., a covering bond for £150 in favour of the said firm, provided that the firm would discharge a claim of £10 10s., together with costs of an action then pending for the recovery of this sum by plaintiff from Du Plessis, jun., plaintiff wrongfully alleging that he had a lien over all the title-deeds of the said Du Plessis, jun.

20. The said firm agreed to this arrangement, and in terms thereof discharged the plaintiff's said claim, with costs. Thereupon on the 25th April, 1906, the plaintiff, in terms of the arrangement, secured on behalf of the said firm the registration of a covering bond for £150, specially hypothecating as a second mortgage the separate properties referred to in clause 3 of this annexure, though the plaintiff knew that the said properties were not at the time worth the amount of the existing bonds thereon.

21. Thereafter, on the 2nd May, 1906, the estate of the said Du Plessis, jun., was surrendered as insolvent, as in paragraph 4 of this annexure set forth, and the firm of R. Warner and Co. were, under the circumstances above set forth, compelled to abandon all claim for preference under their bond, and have had to accept a dividend as concurrent creditors. The plaintiff has, moreover, not refunded to the said firm the amounts paid under the arrangement as aforesaid.

"F."—The plaintiff has on divers occasions, and with reference to sundry matters, acted in an improper and unprofessional manner as follows:

22. In endeavouring to persuade creditors interested in insolvent estates to depart from promises made to vote for defendant as trustee, with a view to inducing such creditors to support the candidature of plaintiff or of plaintiff's nominee, to wit, in the insolvent estates of Charles Gerhardus van der Byl, of Somerset West Strand, and A. P. du Plessis, jun., of Somerset West.

23. By arranging a compromise of a case direct with the party against whom the plaintiff was acting, although such person was represented by the defendant's firm to the knowledge of plaintiff, to wit, in the matter of *Skarts v. Roos*.

24. By attempting to influence a client of the defendant's firm not to employ such firm, but to transfer his business to plaintiff, to wit, Rayoolsha, of Sir Lowry's Pass.

25. By neglecting when transmitting a diagram prepared for purposes of transferring premises purchased by defendant from Mrs. Willeputs through plaintiff, to communicate a disclosure specially made to plaintiff by the surveyor employed that the diagram did not contain the entire premises sold and purchased.

26. By wrongfully entering into an agreement with one J. J. de Beer, an enrolled agent, also practising at Somerset West, whereby plaintiff and De Beer agreed (independently of special arrangements with clients) each to charge and the other to allow in all future court cases, in which they should appear as opposing one another, fees at the rate of £2 2s. per diem, for attendance in court, the said charge being far in excess of that authorised by the Magistrates' Courts rules as to costs. The said charges were made accordingly by plaintiff and De Beer, to wit, in the case of *Fauré v. Haupt*.

Mr. Benjamin (with him Mr. W. P. Buchanan) for plaintiff Mr. Close (with him Mr. D. Buchanan) for defendant.

Karl Johannes Petrus van der Merwe, Mayor of the Somerset West Municipality, said he was present at the meetings on January 31 and February 1. At the first mentioned meeting the defendant (Fagan) was present. A question arose with regard to proceedings taken to unseat Fagan, and the defendant read a letter (produced). Witness took objection to the letter being read, as he considered it was not at home in their deliberations. In spite of his protest, the letter was read. The meeting was an open meeting. The Mayor then suggested that the meeting should adjourn pending his getting a full meeting of the members of the Council. They met again on February 1, and the letter was again read. Witness again protested against the letter being read, but, notwithstanding that, it was read. With regard to what had been stated in the letter, he thought that if the Mayor read such a letter in an open meeting there must be some truth in it. Mr. Cilliers asked witness after the meeting if the letter had been read. "Now, I wish you to tell his lordship the grounds that led up to this statement," continued counsel.

Mr. Fagan came to my private residence, and asked me if I would accompany him to Stellenbosch to see Mr.

Roux, in order to try and persuade him to withdraw the protest he had made against the action of the Council in passing transfer of a certain lane to Mr. Abbeglen.

Was Mr. Fagan acting for Abbeglen in that matter? inquired counsel.

The witness replied in the affirmative, and added that when Mr. Fagan invited him he replied: "Well, as to-morrow is a holiday, I do not care about going away from my home, and, secondly, as there is some ill-feeling between you, I do not like to be mixed up in it." "Well," said Mr. Fagan, "Cilliers is only doing it out of spite." I replied, "I do not think Roux is a man that will allow himself to be used as a tool for spite, and Cilliers is only acting for the client, the same as you would do." Witness then asked him why he had delayed in bringing forward the matter of the transfer to Abegglen, and Fagan replied that it was the fault of the Surveyor-General, and witness replied that he thought Mr. Fagan was as bad, then Mr. Fagan jumped up, and said, "I tell you that Cilliers is the biggest scoundrel. He humbugged Mrs. Louw, and he would have humbugged Mrs. Brink out of £300 if it had not been for me, and you can go and tell him that."

Mr. Benjamin: Fagan says that Mrs. Louw's name was not mentioned, but that it was Mrs. Du Plessis?

Witness: He said Louw.

Cross-examined by Mr. Close: Considerable interest was aroused in the case at the time.

I put it to you that this letter was read at a special meeting of the Council to ascertain what action should be taken.

It was a special meeting of the Council.

I put it that Fagan read this letter which he had written some time before, commenting on the action of Cilliers to show his animus?

He read the letter.

Why did you not move a resolution protesting against the reading of this letter.

I did object.

Was not a vote of confidence moved in the Mayor (Mr. Fagan) at the time he explained his position?

Yes, but I protested.

But the minutes state that the Council was unanimous, and where is the reservation you made?

I said I appreciated what he had done, but that there was one thing he had done to which I objected.

Is that stated in the minutes?—No.

Some time before the end of 1906 there was some ill-feeling growing between you and Mr. Fagan?—Not from my side.

Mr. Fagan was in the habit of discussing matters with you?—Yes.

And you often spoke of Mr. Cilliers, and, in fact, on one occasion you told



Mr. Fagan that Celliers was unscrupulous in his charges, as you had opened a letter addressed to another Van der Merwe?—No, I do not remember it.

You often spoke of other members of the Council to Mr. Fagan?

I do not talk about the other Councillors.

Mr. Fagan consulted you about the matter of the transfer?—Yes.

And in the course of conversation Mr. Fagan said this about Celliers?—Yes.

Mr. Fagan gave his opinion of Mr. Celliers?—Yes, pretty strong.

Are you sure he used the word Mrs. Louw?

Yes, I am.

I put it to you that you are mixing up the name Louw with Du Plessis.

No, I am not. I know Mrs. Louw, and I knew Celliers had acted for Mrs. Louw before her husband's death, and that Fagan was then working for her.

You did not communicate that information to Celliers for a month after?—No.

Did you write the statement down?—No.

Did you see Mrs. Louw after Fagan said this?—No.

I thought you told my learned friend that you were impressed by this letter?—I thought it was just a business squabble.

Mr. Fagan was very angry when he made use of this statement?—He was huffed.

I cannot understand why your blaming Fagan for the delay should cause Fagan to call Celliers a rogue?

I told Fagan that I thought he was to be blamed for having delayed this matter so long.

Had you mentioned this matter to Fagan before?—Yes.

In re-examination, the witness said he had given Fagan work.

Andreas Zacharias de Beer, the Municipal Clerk, gave evidence in support of the eighth paragraph in the declaration, and put in copies of the minutes. He was present at both the meetings, and heard the letter read. Witness thought something must be wrong, or Mr. Fagan, smart business man that he was, would not make such a statement. On January 26 Mr. Fagan asked witness and his wife to dine with him, and witness accepted. They had a conversation, which commenced with regard to Mr. Dorrington, who was a member of the Council. Mr. Fagan wondered if Dorrington would pass a vote of censure on the Mayor, as he had challenged him to do so. Fagan then said: "I have sent a letter to Celliers in the strongest terms possible, telling him that he had done certain dishonest things, and if he did so again, I would take steps to get him struck off the roll. Celliers knows that the letter was not typed by me, but that I dictated it to my typist, and if my statements were not true, he would certainly have sued

me for libel, but instead he sent me a mildly-worded letter in reply." Witness said that in May, 1906, Fagan said that if it had not been for him, Celliers would have swindled Mrs. Krynauw out of £50.

What impression did these various statements raise in your mind?

Well, there is never smoke without fire, and as these things had been going on for twelve months, I became suspicious.

Continuing, witness said that when the affidavits in the action to unseat Mr. Fagan were being drawn up, Mr. Fagan wanted witness to swear to something that was not correct—

Mr. Benjamin: Now, in June, 1906—

Mr. Close: My lord, there is nothing in the pleadings referring to June, 1906.

[De Villiers, C.J.: He cannot get damages for that date, but if there was slander, I do not think it can be excluded. I would suggest that it be left out.]

When that statement was made in January, was Wade getting particulars from the books for plaintiff?—No, he was not.

Celliers has a right to look at the books as a ratepayer?—Yes.

And there was no spying?—No. Continuing, witness said that on February 1 Fagan asked him if Wade had been in to look at the minute-book, and witness replied that he had. At the meeting, Mr. Fagan said that the Town Clerk said a spy had been in, but this statement he (witness) repudiated. Witness remembered the Municipal contractor applying for an advance, and Mr. Fagan said to him: "I am disappointed with you. You are still giving your work to Celliers, and therefore you cannot get money on account. If you cancelled the sale with Mr. Celliers you can get the money." A few days after the contractor went to the Municipal office, and Fagan paid him.

In cross-examination, witness said that although he visited Mr. Fagan privately on January 26, he took Municipal matter with him to discuss. Witness occasionally consulted the Mayor at his own house on Municipal matters.

I put it to you that that afternoon you told Mr. Fagan about Celliers and Wade and the books?—I did not.

You deny that?—Yes.

You then knew that the case was set down?—I had heard it.

A lot of investigation into the Council's books took place?—Yes.

When did Celliers go through them?—On the 25th.

I put it to you that Celliers constantly saw Wade?—I deny that.

Witness said he could not say where all the information contained in the voluminous affidavits handed in in the other case came from.



Are the minute-books accessible to the public?—They are to a ratepayer.

I put it to you that there had been unusual investigations into these books?—No.

At that time you knew that for some time past there had been ill-feeling between Celliers and Fagan?—I did not come in contact with Celliers to know what his feelings were. Mr. Celliers and I never discussed the matter.

You heard of this action on a Saturday?—Yes.

Did you go and tell the Mayor?—No: I only heard it casually.

These proceedings came on, and affidavits were prepared, and you tell the Court that you did not care to sign the affidavits because there was a lot that was not true in them?—Yes.

But you signed them?—Yes, when they were amended.

Witness, continuing, said he objected to the affidavit, because of certain statements in it which were not true. Sections 33, 34, and 35 in the affidavit were not read over to him. He gave instances of where he did not agree with the statements in the affidavits.

You say that Mr. Fagan wanted deliberately to commit perjury for the sake of 3s. 11d.?

Witness: The amount was more—it was 4s. 10d.

Witness, continuing, said he was sure that Mr. Fagan had used the name of De Beer with Celliers in May.

How did that come about?—Mr. Fagan told me to tell Bream that he must be careful of Celliers, or Celliers would make him bankrupt.

Why did Mr. Fagan choose a messenger?—I do not know. I thought Mr. Fagan was working for the Municipality. You see, Bream was doing the work very cheaply, and I was afraid of his going bankrupt.

Did you tell Celliers at once of what Fagan had said?—No, I said nothing until March last.

And how did you come to mention it?—Celliers asked me if I said so-and-so to Bream and Dorrington, and I replied that I had.

Did Celliers suggest to you the words that were used?—No.

Didn't you know there was considerable ill-feeling between the parties at this time?—Yes.

And you gave all the messages?—Yes.

Has Mr. Van der Merwe got a bond over your property?—Yes.

How much is it?—I do not see that that has anything to do with the case. I decline to answer.

Johannes Rynhardt van Breda, a farmer, of Standerton, and brother-in-law of Celliers, said that last year Fagan met him, and said he intended starting business at Somerset West, and asked witness to give him his work, and that of his mother. Witness replied

that he could not give up his work, as Celliers had it, but that if Celliers swindled him he would soon make a change. With regard to his mother's property, he said he had nothing to do with it. Fagan then replied in Dutch. As conveyed in the declaration, witness took Fagan's statement to imply that Celliers was a rogue and a scoundrel. Witness did not tell Celliers at the time.

In cross-examination by Mr. Close, the witness said he and Mr. Fagan were in the committee which worked for Marais and Krige at the Parliamentary election in 1903. They were all thanked for the share they took in the election. Witness did not know that Celliers wanted to join the committee.

I put it to you that you asked Mr. Fagan what Celliers was like, and that he replied as you have stated?—That was never mentioned then.

Did you trust Mr. Celliers?—No. I trusted no man at election times. I did not know how he would vote, whether he would vote Progressive or Bond. He told me he was not going to interfere with politics because he was friendly with both sides.

When you heard this statement from Fagan you thought that Mr. Celliers had acted badly?—Yes.

And yet you did not tell Celliers about it for fifteen months after?—The first time I mentioned them was three days before my sister's wedding.

I put it to you that not only on the occasion of the election, but at other times you said Mr. Celliers was unscrupulous in his charges?—No, I did not.

Didn't you make objections to his charges?—No, indeed. I got the account and then went and paid it.

The Chief Justice interrupted the cross-examination to remark that if the line of defence as shown in the cross-examination were not established he was not sure it would not increase the damages.

The witness said he got an offer at the sale of over £2,000, and afterwards the School Committee bought the place for £3,000. That was the reserve price, and they would not have sold for a penny less. He was away when the option was given to the School Committee, and he told his mother he was sorry that such option had been given.

Mr. Close: I put it to you that you have had considerable ill-feeling against Mr. Fagan for some time past—that there was ill-feeling over a certain case Mr. Fagan conducted against you?

Witness: I said I was not feeling satisfied at all with Mr. Fagan for taking up a case against me, where he ought to have acted for me, in putting through a transfer and bond. I said he did not act fairly with me when he took up the case against me, and he afterwards said himself he was sorry.

Mr. Close: In that case you were the plaintiff and you withdrew and paid the costs?

Witness: I would not have withdrawn, but I had to go to British East Africa, and my brothers were waiting for me, and I thought I had better pay a couple of pounds rather than postpone my trip.

Jacob Petrus Celliers, the plaintiff, said he was a Councillor of the Somerset West Municipality, and was a valuator to the Divisional Council of Stellenbosch. He had been a Justice of the Peace for some years, and had been in practice as an attorney at Somerset West for some time. He had known the defendant for the last six years. Witness joined Mr. Cairncross in an application made for the unseating of Mr. Fagan as a Councillor of the Somerset Strand Municipality. First of all Mr. Cairncross was alone in the action, but witness was advised that there would have to be a ratepayer joined. Witness was a ratepayer. There was no personalities introduced in the action against Fagan.

The witness was examined as to the contents of a certain letter complained of. He said that the charge of "scurrilous tactics" in the matter of *Krynhout v. De Beer* were wholly unfounded. He acted in a purely professional capacity. A letter was written by Mr. De Beer in that matter, and witness understood that that was the letter which caused Fagan to use the expression "scurrilous tactics," but witness had nothing to do with that letter. He attached the letter to an affidavit in the case of *Krynhout v. De Beer*. The application to unseat Fagan came before Mr. Justice Maasdorp. In regard to the matter of *Du Plessis v. Arnold*, the circumstances were that Mr. Fagan and witness were joint assignees in the estate of Arnold. Witness was administering assignee, and advertised the sale, but on the morning of the sale, Mr. Markotter attached the goods, and afterwards sold them. Witness wrote to Markotter stating that he could not reconcile his action with the fact that his partner, Fagan, was a joint assignee in the estate. On the 1st February, witness heard that certain letters had been read at meetings of the Council. Thereupon witness made inquiries, and he questioned Mr. Van der Merwe and obtained a statement from him. Witness at once wrote to Mr. Fagan, saying he had heard of "the wicked slander." Other statements were made by witnesses to him at the beginning of the present year.

Mr. Benjamin: Do you think that the reading of these letters at the Town Council meetings affected you?

Witness: It has done me a tremendous lot of harm. The effect of a man like Mr. Fagan, who was the Mayor, reading such letters in public, naturally makes the public believe they must be true, I suppose, and somehow it has been spread

throughout the whole district. It has spread like wildfire; the whole district knows about it. Proceeding, the witness said he had been authorised by Theunis- sen to sell certain land which was disposed of to the defendant. There was a good deal of unpleasantness with Fagan with regard to the administration of the Arnold Estate. Witness advertised the sale, but it was withdrawn on a notification received from Fagan, who said Arnold had given him power of attorney to carry the sale out. Immediately afterwards, Fagan proceeded to advertise the property. The slanders had done him a great deal of harm in his business, particularly in a country business which was not only a legal one, but a trust one. A number of clients had gone away from him. The witness went on to explain that the defendant was a much older man than he was, Fagan was a man of some public position, and slanders from him naturally had a great effect. There were many other slanders brought to the notice of witness.

Cross-examined: His connection with the young Du Plessis began in 1902; it was only recently he was connected with the family. With regard to the Du Plessis' transaction, the witness contended that the boom in property had not stopped in May, 1903. In 1903 he believed he made valuations for the Divisional Council, and the transfer which was made in 1906 was on the Divisional Council valuation. With regard to the commission in a sale, it was a simple matter of arrangement whether the buyer paid or not.

The witness was cross-examined as to drawing up no case for counsel's opinion in the matter of Du Plessis. He said he passed the case for opinion, but had not then made a research, and he admitted having made a slip. He did not, he said, suppose at that time that Mr. Fagan was making up a case against him, as he now appeared to have done.

Mr. Close: Is that your suggestion now—that a trap has been laid for you?

Plaintiff: Oh, yes.

[De Villiers, C.J. (to Mr. Close): What is your charge, in a few words, against Mr. Celliers in respect of that?]

Mr. Close: The charge there is the improper passing of transfer direct to Du Plessis, when, as a fact, he knew of the circumstance that there was an intermediate buyer, and we bring that forward as acting improperly.

[De Villiers, C.J.: Do you mean he obtained any benefit for himself out of it?]

Mr. Close: I don't know whether he got any benefit himself from it, except the indirect benefit in obliging a client.

[De Villiers, C.J.: You mean he ought to have paid double transfer?]

Mr. Close: We mean he ought to have seen that double transfer was paid,

and I say that, for a professional man to act like that, is acting improperly. That is one of our charges.

[De Villiers, C.J.: A professional man can make mistakes. If a mistake was made, it does not necessarily prove that he was assisting in a fraud on the Government. You say it was a fraud on the Government?]

Mr. Close: I say it was a fraud on the Government, and that it was an unprofessional act on the part of an attorney of this court to have allowed it to go through in that way, whatever the motive was.

[De Villiers, C.J.: But supposing it was a purchase by Jardine on behalf of Du Plessis?]

Mr. Close: One can only say the property was actually knocked down to Jardine.

The witness said that if he had seen to a double transfer it would have benefited him. If there were a dishonest motive, one was generally dishonest to make profit. He had made a mistake in passing the case for opinion. The thing was not fresh in his mind at the time, and he should never have passed it.

In the course of further cross-examination, the witness exclaimed heatedly: Mr. Fagan has an insinuation of a dishonest motive for everything I do. No matter how honest my actions may be he ascribes bad motives to them.

Cross-examination continued: Witness had a good deal to do with the affairs of the Du Plessis family. Du Plessis omitted several things from his schedules for which witness might be asked, on the same principle as these questions, to explain.

[De Villiers, C.J.: You say that in the Du Plessis case, knowing there was undue preference, he aided and abetted in it?—That is the charge, is it?]

Mr. Close: Yes, my lord.

[De Villiers, C.J.: What do you say to that, Mr. Celliers?]

The witness said the bank was not his client. He did not know Du Plessis was insolvent or that his affairs were so involved. Until shortly before his insolvency Du Plessis had the name of being a wealthy coloured man in Somerset West. He put through the transfer on instructions. He was not acting for any creditor except the bondholder, and he was convinced that the latter was fully secured.

De Villiers, C.J., said it seemed to him that much time was being wasted. The proper course, he thought, would be for the plaintiff to prove the uttering of the slanders, leaving it to defendant to justify them. Then, perhaps, the plaintiff might be recalled. His lordship added that there was nothing so far to justify the suggestion that the Law Society should take any steps. There might be something still to come, but

there was nothing so far. The course which I would suggest and the most reasonable course, I think, is that you should have the right to have the plaintiff recalled for the purpose of cross-examination after you have given your own evidence. That would simplify matters.

Mr. Close: The onus was not put upon us.

[De Villiers, C.J.: It would be much better if the Court first of all decides what were the words actually used by the defendant, and having decided, then it would be much easier to confine the evidence to such points as are relevant. What I would still suggest is this: The witness now should step down—and of course, I do not know whether the plaintiff has any more evidence—then you can give your evidence. Then, if afterwards necessary, he may be recalled for the purpose of further cross-examination by you.]

Mr. Close: I do not know what further evidence my learned friend has to call.

To the Witness: You were practising at Somerset West in 1903, when De Beer came there?—Yes.

And I put it to you, you and De Beer made an agreement about fees on your suggestion?—No.

I put it to you you made an arrangement by which you were to allow each other to charge, and charge in all contested cases two guineas?—There was no such agreement with Mr. De Beer, but we did in certain trial cases, where a number of witnesses were called, agree to charge two guineas for the appearance at court.

[De Villiers, C.J.: For your appearance in court?—For the attorney or the agent in court.]

Was it explained to your client, and did he explain to his client?—That I cannot say.

[De Villiers, C.J.: That, I think, is very improper—not to tell your client beforehand.]

By Mr. Close: In one Faure's case, witness explained the arrangement to him, but Faure objected, and witness refunded a guinea. In case the client won he would not have to pay attorney and client costs, so that it was not, he submitted, a one-sided arrangement. In another case—the case of one Nochemowitz—witness allowed De Beer three guineas for attendance. The case was on three times. The first day it was postponed by consent, the second day evidence was heard, and the third day judgment was given.

Mr. Close: You allowed three guineas instead of 10s. 6d., according to the tariff?

Witness: No; I think it should be £1 11s. 6d. for three days. The witness added that he had not been able to find the papers in the matter, and, there-

fore, could not recall the circumstances. He did not regard the arrangement as improper.

Re-examined: Mr. Fagan had spoken to him of the smallness of the tariff charge, and had asked him to agree to allow a guinea. That was an arrangement between them.

Mr. Close said his client denied this.

In reply to the Court, Mr. Benjamin said he had other witnesses on the question of justification, but no more witnesses on the defamatory statements.

De Villiers, C.J., said that on the following day the Court would hear the evidence for the defence on the question of justification, reserving the right to the plaintiff to call further evidence on this point.

Mr. Benjamin closed his case.

The defendant stated that he was a law agent practising at Somerset West. For six years he had been Mayor of the Somerset West Municipality. He started in practice in January, 1906. Formerly he had been in partnership with Mr. De Villiers, who subsequently disappeared, and Mr. Markotter took his place. He denied that he had ever entered into an agreement with regard to the fixing of fees. There had never been an agreement between Celliers and himself, though there might have been one between Celliers and Markotter, but of this witness had no knowledge. Witness and Celliers were appointed trustees in the insolvent estate of A. P. du Plessis, and he formed a very strong opinion as to the conduct of Celliers. As Mayor he had never shared in any profits through Municipal work. That was entirely in the hands of Markotter. With regard to certain transactions, he knew that rumours were going about, and he spoke to Mr. Van der Merwe on the subject. He admitted he lost his temper, and said to Mr. Van der Merwe, in confidence as he thought, that Celliers was a scoundrel; that he had humbugged Mrs. Du Plessis, and would humbug Mrs. Brink. Five minutes afterwards he was sorry for what he had said, but he was angry at the time, and did not think the conversation would be reported. On another occasion, when De Beer told him of what was going on in connection with Municipal matters, he said that if Celliers had done what was said of him he was a low blackguard, and that he should be struck off the roll. He also admitted some of the remarks made by him in conversation with Mr. Van Breda, in connection with election proceedings. He denied, however, that he had ever used a curse word. He had never done so in his life. He had no recollection of having asked for these remarks to be reported to the plaintiff. Witness had absolutely no recollection of the statement deposed to by Mr. Breda relative to wanting to get the

estate in his hands. Witness had not told witnesses to convey his statements to Mr. Celliers. He thought he was speaking in confidence to people whom he regarded as intimate friends.

Regarding the letter, the witness said that at the time he wrote it he was very irritated and annoyed at the plaintiff lecturing Mr. Markotter. He was also annoyed by a letter written by the plaintiff, and in answering that letter, witness said that after inquiry he considered that Celliers had charged him with what he (Celliers) knew at the time to be incorrect statements. He called upon Celliers to withdraw what he considered an offensive part of the letter, adding that plaintiff had deliberately tried to confuse two issues by a base attempt to injure him (defendant) in his reputation and character as a business man. The fact that Mr. Celliers had attached to an affidavit a letter reflecting on witness's character was what witness referred to in the letter complained of as "scurrilous tactics."

[De Villiers, C.J.: What part of Cellier's letter to you do you consider "displayed malevolence which made it positively silly?"]

Defendant: Not part of that letter. The letter was a climax. I felt afterwards that I was too angry at the time when I wrote that letter. I have often since felt sorry that I wrote that. There was one thing after the other until I got so sick of it that I wrote that letter.

The witness was further examined regarding correspondence between himself and the plaintiff. He complained that certain letters accused witness's firm of unprofessional conduct. "It made me very angry," said the defendant. "It was really a climax, and I was at the time in a serious state of mind owing to public worries and municipal unpleasantness I had had."

Asked what were his reasons for making the statements in the letter attached to the declaration, the witness said they were the conduct of matters in the cases of Du Plessis and Gordon, and the spying behind his back through Wade, whom witness understood was practically in Cellier's employ at the time. Then he heard of the arrangement with Mr. De Beer, that they should allow each other more. That also was in his mind.

Mr. Close: These things you believed to be true at the time you wrote that letter?

Witness: Oh, yes. I still believe in them, though I am sorry, very sorry, that I expressed it in that manner.

The plaintiff gave further evidence relative to the matters of Arnold and Gordon. He referred in detail to the transaction in respect of the various matters, saying that the parties were illiter-



ate and pliable, and were simply in the hands of their legal advisers.

[De Villiers, C.J.: The gist of your charge in the Du Plessis case is that plaintiff induced Du Plessis to pay more for the property than it was worth?]

Witness: Yes, my lord.

But supposing he believed the property was worth that?—He was acting for Cairncross. But Du Plessis was an ignorant man and could easily be led by his legal advisers. The man had been simply misled—I don't want to use a stronger word—into paying this large sum.

I understand that the gist of that accusation was undue preference?—That was a subsequent matter, my lord. I felt it very much that this poor fellow had been made to pay £900 for property which a few months before was sold for £300. If Du Plessis had been an educated man able to protect himself I would have thought nothing of it. Du Plessis told me he had not even seen the property, that he accepted all Mr. Celliers told him.

Do you consider it humbugging a man to get him to pay a good price for a thing?—When he was acting as legal adviser.

Your suggestion is that he shared in the profits?—I won't say that, my lord, but he could not have done it with an honest intention. If he had sold it for, say, £450, I would have said he got a small profit, but selling on a falling market for £900 what was sold a few months before for £300 seemed to me suspicious.

The witness, in further examination, detailed transactions in respect of the insolvency of young Du Plessis. He felt very strongly for these people, and he regarded the circumstances as suspicious.

"Before this case came on," said the witness, "I did all I could to keep it out of Court. I did everything that a man with a grain of self-respect could do. I went to Mr. Celliers, spoke to him and wrote to him, asking him to allow the past to be buried between us. I wanted both of us to come together and sign a joint document saying that whatever we had said of each other would be withdrawn. But they wanted me on my knees. They wanted an apology such as I could not give as an honourable man. I had it on my mind that these people had been very badly treated, and that their terrible losses were due to these things."

[De Villiers, C.J.: I suppose you were very much annoyed about the case against you brought by the plaintiff?] It was prior to that I made these statements.

Before the action?—Yes.

Take what you said to Breda, what justification have you for that?—It was said to me one day that Celliers had given Urtel a month's refusal on property, which was in his hands. He said

that the owner would accept £200, and Urtel was to try meanwhile to get more, and share the profits with Celliers. I said I thought it was not a proper thing to do, and to tell Celliers if that becomes public, his name will be struck off the roll. Subsequently, Mr. Urtel said he had forgotten the conversation. In connection with the application to have him unseated, he had been rushed by Mr. Celliers and treated like a criminal. Had he got reasonable time to prepare his case, the letter would never have been heard of. The affidavits of the applicants had lain on the Council table for several days, and he thought it unfair the councillors should have been allowed to read these charges before he had prepared a defence.

Rumours were constantly going about that Messrs. Cairncross, Celliers, and Walker were going to bring further actions against him, that they were not quite done with him.

[De Villiers, C.J.: But you are not quite done with him?—I wrote that I wished everything was over between us.

The witness, further examined, stated that the plaintiff had admitted to him that he was in court to assist in the criminal prosecution against the defendant for certain obstruction in the street causing an accident to a cyclist. Witness was placed in the dock with a coloured man. Both were acquitted, and the threatened civil proceedings fell through.

Cross-examined by Mr. Benjamin: Mr. Celliers did not ask a single question in the criminal proceedings, although he sat between the sergeant and Mr. Adams. Witness could not say that Celliers suggested a single question to the police officer. If the plaintiff said he had absolutely nothing to do with the case, witness would rather not contradict him. Although he had the impression that Celliers was interested in the case. Markotter told witness that the plaintiff had approached him with regard to the extra allowance in fees, and when witness heard the conditions, he said he would have nothing to do with it. Witness never saw that letter in reply to that of Markotter. The plaintiff said to Markotter that they must not pursue a cut-throat policy, but charge the same. Witness absolutely declined to have anything to do with the suggestions of the plaintiff to arrange a scale of charges. Mr. Markotter dealt with all municipal work. Witness believed that the plaintiff was acting towards him in spite. When witness spoke to Van der Merwe, he was angry. It never entered his mind that the plaintiff had done anything wrong towards Mrs. Louw. He did not tell De Beer that the plaintiff had humbugged Mrs. Louw.

Upon one occasion you took Mr. De Beer over to Stellenbosch?—He took me over.



Mrs. Louw was interested in that property?—She had nothing to do with it.

Was it not her property?—It stood vested in the name of Arends.

Was she occupying it?—Yes.

If Mr. De Beer says you told him on that occasion that Celliers had humbugged Mrs. Louw, it was not correct?—I have no recollection of it.

Proceeding, the witness said that he believed De Beer was living in dread of the plaintiff, who had on one occasion told De Beer that he had committed perjury in an affidavit.

I suppose you know all ratepayers have a right of access to the municipal books?—I do not believe all of them. I think only the minute-book, and perhaps some other, but not to the private documents of the municipality.

Do you think it would have been necessary for Mr. Celliers to employ a spy for the purpose of obtaining information for him?—If he wanted to do it privately, yes.

Was there any necessity for Celliers to spy upon the municipality?—I think he wanted to work up something against me.

Mr. De Beer says he would have openly shown him the books?—I think he preferred to keep in the background, and let someone else do the work.

Further cross-examined, the witness denied that he had ever specially asked Breda for his business. He might have said he would be glad if Breda would do what he could for the office.

Mr. Benjamin: Now, Mr. Fagan, you say this letter was privileged. But you are aware of the remarks made by Mr. Justice Laurence in the case of *Cairncross v. Fagan*, when that letter came under his notice? You are aware that his lordship said there was a letter filed which was offensive and abusive, and which ought never to have been put before the Court? And notwithstanding that, you have now put that letter on record, and you say it was privileged?

Defendant: I still look upon it as privileged. It may be abusive, and at the same time it may be privileged.

You know his lordship said it was deplorable that such a letter had been filed, and notwithstanding his remarks, you still persist in putting it on the record and making it a public document?

[De Villiers, C.J.: It is annexed to make it public.]

Defendant: That is what I say. You (plaintiff) make it a public thing, not I.

[De Villiers, C.J.: Besides, the judge did not say it was not privileged.]

Defendant: No; that is my point. It may be abusive, and it may still be privileged. The witness added that the letter was filed in reference to an application for extension, and he wanted to show the Court the friction that there was.

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Counsel proceeded to read certain letters.

[De Villiers, C.J.: Why do you read these?]

Mr. Benjamin: I read them to show the malice on the defendant's part.

Defendant: It is generally known there was friction between us; very serious friction, I am sorry to say.

[De Villiers, C.J.: Is it necessary for your case to read all this?]

Mr. Benjamin: Well, perhaps not, my lord, but there are one or two letters I would like specially to draw attention to.

Mr. Benjamin (to witness): I put it to you, Mr. Fagan, that you came into Court to-day to justify yourself on all these various defamatory statements on the sole ground that you had got rumours from people here and there, and you believed them?

Defendant: No, no, no, Mr. Benjamin. There are the documents.

Re-examined by Mr. Close: He had never had any arrangement with another practitioner with a view to charging above the tariff fees.

Servas Daniel Faure, general dealer, of Somerset Strand, said that Mr. Celliers acted for him as his attorney in a case against a Mrs. Haupt in 1905. In August of that year, plaintiff forwarded him a bill of costs, in which there was a charge of two guineas for appearance in Court. In January, 1906, Mrs. De Beer's bill of costs was forwarded to him. That contained a similar charge. Witness objected, and a guinea was taken off. Celliers came to him one day a couple of weeks ago, and said he saw witness was going against him. Witness said he did not want to go into Court. Celliers then said, "You must say you are satisfied." Celliers went away saying something about, "he who laughs last laughs longest."

By Mr. Benjamin: What Celliers said was not: "Didn't you tell me at the time you were satisfied?"

[De Villiers, C.J.: Did plaintiff refund you a guinea?]

Witness: No; I thought it was the correct charge at the time. I thought because Mr. Celliers was an attorney he was entitled to two guineas.

Nathan Nochomowitz said he had a case last year in which Mr. Celliers appeared for him. The case was called one day and postponed. It was heard another day, and judgment was given at a later date. The bill of costs had been paid to Celliers.

Counsel explained that this bill had been put in showing a charge by Mr. Celliers of £3 3s.

Witness (to the Chief Justice): I should like to ask you if I can get the five guineas back which I paid Mr. Celliers too much?

[De Villiers, C.J.: Did you pay him five guineas too much?]

Witness: Well, according to what I have found out, I have paid five guineas too much.

[De Villiers, C.J.: Well, you had better consult your attorneys.]

Johannes Jacobus de Beer, law agent, said he practised at Somerset Strand from 1903 until 1905.

Mr. Close asked the witness if any arrangement was made with plaintiff about fees.

[De Villiers, C.J.: It is admitted that there was an arrangement about fees.]

Mr. Close: But we say there was a general arrangement.

The witness said that at the end of 1904, Mr. Celliers approached him, and suggested that in contested cases, there being such a lot of work to do, and the statutory fees being so low, they should agree to raise the charge to two guineas. That was in all contested cases. At the time there were no other practitioners there. It was agreed that the bill should not be taxed, but if the clients objected the extra amount should be allowed to fall away. The bills were to be placed before the clients. In February of last year witness was instructed by Warner and Co. to make inquiries as to the position of the younger Du Plessis. It was not the case that plaintiff did not know of Warner and Co.'s matter until April. Witness had correspondence with Celliers about the matter, and had interviewed him about Warner's affair early in March, when Celliers assured him he knew all about Du Plessis's property, and that the bond would amply secure the debt. Mr. Celliers had spoken to witness before the case, and had told him not to say anything about this arrangement in Court.

[De Villiers, C.J.: How could he be so foolish if he admitted it himself in Court?]

Witness: Well, I have only answered the question.

When he said that to you, you went and repeated it to the defendant?—He saw me talking to the plaintiff, and asked me what he said.

[De Villiers, C.J.: How could he be so foolish when he admits it in court?]

The witness made no reply.

Carol F. Markotter, partner of the defendant, said that Celliers asked him to agree to charge more than the tariff fees in contested cases. Defendant refused to have such an agreement made, when it came to his notice of a charge of a guinea being made by Celliers. The arrangement was never acted upon. Celliers told witness in the first place that there had been such an agreement with De Villiers, witness's predecessor. Witness did not show Fagan the letter from Celliers relating to the arrangement. He forgot the letter. Witness only consulted Mr. Fagan in contested Magistrate's Court matters.

By Mr. Benjamin: Mr. Fagan invariably conducted contested cases, but witness did not consult him in uncontested cases. Witness always drew up the bills of costs, as he was better acquainted with the charges than Mr. Fagan was.

Stephanus Abram le Roux, farmer, of Stellenbosch, said that some time last year he undertook to vote for Mr. Fagan in the election of a trustee in the estate of Van der Byl. Celliers afterwards came to see him, and asked for the vote, but witness said he could not break his word. Celliers said he would do better for him than Mr. Fagan.

Mr. Close: Did he remain some time to try and get you to change your vote?

[De Villiers, C.J.: Is that a matter to put before the Law Society?]

Mr. Close: It shows "the tactics," my lord.

[De Villiers, C.J.: It is merely rivalry; we could spend a month going into these things.]

In cross-examination, the witness said that this had happened after the summons was issued in the present case.

Charlotte Brink, holder of a bond passed in favour of her late husband for £700, stated the plaintiff acted at one time as her attorney, but later the defendant conducted her affairs. In July last the property became much depreciated through a storm. The mortgagor, Mr. Gordon, was repeatedly asking for time in which to pay interest. She was not aware that Gordon had ceded an interest in his parents' estate to the plaintiff. Proceedings were being taken in the matter. The plaintiff told her if she proceeded with the case she was sure to lose. He said he was not accustomed to brag, but when he went to Court he won his cases, and that he had successfully sued Fagan on several occasions, and he would do so again. The plaintiff said he was sorry for witness, as he knew she had lost a lot of money.

Cross-examined by Mr. Benjamin: She was friendly with Mrs. Celliers, whom she knew from childhood.

Nicolas Loubser, of Somerset Strand, who was a Councillor in January this year, stated he was present at a meeting between the Town Clerk and the Mayor, when the affidavits were being discussed. The defendant read the affidavits through, and struck out some points, with which Mr. De Beer did not agree. There was no attempt at a suppression of anything in the affidavit.

Robt. Chas. Warner, sole partner in the firm of R. Warner and Co., of Cape Town, stated in February, 1906, he had an account with Du Plessis, jun. In consequence of information he made arrangements for the passing of a covering bond, which was carried through by the plaintiff. He was not satisfied as to the security after he received the

bond in consequence of what he was informed. The trustees in the insolvent estate were told to sue him for undue preference, and witness agreed to rank as a concurrent creditor, which resulted in a loss to him. He was informed that Celliers had a lien on the deeds of transfer when he wanted to register the bond. He had to pay ten guineas to the plaintiff, and the plaintiff did not tell him the condition of the estate was a precarious one.

Cross-examined by Mr. Benjamin: He had been informed the estate would realise fifteen shillings in the £.

[De Villiers, C.J.: What is your complaint against the plaintiff?—I say he must have known at the time when he had that bond registered that A. P. du Plessis was insolvent.

Why?—Well, from information conveyed to me.

By whom?—By Fagan.

Mr. Close said this was all the evidence except on the Du Plessis matter, and he would suggest that this matter should stand over until the Du Plessis trial was actually decided.

[De Villiers, C.J.: You had better finish your evidence.]

Mr. Close said after the expression of opinion of the Court in the matter of Du Plessis, he did not propose to call witnesses.

Mr. Benjamin then called

Wm. Fredk. Urtel, farmer, who said the plaintiff had been his attorney for a number of years. In 1903 he had a conversation with the plaintiff with regard to the sale of certain erven of Theunissen. Witness had a verbal refusal from the plaintiff, but he could not state the amount. Witness tried to obtain a refusal from the plaintiff. He had no arrangement with plaintiff by which he was to share the profits.

Cross-examined by Mr. Close: Witness did not offer the property to the defendant for £300. The defendant did not buy through witness. Witness had the refusal of the ground.

[De Villiers, C.J.: Whatever you said to Fagan, did Celliers ever offer you land he had for sale on condition you shared in the profits?—No.

Mr. Benjamin closed his case.

[De Villiers, C.J.: I think you admitted in cross-examination that in July, 1896, you took an underhand cession of Gordon's claim upon his parents' estate?]

Witness: It was not really so much a claim on his parents' estate as some money out of his parents' estate which was in the hands of Messrs. Silberbauer, Wahl and Fuller for investment. The estate was administered about 15 years ago, I think, and it was really funds out of the estate in the hands of Silberbauer, Wahl and Fuller for investment.

[De Villiers, C.J.: What was the security for? Was it for money to be advanced, or an old debt?]

It was a covering security for past and future advances. On the 1st July, Gordon owed me about £74, and he got further advances from me after the 1st July, which brought his total indebtedness to £221. On account of the debt of £74, I received, a few days after the 1st July, £14 10s. from Silberbauer, Wahl and Fuller. That reduced his indebtedness about the 1st July to about £60. Part of the balance I lent him to pay Mrs. Brink.

The £74 you received for past debts?—That was owing to me.

In whose favour was the bond passed?—Mrs. Brink.

When was the bond passed in her favour?—I should explain first of all that Mrs. Brink held two bonds, one passed in 1903 for £700, which represented the full purchase price of some erven, and at the beginning of 1905 an additional security bond was passed to Mrs. Brink for £700.

When did insolvency take place?—In September, 1906. I should like to mention one matter in connection with that and that is the last advance I made to Gordon was £21 to pay Mrs. Brink's interest. This was given shortly before his insolvency. Gordon told me that he had arranged with Mrs. Brink that if he paid her interest his bond would not be called up. The application for civil imprisonment was dropped by consent between Mr. Fagan and myself.

Mr. Close said that the Magistrate suggested that the man should surrender his estate for the benefit of his creditors.]

Witness: That is not so. I said that if the man cannot get time to pay his debt he will certainly not go to prison, but will surrender his estate.

Mr. Benjamin said that the onus rested upon the plaintiff, in the first place, of proving publication of the various defamatory statements. If the plaintiff satisfied the Court on that point, then the defence, as he understood it, would be either that the statements were true and for the public benefit, or that they were privileged. The former line had only been taken in one case, viz., that of Van der Merwe. In all the other cases, the position taken up by defendant was solely one of privilege. On the question of privilege, counsel cited Odgers, p. 273, and said his submission would be that if the occasions were privileged, there was malice on the part of defendant, and, further, that the communication was so irrelevant to the circumstances of the case as not to be protected by privilege. On the question of malice, he cited Odgers, pp. 309 and 313. The dictation to the defendant's typist, Anna Hansen, was, he contended, not privileged. Counsel cited *Palmer v. Hill* (1892, Q.B.D., 524) and Odgers, p. 174. As to the publication to the Municipal Council, the meet-

ing may have been privileged, but the communication was of such a nature, and so irrelevant to the occasion, that it was not protected. The mere words alone showed malice. The letter was in no way material to the affidavit submitted by defendant in connection with the proceedings on motion.

De Villiers, C.J., on the question of publication to a shorthand clerk or typist, drew counsel's attention to *Edmondson v. Birch* (1907, 1 K.B.D., 371). He added that he should like counsel for plaintiff for the present to address himself to plaintiff's conduct in regard to the agreement as to fees—whether that would not justify a great deal that was said by defendant.

Mr. Benjamin said he could not justify that at all. But this was not the proper way in which the matter should have been brought up. A notice ought to have been sent to the Law Society, and the plaintiff's conduct ought to have been brought before the Supreme Court in the ordinary way. Counsel called attention to the exaggerated language employed by defendant in his letter.

[De Villiers, C.J.: The result on people who heard that letter read would be that they would say the man who had written that letter has lost his temper and he does not know what he is writing about. I do not say that is an excuse.]

Mr. Benjamin said there was no doubt that plaintiff suffered very seriously in his business and profession on account of the defendant's statements.

Mr. Close said that defendant stood before the Court to justify the statements he had made in respect of the slanders which were alleged against him. Counsel referred to the attempts which were made to settle this matter out of court. Proceeding, he urged that on the occasions when he made the statements, defendant referred to matters at least one or two of which had been conclusively proved to be true, and with regard to others, he had had very serious grounds for making the statements he did make. In regard to the letter, three publications were alleged, viz., in the Council meeting, to the typist, and to certain persons outside (the Hofmeyrs). The Hofmeyrs had not been called, so that that part of the case fell away. As to the annexation of the letter to the affidavit, counsel said that Odgers (p. 216) said that every affidavit sworn in the course of judicial proceedings was privileged.

[De Villiers, C.J.: It is not the affidavit but the letter that is relied upon by the plaintiff.]

Mr. Close: But the letter is annexed to the affidavit, and, therefore, forms part of it.

[De Villiers, C.J.: The libel is not the framing the affidavit, but for showing a certain letter to divers persons.]

Mr. Close went on to say that the Town Council and Mr. Fagan, as Mayor,

were joined as respondents in certain proceedings, and it would be his duty to consult with the Town Council as to their defence. The confidential relationship existed between defendant and the Council of co-respondents. There was a qualified privilege by reason of common interest (Odgers at pp. 220 and 253 quoted.) Defendant thought in these proceedings that he was being rushed, and, rightly or wrongly, he thought he should explain to his co-respondents why he was being rushed. On that application an extension of time was granted by the Court. Counsel quoted from the judgments of Lawrence and Maasdorp, J.J., in the case of *Cairncross and Another v. Fagan*. The publication of the letter to the typist was privileged. Dealing with the questions of fact, counsel referred at some length to the correspondence which had passed between the parties, and said that the only libellous clause in the letter relied upon by plaintiff was that in which defendant said: "My opinion is that some of your tactics are disgraceful and dishonouring to your profession."

[De Villiers, C.J.: What were the disgraceful tactics?]

Mr. Close: The arrangement with De Beer.

[De Villiers, C.J.: Do you suggest seriously that that was in Fagan's mind when he wrote that letter?]

Mr. Close: Yes, my lord. Mr. Fagan is making a general summary of the situation there. Counsel went on to contend that the plaintiff had in certain two cases heard in the Magistrate's Court, charged excessive fees. On those cases the defendant was justified in accusing plaintiff of disgraceful tactics in a professional sense. Plaintiff had not alleged, in reply to defendant's plea of privilege, that defendant was guilty of express malice. Counsel entered into a detailed examination of the various acts which defendant relied upon as justifying his allegations against plaintiff, and submitted that in any event plaintiff was only entitled to very nominal damages.

Mr. Benjamin quoted *Diepenaar v. Human* (1878, Buch., 140).

De Villiers, C.J.: In this case the plaintiff seeks to recover from the defendant two sums of £1,000 respectively as damages for certain defamatory words written and spoken of and concerning the plaintiff by the defendant. The first occasion on which the defamatory words are alleged to have been uttered was at a meeting of the Council of the Municipality (Somerset West Strand), when a certain letter which defendant had written to plaintiff was read. But it would appear from the evidence of Mr. Van der Merwe himself, who gave evidence on this point, that the letter was read in connection with certain proceedings



having reference to the motion for the removal of defendant from the Council. In that motion the Council had been made respondent together with defendant, and, if it were for the defendant to refer to any correspondence which had passed between him and plaintiff in the affidavit, then the presumption of the existence of an *animus injurandi* would be rebutted by the circumstances under which such correspondence was communicated. It is true that if the plaintiff could prove, independently of the words used, that the defendant was influenced by motives of malice, he could not take advantage of the privilege, but I am not satisfied that such malice did in fact influence him. I find that the letter was referred to in the affidavit for the purpose of showing that the case was being hurried on by the applicant in that particular case, that the defendant wished for further time, and that he wished to satisfy the Court that it was to some extent a personal matter between the parties, and that the applicant in that case was not solely actuated by public motives in proceeding against him. I quite agree with what the learned Judge said in the original case that a letter of that kind ought not to have been inserted, that it was not really relevant to the suit, but defendant at the time that this letter was read, and when it was annexed to the affidavit must have thought it was relevant, and I am not prepared to hold that there was necessarily proof of malice on the part of the defendant in reading this letter with the notice of motion at the Council meeting, nor am I prepared to say that, if I held that there was malice, it would have induced me to add to the amount of damages which I consider ought to be awarded. I may make this further remark upon this part of the case, that I do not consider, seeing that the communication to the Council would be privileged, that the employment of a clerk by the defendant for the purpose of typing the letter was necessarily such a publication as would render him liable. It was in the ordinary course of business that he employed the clerk, he did not do so with the object of publishing to her specially the contents of the letter, and as the occasion on which this statement was made to the Council was privileged I consider that privilege must also embrace the communication to the clerk, for the purpose of type-writing the letter for the information of the Council. If the circumstances under which the letter was read to the Council were sufficient to rebut the existence of *animus injurandi* on the defendant's part in so reading it, they could equally rebut the existence of *animus injuriandi* on his part in causing the letter to be type-written for the purpose of being so read. Coming then to the next charge, that refers to communications made to one

Carl Johannes Petrus van der Merwe, on the 31st December, 1906, and counsel for the defendant has contended that that was also a privileged communication. In my opinion, it was a wholly unprivileged communication. It so happened that Van der Merwe was also a member of the Town Council, but these words were not uttered to him for the purpose of that particular lawsuit in which the Council was made co-respondent with defendant, but for the purpose, as I take it, of venting his indignation and bad opinion of the plaintiff, and it was a wholly unnecessary statement, there was no privilege surrounding that statement, and if the statement was made, and if the statement was false, the defendant is clearly liable. Now, substantially, the words used were these: "I can tell you that Celliers is one of the biggest scoundrels. He humbugged Mrs. Louw, and he would have humbugged Mrs. Brink out of £300 if it was not for me, and you can tell him so from me." The defendant says that Mrs. Du Plessis was mentioned, not Mrs. Louw. Well, he may have thought so, he may have intended to mention Mrs. Du Plessis, and I do not think he deliberately swears what is not true when he now says he never mentioned Mrs. Du Plessis, but I consider that he was mistaken, that Mr. Van der Merwe had an accurate recollection of what took place, and that he was right as to the use of these words. No proof whatever has been given that on any occasion the plaintiff has deceived Mrs. Louw at all. An attempt was made to show that he had deceived Mrs. Du Plessis; as far as I can see, the receipt was in the nature of an alleged undue preference. Now, I consider it a somewhat unfair proceeding to drag this matter of Du Plessis into the matter at all, because it is a matter in which an action is still to be brought, as I understand, for undue preference against the plaintiff, and it should be left out of the consideration of this case. And the same remark applies to the evidence given regarding the plaintiff's dealings with Mrs. Brink. That also forms the subject of an action for undue preference, for which I understand the defendant himself is engaged as legal adviser, and I think it would have been well to have kept that matter out of this case altogether. I consider, therefore, that this was a defamatory statement made by the defendant of the plaintiff, for which there is no justification whatever, and for which the defendant is liable in damages. The same remark applies to the statements which were made by the defendant to Mr. De Beer on two occasions. There substantially the words mentioned in the declaration were used by the defendant, and for these words also he should be held liable in damages. Then, with regard to the statements which were made to Mr. Van Breda, I am



satisfied that Mr. Van Breda's memory is perfectly accurate, and that the charge was made by the defendant "that a certain man had written to Celliers he must sell certain erven for him at not less than a certain price, and thereupon Celliers went to Urtel and said, 'See this fellow wishes to sell these erven. This is his lowest price. You buy the erven now, and again sell them, and let us divide the profit.' Now, what do you think of a man who can act in such a way?" Now, what was intended by such words? He may well ask what he thought of a man who could act in such a way, because if he had acted in such a way he would have been nothing short of a scoundrel. If these words had been used, defendant must prove the truth of them. He cannot say, "I heard them from Urtel, and, therefore, I was justified in using them." He must not only prove that he heard these words from Urtel, but he must prove that the words were true. He did not attempt to call Urtel to prove that the words were true. He had no right to say that of any man without proving the truth, and he has not attempted to prove the truth. But Urtel was in court, and was called on behalf of the plaintiff, and he, it is true, says, "I don't remember it," but it is quite enough for the plaintiff's case, because it is for the defendant to prove that the words were used, and if the man who gave the information to the defendant cannot remember it, it is quite enough for the plaintiff's case. The defendant has wholly failed to prove justification with regard to these words. I cannot for one moment accept the proposition that, because statements are made at election time, any slander or defamation may be uttered in regard to the private character of people whom you are speaking of. Therefore, upon all the grounds except the first, the plaintiff would be entitled to damages. Under ordinary circumstances, I should have given very heavy damages indeed. Every attempt to rake up all the past history of the man on every little point has been made, but there is certainly one very serious allegation that has been made against plaintiff, and which has been proved against him, and that is the allegation that he, an attorney of the Supreme Court, had made a private arrangement with a gentleman acting as an agent in the Magistrate's Court that, in contested cases in which the two should be on opposite sides, they should not object to the opponent, if the opponent should be the winning party, charging two guineas in every contested case. It appears to me that an arrangement of this kind would entirely defeat the object of the law. It would entirely defeat the provision of the law that costs shall be subject to taxation. If such arrangements were to be generally made between attorneys

of the Supreme Court, I think it would be the grossest injustice to clients generally, and it becomes still worse when that practice is adopted in regard to cases in the Magistrates' Courts, because there you have poor people engaged in law, people who know very little of their rights, and who unreservedly accept statements made by their legal advisers as to the amounts which they should be liable to pay. These poor people engaged in the Magistrate's Court should be specially protected against any attempt of this kind to fleece them out of their rights, and I consider it a very serious reflection upon the plaintiff that he should have entered into any arrangement of this kind, and because of that the damages are reduced to the very lowest sum which I can possibly award under the circumstances. But for that fact, I should have been quite prepared to award the full sum of £1,000 damages in this case. But I can well understand that the defendant himself may have strongly disapproved of such an arrangement, unless it is clear, as the plaintiff wished to prove, that the defendant had been party to such an arrangement. I am not satisfied that the defendant was aware that any such arrangement had been made between his partner and the plaintiff. If that had been a standing arrangement, I should have thought there would have been more than the one case that has been brought before the Court, and in which the whole of the bill of costs is entirely in the handwriting of the defendant's partner at that time, De Villiers, and, at all events, it is clear that, as soon as Markotter, the defendant's partner, brought it to the knowledge of the defendant, that some such arrangement existed, or was desired, he at once repudiated it. Then a letter was written in answer to which the plaintiff stated that such an arrangement had previously existed, and that the suggestion to make such arrangement had come from the defendant himself, but I am not quite satisfied that the plaintiff is right there, because, whatever may be said regarding the defendant in this matter, I think he has shown that he has a keen sense of honour in his business transactions. He seems to be a man who suffers from great nervous irritability, and he took over statements made which he ought not to have taken offence at. The judgment of the Court is, therefore, for the plaintiff for £50 damages, with costs, not including the costs of the witnesses J. J. de Beer, Nathan Machonowitz, and Servaas Faure. Their expenses must be paid by the plaintiff, because they are witnesses who came to prove the conduct of the plaintiff.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendant's Attorneys: Van Zyl and Buissinné.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLAY.]

GODDESS V. PIENAAR. ( 1907.  
( June 6th.

Mr. Roux moved for judgment, under Rule 319, in default of plea, for £158, for certain four wagons supplied, and £3 for hire of a store.

Dr. Greer (for defendant) applied for removal of bar and leave to plead.

From the affidavits, it appeared that applicant had recently come up from the country, and had been confined to the Monte Rosa Hospital, receiving his discharge on Tuesday, the 4th June. Respondent had commenced an action against him to recover £158 for certain four wagons and £3 hire of stores, and, after certain correspondence between the attorneys, the defendant had been barred from pleading. Respondent's attorneys took up the attitude that the applicant's attorneys were sufficiently posted in the case to have filed plea. Applicant's attorneys, however, said that that was not so, and that they had been unable to obtain instructions from their client while he was confined to the hospital. Respondent did not now object to applicant being allowed to plead, but urged that he should be put to terms, so that the case could be brought to trial this term.

Dr. Greer submitted that defendant had been unreasonably barred, and that the other side ought to pay wasted costs.

Mr. Roux submitted that, as the delay had been occasioned by the defendant, and plaintiff had acted quite regularly, the plaintiff was entitled to wasted costs.

Hopley, J.: As a rule, when a defendant gets leave to purge default, and has been in default without a genuine excuse, the Court makes the defendant pay the wasted costs. But there are special circumstances in this case, and circumstances such as a very little inquiry or a very little courtesy between the attorneys would have shown to exist. If Messrs. Van der Byl and De Villiers (the plaintiff's attorneys) had approached the defendant's attorneys in a somewhat less peremptory spirit than their first letter on the subject shows, I dare say they would have got the information that his doctor had ordered Mr. Pienaar not to attend to business while he was in hospital, and then all those complications would have been avoided, and they could have waited until the defendant was out of hospital. As a matter of fact, they put the defendant's attorneys in such a position that it was very difficult for them to act. On the one hand, they had the doctor's orders that defendant must not attend to business while in the

hospital, and on the other hand, they had the plaintiff's attorneys assuming that they (defendant's attorneys) knew all about the case for the purposes of their plea, because they had in February communicated with them about the matter. Although they had communicated with them in February, it does not follow that they had necessary and final instructions as to everything that ought to be said in a plea. The plaintiff's attorneys might have been a little more patient in the circumstances than they have been. At the same time, not wishing to make the plaintiff lose the costs in consequence, I think that the matter will be fairly dealt with by making the costs costs in the cause, so that the party who is eventually proved to be in the wrong will have to pay them. Leave will be granted to purge default, defendant's plea and counterclaim must be filed on or before Thursday next, and costs will be costs in the cause.

#### DU TOIT V. VOORTMAN AND ANOTHER.

This was an application on notice to Henry Voortman and the Assistant Resident Magistrate of Humansdorp, calling upon them to show cause why the first respondent should not be removed from office as joint trustee of the insolvent estate of Frederick May, and why one Percy R. Stapleton should not be appointed sole trustee of the said estate.

It appeared that a majority in number of the creditors were in favour of the appointment of Mr. Stapleton as sole trustee, but that, on the debts admitted by the Magistrate, creditors representing the greater value were in favour of Mr. Voortman. Under the circumstances, the Magistrate had appointed the two candidates as joint trustees. The grounds of the present application were that a claim for interest on an open account by one Collin ought not to have been allowed, and that a claim by one R. W. Metelerkamp should have been admitted. In either event the majority in value would then have been in favour of Mr. Stapleton, as well as the majority in number.

Dr. Greer was for applicant; Mr. P. S. T. Jones was for respondent Voortman. The second respondent did not appear.

Dr. Greer referred to section 40 of Ordinance 6, 1843, and cited *Graham and Ozer v. Caldecott* (1876 Buch., 4) and *In re K.* (3 Menzies, 258). Dealing with the facts of the present case, he said that Collin claimed on an open account an amount of £201, on which he charged £72 interest, making a total of £273 12s. 9d. An allowance of £2 6s. was made by the Magistrate in respect of interest, and after other allowances had been made, the debt was reduced to £251, of which about £70 was represented by interest. Counsel submitted

that the Magistrate was wrong in allowing any interest to be charged on an open account.

[Hopley, J.: There may have been a contract.]

Dr. Greer said it did not appear that there was an agreement, and it was against custom to allow interest on an open account. He quoted *Henderson and Co. v. Haslitt* (9 H.C., 178).

[Hopley, J.: I must assume at present that the Magistrate was right in accepting the proof of debt.]

Dr. Greer submitted that the Court could review the decision of the Magistrate on this point.

Hopley, J., said he did not know how he could decide the point without evidence.

Dr. Greer, in further argument, cited *Hofmeyr and Co. v. Effendi* (7 S.C., 102).

Hopley, J., said that the whole point in the case was whether, by the customs of trade in the district of Humansdorp, there was an implied contract on every purchaser at a shop to pay interest on the account after a certain period.

Dr. Greer then dealt with the other part of the case. He submitted that the Magistrate ought to have admitted the claim of £67 7s. 11d. filed by Metelerkamp for money which he advanced to pay a certain account on behalf of the insolvent. He cited *Jeanneret v. Estate Sharp* (22 S.C., 42), and *Zondag v. Fichat* (12 C.T.R., 590). In any case, he submitted that on the authorities the Magistrate was wrong in appointing these two gentlemen joint trustees. He should have appointed provisional trustees.

Mr. Jones admitted that if either of the two claims in question had been decided as applicant contended, there would have been a majority of creditors, both in number and value, in favour of Stapleton. As to Collins's account, there was a custom in Humansdorp to charge interest after six months on overdue accounts. That custom was recognised by the Court in *Fraser v. Norden and Co.* (2 Menzies, 212).

[Hopley, J.: The part of the case that troubles me most is whether there has been an election at all.]

Mr. Jones said that if the Court ordered another election, the result would probably be a deadlock. He suggested that, to save expense, the Court should at once appoint Voortman and Stapleton as joint provisional trustees, with power to liquidate the estate.

Dr. Greer said that, although he was not specially instructed, he would, in the circumstances, be prepared to consent to an order in those terms.

Hopley, J.: In this matter the applicant, who is a creditor for a small amount in the insolvent estate of one May, gives notice that this Court is to be moved for an order declaring the election of Voortman as a joint trustee in the insolvent estate invalid, and de-

claring one Stapleton elected as sole trustee. Stapleton is a clerk, though not an articled clerk, any longer, in the office of the applicant, Du Toit, who is an attorney at Humansdorp. The grounds on which he wished the Court to make the order are that the Magistrate, sitting as commissioner in the insolvent estate, improperly and unlawfully allowed an amount of £69 odd claimed by one Collin as interest in an open account, and also that he improperly disallowed a claim by one Metelerkamp for £67 odd. If he had allowed Metelerkamp's claim, or if he had disallowed the claim of Collin for interest, then, in either event, Stapleton would have been supported by a majority in value as well as in number of the creditors who voted, and, if he had taken the applicant's view of both those amounts, so much more would Stapleton have been supported by the larger value. But the Magistrate did allow the claim for interest, and he did reject the claim of Metelerkamp, and it is impossible for me, in the information before me, to say that the Magistrate was wrong in so doing in either case. As to the interest, it seems to me that it must be a matter of what was the contract between May and the shopkeeper Collin. That must depend upon local custom and implied contract. There is strong evidence that it is the universal custom in the district of Humansdorp on accounts which run over a long period that interest at the rate of 8 per cent. should be charged after six months. This account had extended over some years. If that is the custom, I do not see that the Magistrate went wrong in assuming that the custom applied in the case of May just as it did in everybody else's. With regard to the other amount of £67 claimed by the father-in-law of May on his estate, the Magistrate took certain evidence and decided that, as matters then stood before him, that claim was one that he must disallow. It is said that this Court now knows more than the Magistrate did. I do not think that on that ground I ought to disturb the Magistrate's decision. Probably there are circumstances of suspicion and of some complication. The Magistrate has decided against that claim, and I do not see that I know enough of the circumstances that I can with safety say that the Magistrate was wrong. Then the further question arises, if that is so, and Mr. Voortman had the larger value and Mr. Stapleton had the larger number of creditors, what course should have been taken under section 40 of the Ordinance, which says that the choice of trustee shall be made by the greater part in number and value of the creditors. Now that has not been done in this case. The Magistrate himself says that one man had the greater number and the other had the greater value, so that he

declared them jointly elected, but it is perfectly clear from the terms of the Ordinance and previously decided cases that he had not the right to do that. Although the matter does not come before me on an application to set aside the election, it seems, on the authorities quoted, and especially the case of *Graham and Oxer v. Caldecott*, that the Court should now make an order declaring the election of both as trustees null and void, and setting such election aside. The Court will, therefore, order that the election of both these gentlemen, Stapleton and Voortman, be set aside as null and void, not having complied with section 40 of the Ordinance. But counsel suggest that the Court should save further expense and also avoid the complications that are certain to arise under a deadlock, if this matter is remitted for election to the Magistrate, by at once appointing these gentlemen as provisional trustees of the estate, with power to liquidate it, and I think that, on the whole, in this small estate, that would be the wiser course. The Court will, therefore, order that Mr. Stapleton and Mr. Voortman be provisional trustees, with power to liquidate this estate and wind it up, and the costs of all these proceedings must come out of the estate.

Court for the sum of £13 6s. 1d., being certain costs and charges incurred in an application brought by respondent against the applicant. Applicant, counsel said, originally sued respondent for a judicial separation, and, in default, a judicial separation was granted, with custody of the children to the wife, and an order to pay £3 a month. Respondent had made no payments under that order, with the exception of a few small payments for the children. Subsequently he applied to the Court to set aside the order, so far as custody of the children was concerned. The Court, however, refused that application, and ordered respondent (the then applicant) to pay the costs. He had, however, failed to pay any portion of the costs.

Respondent said that he was without means. He was employed as a van conductor by a firm of bakers at £2 a week. He had made certain payments on behalf of his children.

Cross-examined: Witness had paid nothing to his wife under the contribution order. He was prepared to offer 2s. 6d. a week towards the debt.

By the Court: He regularly set aside a certain sum each week for the children. He had given them boots and clothing.

Decree granted, execution to be suspended upon payment of 5s. a week, first payment to be made on Monday afternoon next, with leave to applicant to apply for an increased order.

## ILLIQUID ROLL.

CAPE TIMES LTD., V. CRANE.

Mr. M. Bisset moved for judgment, under Rule 329d, for £451 5s. 6d., balance of account due for printing the "South African Magazine," with interest *a tempore morae* and costs. Counsel stated that the summons was issued against Charles H. Crane and Eric France, carrying on business in co-partnership as proprietors of the "South African Magazine." Mr. Crane did not enter appearance. France represented that he was not a partner, and after declaration had been filed, that position was accepted, and as against France, plaintiffs did not proceed with the case. Judgment was asked as against Crane only. Mr. Bisset added, however, that in face of the decision in *Dunell, Edden and Co. v. Hassett and Co.* (18 H.C., 135), he did not think he could ask for judgment against Crane individually.

[Hopley, J.: Does Crane admit that France was not his partner?]

Mr. Bisset said he was not instructed on that point. As a matter of fact, Crane did not take up any position at all.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY

ADMISSION. } 1907.  
                                } June 7th.

Mr. M. Bisset moved for the admission of Eric Edward Jarvis as an attorney and notary.

Application granted and oaths administered.

### PROVISIONAL ROLL.

SIERADZKI V. BENJAMIN.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

BRIMACOMBE V. BRIMACOMBE.

Mr. P. S. T. Jones moved for a decree of civil imprisonment against defendant upon an unsatisfied writ of this



[Hopley, J.: You have summoned the partnership, and the partnership has not taken any notice of it. Crane might have said that, in not entering appearance, he knew there was no partnership. I am wishful to help you, but I must stick to the Rules of Court, and I do not see how the man is in default individually on that summons. You had better obtain some consent from Crane.]

Mr. Bisset said that if fresh service was necessary, it would only mean multiplying costs, and Crane knew perfectly well the nature of the claim.

Eventually the matter was ordered to stand over, and plaintiffs were granted leave to amend their summons, by inserting after "carrying on business in co-partnership, etc.," the words "and also against them individually."

Hopley, J., said that the plaintiffs might perhaps be able to obtain a consent from Crane to judgment being taken against him in that form.

#### GENERAL MOTIONS.

##### *Ex parte* DE WIT.

Mr. J. E. R. de Villiers moved, on the petition of Susanna de Wit, for the appointment of a *curator ad litem* to represent her son, J. J. F. de Wit, of Riversdale, in proceedings to have him declared of unsound mind, and incapable of managing his own affairs. Application was made for leave to have the curator's report set out in writing, and evidence as to insanity given on affidavit. Counsel asked the Court to make an order similar to that granted in *Van der Vyver's case* (15, C.T.R., 1,007).

Ordered that a commission issue to inquire into the sanity of the alleged lunatic De Wit, Mr. Roux (Magistrate of Riversdale) appointed *curator ad litem*, summons returnable on the 9th July, with leave to give evidence by affidavit, if advisable, and curator to report in writing instead of being personally present on return day.

##### *Ex parte* MOLLER AND OTHERS.

Mr. Van der Byl moved, on the petition of certain major children of the late Gerrit Hendrik Moller, and his surviving spouse, for an order authorising the Board of Executors, as trustees under the ante-nuptial contract, to pay out certain money to the major children and to the minors on attaining their respective majorities. It appeared that the late Mr. Moller died in April last, and that the only asset was an insurance policy for £500. The proceeds of the policy, amounting to £1,177 8s. 4d., had been paid over to the trustees, and, after their disbursements and various charges, as set out in the account annexed to the

petition, had been met, a balance remained of £596 13s. 11d., which petitioners desired should be distributed among the children in *pro rata* shares. It seemed that in October, 1893, the Court had "authorised the trustees to raise on the policy such moneys as may be required for the purpose of paying the school fees of petitioners and their brothers and sisters as they became due, and the amount of premiums and fines on the policy not exceeding £200 in all." If the balance of the proceeds were invested, the income would be inadequate to maintain the widow, and petitioners therefore prayed for an order authorising the money to be paid out to them, their mother having renounced her life interest and they having undertaken to maintain her.

Hopley, J., said that the trustees seemed to have infringed the former order of the Court, and to have exceeded the authority granted to them to the extent of about £380. However, the probability was that they did it for the purpose of preserving the policy, although it would have been better if they had come to the Court to ask for further powers.

Ordered that the Board of Executors may pay out to the petitioners and also their major sister, Sophia Moller, their *pro rata* share of the said sum of £596 13s. 11d., or whatever other balance there may be in their hands, and to the said minor children their shares upon their attaining their respective majorities.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

##### *Ex parte* LA COMPAGNIE ( 1907. COMMERCIALE DES COLONIES ( June 10th.

Mr. Benjamin moved for the appointment of J. M. P. Muirhead as curator bonis in the insolvent estate of Abraham Elias Levy, carrying on business in Strand-street, Cape Town, as a retail dealer in paints, wall papers, etc. Petitioners said that the estate was provisionally sequestrated on the 8th June, and that they had a claim for £1,936 out of total liabilities amounting to £1,978. It would be in the interests



of the creditors that the business should be carried on without interruption, and petitioners prayed for the appointment of a *curator bonis*, with power to collect outstanding assets and carry on the business. Counsel said that the Master declined to appoint a curator.

[Maasdorp, J.: The only difficulty in this case is, what does the insolvent say to the proposal? His estate may not be finally adjudicated.]

Mr. Benjamin: A provisional order has been made, and the business will be closed unless a curator be appointed.

[Maasdorp, J.: It would be advisable in these cases to have the opinion of the insolvent. He may have some objection to his business being carried on by some person who does not understand it.]

Mr. Benjamin said he understood that the insolvent and his clerk had agreed to assist in carrying on the business in the interim.

Mr. Muirhead was appointed *curator bonis*, with power to collect outstanding assets and carry on the business, security to be given to the satisfaction of the Master.

#### *Ex parte* ESTATE KOSSUTH.

Mr. De Villiers moved, on the petition of G. W. Steytler, secretary of the Colonial Orphan Chamber, in his capacity as executor dative of the estate of the late Henry Kossuth, for a rule interdicting one Madam Dorothy Weber from removing certain furniture and other goods from the premises, Rhine Villa, Kloof-street, Cape Town, pending an action to be brought by petitioner for rent. Petitioner said that respondent owed the estate a sum of £125, for rent from the 1st August, 1906, to the 31st May, 1907, and he feared that unless an interdict were granted the goods in the premises would be removed, and the landlord's hypothec would be defeated.

Order granted, with leave to respondent to move the Court to set aside the rule.

Mr. De Villiers asked that the Court should grant an order with costs.

Maasdorp, J.: You may ask for the costs in the action, or, if no action is brought, you may move for costs afterwards. It may appear that respondent had no intention of removing the goods.

#### RIEGLER V. AFRICAN LANDS AND HOTELS, LTD.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town in an action brought by appellant against respondents, who are proprietors of the Mount Nelson Hotel, to recover three weeks' wages as waiter.

From the record it appeared that appellant had been engaged as a waiter

at the Mount Nelson Hotel, under contract in Europe for a period of two years, and that he had recently left the defendants' service prior to the completion of the agreement. The agreement made certain provisions in case plaintiff left his employers' service before the contract time expired, for the retention of certain money from his wages, and for the refund of the passage money paid by the defendants in case he left before the end of the contract.

The Magistrate, in his reasons for judgment, said that on the 11th April, 1907, the same parties were before him in a case in which plaintiff sued for £13 10s., wages for the quarter ended 24th March, 1907. Defendants admitted the amount claimed, less £3 7s. 6d. retention money, under clause 4, and pleaded a counter claim for £10 10s., refund of passage money, under clause 12. Judgment was entered for plaintiff for the amount admitted, and absolution from the instance given on the counter-claim. After plaintiff had left the defendants' service of his own accord on the 17th April, at the expiration of a month's notice, he instituted the action now in appeal on the 22nd April for £2 5s., three weeks' wages from the 25th March to the 17th April. The defendants counter-claimed for 10 guineas, refund of passage money, less £2 7s. 3d., wages due to plaintiff in terms of the contract. Plaintiff denied the counter-claim, and excepted to the jurisdiction, and submitted that, in terms of the contract, all matters in dispute must be settled by arbitration, under the laws of Cape Colony. The Magistrate overruled the exception, on the ground that, having chosen the Court as his *forum*, in a previous action, and also in this action; plaintiff could not now raise this objection. Judgment was given for defendants (plaintiffs in reconvention) for £8 2s. 9d., with costs, being the difference between the counter-claim for ten guineas and £2 7s. 3d., admitted by defendants to be due to plaintiff.

Mr. Rowson was for appellant; Mr. Benjamin was for respondents.

Mr. Rowson submitted that the Magistrate should have allowed the exception to his jurisdiction under the 12th clause of the contract. No litigant, by having chosen a certain forum, could confer jurisdiction on a Court. Counsel cited *Harris v. Broman* (7 Juta, 41). As to the 5th clause, no consideration was given, and that clause was utterly illegal, and such as no Court in the world would uphold. It was a pity that no evidence was given as to the reason why plaintiff left the Mount Nelson Hotel. He thought it would be found that he was bound to go, largely by reason of the persecution of his immediate superiors, and therefore did not leave of his own accord.

Mr. Benjamin said that the contract provided that all matters in dispute

between the parties should be referred to arbitration. It was difficult, however, to see that there really was any dispute. Furthermore, plaintiff had chosen his *forum*, and had waived his privilege of arbitration under the 12th clause.

Maasdorp. J.: It appears that the plaintiff in this case entered the defendant's service as waiter for a period of two years, to commence from the 31st July, 1906, and it was one of the conditions of the agreement that, if he should leave the service of the defendant before the expiration of the two years, the passage money should be refunded by him to the defendant. It appears that he left the service of the defendant on the 16th April, 1907, of his own accord, and in order to better himself. The clause providing for the return of the passage money has, therefore, come into operation. The plaintiff sues the defendant for the sum of £2 7s. 3d., for the last three weeks' wages due up to the 16th April, 1907. That indebtedness is admitted by the defendant, but the defendant now claims that he is entitled to set off against it the amount of the passage money, which plaintiff is bound to repay under clause 3 of the agreement. When the case came on for trial, the plaintiff excepted to the defendant's claim being brought in the Magistrate's Court, on the ground that there was a clause in the agreement providing for the reference of all disputes between the parties to arbitration. Now, without expressing any opinion as to whether that clause would have ousted the Magistrate's jurisdiction, I think the Magistrate is right in finding that, when the plaintiff himself chooses his tribunal in the Magistrate's Court for asserting his claim for wages, he could not then take advantage of the arbitration clause mentioned in the agreement, and the defendant was entitled to set off against any claim the plaintiff may have under the agreement such claim as the defendant may consider he is entitled to. The Magistrate was, therefore, right in dismissing that exception. There is some reference made to another clause in the agreement dealing with the retention money, but that is not now before the Court. It is quite clear that wages to the amount of £2 7s. 3d. were due by defendant to plaintiff, as admitted by defendant, and, on the other hand, it is quite clear that the passage money must now be refunded by the plaintiff to the defendant. The Magistrate has found that, under the circumstances, the sum of £8 2s. 9d. remains due upon the defendant's claim in reconvention. The appeal will be dismissed, with costs.

[Appellant's Attorney: E. J. Sydney.  
Respondent's Attorneys: Findlay and Tait.]

NEWMAN V. PHILLIPS.

1907.  
June 10th.  
July 10th.

This was an appeal from a decision of the Assistant Resident Magistrate of Mount Fletcher.

The present respondent sued appellant in the Magistrate's Court for the sum of £1 10s. 7d. In the summons it was alleged that on the 4th October, 1906, the defendant signed a promissory note in plaintiff's favour for £60, payable on the 4th June. Plaintiff discounted this note with the Standard Bank, who thereupon became the legal holders. Defendant omitted to provide for the payment of the £60 on the due date, and thereupon the bank incurred certain charges in connection with the presentation of the note, these being debited to the plaintiff's account. Defendant, on being called upon, tendered the £60, but refused to pay these charges. The £1 10s. 7d. consisted of the bank's notary's charges, overdue interest, and legal expenses. The defendant, in his plea, denied liability, and counter-claimed £15 7s. 7½d. for goods and cash supplied, and accommodation furnished to Phillips between September, 1906, and March, 1907. The Magistrate gave judgment for the £1 10s. 7d., and for the defendant (Newman) on the counter-claim for £15 7s. 7½d., and ordered each party to pay his own costs. There was a cross-appeal. The parties had formerly been in partnership.

In reply to the Court, it was stated that the cross-appeal had been withdrawn.

It appeared from the evidence that the promissory note was given in respect of a dissolution settlement. Newman's case was that it was agreed that the note should not be discounted, it having been given as an acknowledgment of a debt due by one Morgan to the partnership, which it was agreed should be paid to Phillips.

The Magistrate, in his reasons, said there was nothing on the promissory note to show that it should not be discounted or dealt with in the usual way by the plaintiff.

Mr. Watermeyer was for the appellant; Mr. Gutsche was for the respondent.

Mr. Watermeyer submitted it was clear on the facts that it was agreed that the note should not be discounted. The Magistrate had given no finding of fact upon this point, and so the Court was in quite as good a position as the Magistrate to decide on this. Counsel referred to Rule of Court 304 to show the legal charges, and to section 50 of the Bill of Exchange Act. Counsel dealt in detail with the several charges, contending that if the note were given as a promissory note in the ordinary form, appellant was only liable on certain of the items. He urged, however, that this

was not given as a promissory note. It was conditional upon Morgan not paying, and was meant to be an acknowledgment of debt contingent upon Morgan not paying.

Mr. Gutsche contended that even if there were such a verbal agreement as was set up it could be of no force in law since the parties had reduced their agreement to a written document which did not contain such a condition as was set up. Oral evidence could not in these circumstances be held to vary a written agreement. Counsel cited *Tarry and Co. v. South-West Diamond Mining Co.* (2 H.C., 39), *Simpson, N. O., v. Frank and Nicholls* (2 E.D.C., 195), *Griqualand West Diamond Mining Co. v. London and South-Eastern Exploration Co.* (1 Appeal Cases, 240).

Mr. Watermeyer, in his reply, quoted Stephen on Evidence (section 90), Bills of Exchange Act (section 19, sub-section a), Byles on Bills (15th ed., p. 113), and Phipson on Evidence (3rd ed., p. 520).

Maasdorp, J., said the Court could not deal with this case until the Magistrate's finding had been ascertained. The matter would therefore be referred to the Magistrate for his finding upon the following question of fact: Was there any agreement apart from what appears upon the face of the note that the note should not be discounted by Phillips?

*Cur. Adr. Vult.*

*Postea* (July 10th).

Maasdorp, J.: In October, 1906, Phillips, the plaintiff, and Newman, the defendant in the Court below, dissolved partnership, and at the time of the dissolution one Morgan was indebted to the partnership in a sum of about £120. This amount the plaintiff wished to treat as a bad debt, but the defendant objected, and claimed to be allowed credit for half the amount. The plaintiff consented to this, upon condition that the defendant should pass a promissory note in his favour for half the amount, payable in three months' time, in the event of Morgan's debt not being paid. If Morgan paid his debt in three months, the promissory note was to be returned; if Morgan failed to pay, the promissory note should become payable by the defendant. It was stated in evidence on behalf of the defendant that it was agreed that in the meanwhile the promissory note should not be discounted by the plaintiff, but this was denied by the plaintiff's witnesses. The Magistrate did not, in the reasons for his judgment, state his finding upon this issue of fact, and the case was, after argument on appeal, referred back to him for that purpose. He now says: "There was a verbal agreement not to discount the note, but that agreement was not reduced to writing, except in so far as there is a statement in the

account that a promissory note for £100 should not be discounted, and plaintiff's attorney admits that this promissory note should have been for £60." The Magistrate has therefore found in favour of the defendant upon this issue. The whole question of consideration for the note is involved in this issue of fact between the parties, and could not upon the question of consideration be excluded as inadmissible. If Morgan had paid his debt within three months nothing would have been due from the defendant to the plaintiff. During the three months there was virtually nothing due by the defendant to the plaintiff, and the promissory note amounted to nothing more than a security for the payment of Morgan's debt. Before the expiration of the three months the plaintiff was not entitled to negotiate the note, irrespective of any agreement between the parties, but the agreement not to discount made their position quite clear. It was arranged that defendant should be informed of the fact in the event of Morgan paying his debt. This debt was not paid upon the due date of the note, and it then appeared that the note had been already discounted at the bank. The bank being the holder of the note, employed a notary to make presentation for payment at the bank where the note was payable, to note the non-payment, and give notices to the plaintiff and defendant as endorser and maker. The defendant, upon receiving notice, paid the amount of the note at once, but refused to pay the expenses occasioned by reason of the note having been discounted at the bank. At the time the defendant paid the amount of the note, he refused to pay the notary's expenses, because he alleged that the note only became payable upon his receiving notice from the plaintiff that he had not recovered from Morgan. This allegation is admitted by the plaintiff's manager, who says, "In the event of Morgan failing to pay Phillips, Newman was to pay Phillips out the amount for which he had been paid, i.e., £60 promissory note, for which he had received credit, but he adds there was no stipulation that the defendant should be informed if Morgan did not pay. It is clear as between the plaintiff and defendant that the promissory note became payable at the bank in case Morgan did not pay, and it was only after the notary's expenses had been incurred by the bank, as admitted by the plaintiff's manager, namely, on the 7th January, that he informed the defendant that Morgan had not paid the debt. The defendant thereupon offered to pay the amount of the note, which was accepted by the bank, but he refused to pay the notarial costs. The bank as holder of the note might have insisted upon the payment of these costs, but the plaintiff having paid them is, in my opinion, not entitled to recover costs, which would

for £5 on an agreement arrived at after the sale was cancelled. The Magistrate found that this was a sale, and an agreement arrived at. If that was so, then the proper finding would have been for the plaintiff for £5 and costs. Although he found that there was a certain agreement, the Magistrate considered it was conditional on a certain sale taking place, and not a word of that was brought out in the evidence.

Mr. Louwrens contended that the £5 was promised to the plaintiff to break the agreement, and that he was to receive it after the property had been sold by public auction. That sale had not yet taken place. He submitted that the Magistrate should have given his decision in favour of the defendant.

[Hopley, J.: Why did he give 1s. damages. The Magistrate seems to have been very wobbly in deciding the case. "There has been a technical breach of contract," is a very good phrase, but I should like to know what he means by it.]

Hopley, J.: I cannot, in this case, follow the reasons of the Magistrate, or his way of reading the evidence. Both in the case now under consideration and in the previous case between the same parties which has been put into Court the plaintiff has told a consistent story throughout, viz., that his aunt had sold him half her erf in Bredasdorp for £15. There may have been some dispute as to whether she had sold him the undivided share of the erf so as to make it possible for him to claim the half with the buildings on it, or the half with out buildings, but it seems that some sale of the half share of the erf for £15 had been made, and that an agreement was subsequently made by the purchaser to cancel that sale, and that he was to receive £5 for doing so. It seems to me that whatever the exact agreement was about the portion of ground sold there was a complete contract of sale to which the respondent could be held bound, and from which in the circumstances she was subsequently convinced that it would be advisable to be freed; and that £5 was the amount fixed as the price for getting out of it. As far as I can follow the evidence, I cannot see that it was agreed there, that she should not sell, save by public auction, or that only after the auction took place she should hand £5 to plaintiff, and that in case no sale by auction should take place she should not be compelled to pay the £5 at all. That is what the Magistrate finds, but I cannot find anything in the evidence to support that view. Mr. Taillard states it was agreed that the sale should be cancelled, and £5 be paid to the plaintiff, and he said he would give it to plaintiff when the place had been sold, but there is no evidence to show that it was portion of the agreement that plaintiff was not to be paid

[Before the Hon. Mr. Justice HOPLEY.]

**JANUARY V. JANUARY.**      { 1907.  
   { June 10th.

This was an appeal from the decision of the R.M. of Bredasdorp, and the parties were aunt and nephew. The action concerned the sum of £5 which the nephew claimed from the aunt under an agreement by which it was alleged that the aunt would not sell a certain erf. The Magistrate gave judgment for 1s., but ordered each party to pay their own costs, and against this the plaintiff appealed.

In his reasons the Magistrate held that the plaintiff was previous in suing as there had been no intention to sell proved. He disbelieved the evidence of all the plaintiff's witnesses, except one, and regarded it a pity that a family squabble could not have been settled outside. Indeed, it was absurd to bring it into Court. There had been a technical breach of contract, but a trivial one, and one shilling damages was sufficient to meet the circumstances of the case, "with judicial discretion," added the Magistrate, "I give judgment accordingly."

Dr. Greer appeared for appellant, and Mr. Louwrens for the respondent.

Dr. Greer submitted that in giving judgment as he did, the Magistrate erred. He seemed to think that the action was brought for damages for breach of contract. Apparently that was not so, because it was an action



until after the auction. The facts show that an auction was attempted, but that the respondent had fixed so high a reserve price that no sale resulted. The appellant was not compelled to wait any longer for his money, and therefore I think that the judgment should have been for the plaintiff for the amount claimed, £5. I cannot understand how the Magistrate came to any other conclusion, or how he arrived at the result that the appellant was entitled to a shilling as damages for a "technical breach of contract," as stated by him in his reasons. Either there was an amount of £5 due under the agreement, or else there was no breach and nothing at all was due. The Magistrate's judgment must be set aside, the appeal allowed with costs, and the judgment of the Court below changed to one for the plaintiff for £5 with costs.

CROSS V. PURCELL.

This was an appeal from the decision of the R.M., Paarl, dismissing an action in which Peter Murray Cross, a tailor, residing at the Paarl, sought to recover £4 from one Purcell, also of the Paarl, for breach of contract.

It was alleged that the defendant ordered a suit of clothes from the plaintiff, for which he agreed to pay £4. When the suit was ready to be tried on, the defendant refused to do so or to take delivery. For the defence in the Court below, it was alleged that the order for the suit was cancelled, as the plaintiff had not complied with the conditions of the agreement on which the suit was ordered. This was denied by appellant.

The Magistrate, in giving judgment for defendant, gave as his reasons that the plaintiff's evidence was vague and unreliable, whilst his witnesses were very unsatisfactory. On the other hand, the defendant's evidence was reliable and given without hesitation.

Mr. Murray Bissett for appellant (plaintiff in the Court below), and Mr. Marais for respondent.

Mr. Bissett contended that probably the Magistrate had been taken in by the straightforward manner of the defendant, and went on to contend that it was hardly likely that plaintiff's assistants would have committed perjury for the sake of such a small amount as that involved.

[Hopley, J.: Magistrates are generally experienced men, who can usually sum up character.]

Continuing, Mr. Bissett contended that the defendant's evidence seemed to be somewhat embellished, especially in that portion where he stated that when he cancelled the order he was laughed at by plaintiff's assistants.

[Hopley, J.: One knows that when a man is disappointed he often behaves in a manner that is ludicrous to on-lookers, and, after all, these assistants were only apprentices.]

Mr. Marais contended that when the plaintiff was not ready to fit the suit on, the specified day that the defendant was justified in cancelling the order.

Mr. Bissett contended that it was not absolutely necessary to try on clothes. They knew of people who got their suits out from England, and ladies got their dresses from Paris, all of which were satisfactory.

Hopley, J.: The Magistrate has found that there was a contract between the appellant and the respondent, whereby the respondent ordered a suit of clothes to be ready for trying on on the 2nd of April, and to be ready at all hazards on the 6th April. The Magistrate has found that on the 2nd April, when the defendant went into the shop, he found the piece of cloth from which the suit was to be made still lying in the window, uncut, and that after handling it, he inquired why things had not gone further. That in response to his inquiries, he was informed that the master had gone home indisposed, and that he then verbally cancelled the order. I cannot say, on the evidence as one reads it, that there is not sufficient to support the Magistrate's finding on that point, but the question is if the defendant did so what are the rights of the parties, what should have happened? The appellant's point of view is that the suit was ordered from him, and that he has it now ready for fitting on, and that if the respondent would try it on he could finish it off in a very short time; but if the Magistrate's finding is correct, that the suit was wanted for April 6th, it is futile for the appellant to say that in the month of May it is only ready for a try on. When the respondent cancelled the order the appellant might have said: "You cannot cancel it; although it is not ready for a try on now, we will have it ready by April 6th, and will keep you to your bargain." He did not take that course, but on the contrary allowed the customer to leave the shop, and it is in evidence that the latter ordered a suit from another tailor close by, which corroborates his evidence that he did then and there cancel, because it is not likely that he would leave an order for one suit of clothes in abeyance and order another, he probably not being a person who would order two suits at the same time. After the cancellation nothing happened for ten days or a fortnight, and then, as the respondent was passing the tailor's shop, the appellant beckoned to him, but said nothing. This was extraordinary, and it is contradicted by the respondent. I feel that the course of conduct pursued by the parties affords a considerable justification for the Magistrate's finding as to the cancellation of the contract on April 2nd. The Magistrate adds that possibly the appellant might have brought an action for damages for breach of contract, but



that point does not seem to have occurred to him, for the appellant went on making the suit of clothes after the cancellation had taken place, instead of stopping the work when the order was cancelled. It is now urged, however, that the Magistrate should have given some damages for the breach of contract by the cancellation of the order on April 2nd, but there is no evidence of any damage to the appellant by reason of such cancellation, and I do not see how the Magistrate, even if he had held that the cancellation was unjustifiable, could have found any damages for the appellant. On the whole of the evidence, I cannot say that the Magistrate is wrong. There is a great deal to be said as to the weight of evidence, and the conflict of evidence, but the Magistrate has made his decision, and I cannot disturb it. The appeal will be dismissed, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

INSOLVENT ESTATE OF VAN } 1907.  
DEN HEEVER V. GREYLING. } June 11th.  
" 12th.  
" 18th.

Cession of Inheritance as security for debt—Notice by cessionary to cedent's debtor—*Bona fide* payment to cedent—How far cession avails as against cedent.

*G. and his wife were married in community and had 3 children. Mrs. G. died intestate. G. took out letters of administration and liquidated his wife's estate but failed to bring up in the liquidation one farm part of joint estate in which Mrs. van den Heever, his daughter, had an interest. Mrs. van den Heever thereafter became indebted to one Hunt, to whom she ceded all*

*rights in her share of her maternal inheritance as security for all debts then owing by her, or in future to be incurred to Hunt. Hunt informed G. by letter, that he (Hunt) held Mrs. v. d. H.'s power of attorney and requested that all payments in connection with her property should be made to him: but he did not give notice of the cession: G. however admitted that he had knowledge of it. G. thereafter paid out to Mrs. v. d. Heever what she claimed from her maternal inheritance, and she gave him an acquittance in full. Thereafter she became insolvent and Hunt ceded his rights in her estate to her trustee. The trustee now sued G. for the full value of the whole of the inheritance.*

*Held that, as G. was aware of the cession from Mrs. v. d. H. to Hunt, the payment made by G. to her was bad.*

*Held further, that the cession to Hunt was good only for the amount of the cedent's debt to him and the trustee was entitled to recover the amount.*

*Held further that, by the full acquittance given by her to G. previous to her insolvency with notice to the cessionary of the transaction, the balance of her inheritance vested in him.*

This was an action to compel an executor dative to file an account in the estate for which he was acting, and to pay over the share of one of the heirs, or (failing compliance) to pay the value of the said share *de bonis propriis*. Plaintiff's declaration was as follows:

The plaintiff is Gideon Stephanus Cloete, in his capacity as the sole trustee of the insolvent estate of Maria Johanna Elizabeth van den Heever (born Greyling), and the defendant is Arnoldus Jacobus Greyling, in his capacity as executor dative of the estate of his late wife Rachel Alida Elizabeth Greyling (born Vorster), and also in his private capacity.

The plaintiff's declaration was as follows: (1) The plaintiff is the sole trustee duly appointed of the insolvent estate of Maria Johanna Elizabeth van den Heever (born Greyling), married

without community of property to Johannes Daniel van den Heever, of Lady Grey, in the district of Aliwal North. The said estate was finally adjudicated as insolvent by order of this honourable Court, on or about the 9th day of August, 1906. (2) The defendant resides at Lady Grey aforesaid, and is sued individually and in his capacity as executor dative duly appointed of the estate of the late Rachel Alida Elizabeth Greyling (born Vorster), to whom he was married in community of property, and is the father of the said insolvent Maria Johanna Elizabeth van den Heever, born of the said marriage. (3) By the mutual last will and testament, dated the 18th November, 1872, and codicil thereto, dated the 13th June, 1887, of Arnoldus Jacobus Greyling, senior (the father of the defendant), who died on the 20th day of July, 1887, and his spouse Magdel Maria Greyling, who died on the 18th day of March, 1903, there was bequeathed *inter alia* to the defendant subject to the usufruct thereof for life of the survivor, the said Magdel Maria Greyling, and to certain conditions unnecessary to be here set out, certain one-fourth share of the farm Honings Nest Kloof, situate in the division of Barkly East. (4) The said Rachel Alida Elizabeth Greyling (born Vorster), died intestate on the 12th day of August, 1888, leaving issue of the said marriage, her surviving, namely, the said insolvent and Schalk Willem Greyling. (5) At the date of her said death and at all times material, there had vested in the said Rachel Alida Elizabeth Greyling (born Vorster) by virtue of the said community of property the legal right in and to one-half of the said legacy and the said insolvent as one of the heirs *ab intestato* is entitled to one-half of the said half of the said legacy. (6) The defendant individually received transfer of the said one-quarter share of the said farm so bequeathed from the estate of the said Arnoldus Jacobus Greyling, senior, by deed of transfer dated the 29th day of December, 1904. (7) Thereafter on or about the 22nd day of November, 1905, the said insolvent for valuable consideration ceded by cession in writing of the said date as security for the due payment of certain legal costs and charges to one Clifford Athol Hunt all her right, title, and interest in and to the said half of the said one-half share of the said legacy. (8) The said legal costs and charges have not been duly paid or at all and the said Hunt having claimed and been duly admitted to prove upon the said insolvent estate for the amount thereof, to wit, £37 3s. 5d., did on the 14th day of January, 1907, and under and in accordance with the provisions of section 30 of the Insolvent Ordinance No. 6 of 1843, cede and transfer all his right, title, and interest in the said cession to the plaintiff in his said capacity. The defendant has had

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at all times material full legal notice and knowledge of the said cessions. (9) The defendant in his said capacity as executor, filed with the Master of this honourable Court a certain account in the estate of the late Rachel Alida Elizabeth Greyling (born Vorster) termed "First and Final Liquidation Account," on the 12th of February, 1890, which account is dated 31st January, 1890, but has not brought up therein or in any account of the said estate the said share of the said farm due to the said estate nor framed a distribution account showing the share in the said farm due to the insolvent, nor has he transferred the same to the said estate nor accounted thereto or to the said Hunt for the same.

Wherefore the plaintiff claims: (a) An order compelling the defendant in his said capacity to file an account with the Master of this honourable Court in the said estate of the late Rachel Alida Elizabeth Greyling (born Vorster), and to bring up therein the true and proper value of the share of the said farm due to the said estate and to show in a distribution account the true and proper value of the share of the same due to the said insolvent. (b) An order compelling defendant in his said capacity to pay over to the plaintiff in his said capacity the duly ascertained value of the said insolvent's share in the said farm. (c) Failing compliance with prayer (b), that the defendant be ordered to pay over the value of the said share ascertained as aforesaid to the plaintiff in his said capacity *de bonis propriis*. (d) Alternative relief. (e) Costs of suit against the defendant individually and in his said capacity.

Section 8 of the declaration was amended to read as follows: The said legal costs and charges have not been duly paid or at all, and the plaintiff, in order to render the said inheritance available for the benefit of the estate, has agreed with the said Hunt to pay the amount of the said costs and charges, to wit, £37 3s. 5d., and the said Hunt, in consideration thereof, did on the 14th day of January, 1907, duly and lawfully cede and transfer all his right, title, and interest in the said cession to the plaintiff in his said capacity. The defendant has at all times material had full, legal notice and knowledge of the said cessions.

The defendant's plea was as follows:

(1) The defendant admits paragraphs 1, 2, 3, and 6 of the declaration. (2) He also admits paragraph 4 thereof, save that he says there were three children, and not two as stated in the declaration. (3) He admits paragraph 5, save that he says the said insolvent is no longer entitled to her share of the said legacy, as will more fully appear hereinafter. (4) As to paragraph 7, the defendant says that, save that he received a letter from one R. G. Atwell, of Lady Grey,

dated the 7th of June, 1906, informing him of the alleged cession, he does not admit allegations in the said paragraph contained, and puts the plaintiff to the proof thereof. (5) As to the amended paragraph 8 the defendant says that, save as aforesaid he has no knowledge of the allegations therein contained, nor has he had due notice of the said cessions. He says, moreover, that even if the said Hunt did cede his rights under the said cession to the plaintiff, as alleged, the said Hunt has not proved his claim against the said insolvent estate, and the plaintiff had no right under the circumstances to take cession from the said Hunt of any rights the latter may have had to the property in question. Section 30 of the Insolvent Ordinance does not apply to the circumstances alleged, and the plaintiff has no *locus standi* herein. (6) The defendant admits paragraph 9 of the declaration, but says that prior to the 23rd of May, 1906, he paid out for the said insolvent the sum of £133 3s. to settle certain moneys then due by her, and in consideration of the said payment the said insolvent, on or about the 23rd of May, 1906, entered into a certain deed whereby she acknowledged having received value for the share of Honing's Nest Kloof due to her by the estate of her late grandfather, and renounced any further right to the said farm. (7) The defendant says, in further reference to the said paragraph that it was not until 1904 that he received his quarter share of the said farm, and as so long a time had elapsed since the death of his first wife, the said Rachel Alida Elizabeth Greyling, he was not aware of the necessity for filing such an account as is referred to, but he subsequently paid out both the said insolvent (as already stated) and also his son, Schalk William Greyling, in cash, which they accepted in lieu of the shares of the said farm due to them, and for which the defendant holds their receipts and acquittances. (8) Subject to the above, the defendant is willing to file with the Master of this Honourable Court, if the said Master deems it necessary, an account containing the particulars referred to in the plaintiff's claim, but the defendant contends that for the reasons above given he has discharged the obligation resting upon him in respect of the said insolvent's claim to the said inheritance. Wherefore, the defendant prays that the plaintiff's claim may be dismissed, with costs.

Mr. W. P. Buchanan (with him Mr. Upington) for the plaintiff. Mr. Burton (with him Mr. Pohl) for the defendant.

David Ross, clerk in the employ of Mr. Attwell, attorney, of Lady Grey, said that formerly he was in the employ of Mr. Hunt, attorney, of Somerset East. Mrs. Van den Heever instructed Mr. Hunt to obtain from defendant her share of the inheritance. Witness drew up a deed of cession on Mr. Hunt's in-

structions, whereby Mrs. Van den Heever agreed to cede her share in the inheritance in consideration of legal costs and disbursements. The witness deposed to interviews with Mrs. Van den Heever and to other matters. He stated that he posted a letter on November 25, 1905, to the defendant, notifying him of the cession. The letter was never returned. He was not sure that he press-copied the letter; it was usual in the office to do so. He was, however, certain he sent the letter. In May of this year he saw defendant at Lady Grey, and the latter admitted having received the notice. The letter-book was now in the possession of his former employer, Mr. Hunt. The witness gave evidence as to further correspondence, and as to an interview between the attorneys and the parties, at which Greyling agreed to pay to Mrs. Van den Heever her share of the inheritance at the rate of £1 14s. per morgen for 66 morgen.

Gideon Stephanus Cloete, attorney, of Lady Grey, said he was the sole trustee in the insolvent estate of Mrs. Van den Heever. The assets realised about £57 and the liabilities were £232. He saw defendant early in May, 1906, when the defendant told him he had had notice of the cession to Hunt. Witness warned defendant to pay the inheritance to Hunt.

Cross-examined by Mr. Burton: Mrs. Greyling paid £133 in satisfaction of a debt in respect of which a writ had been issued against the goods of Mrs. Van den Heever. Witness paid Hunt, and the cession was made over to witness as trustee.

John D. van den Heever, husband of the insolvent, also gave evidence for the plaintiff. He admitted that Mrs. Greyling paid the £133 to satisfy the writ against his wife, but he said Mrs. Greyling owed her £182, with costs. That was what witness calculated as her share of the inheritance.

In reply to the Court, witness said he advised his wife to accept £120 and £100 loan in settlement of the £182. He offered Greyling to accept this. It was not the case that the goods were sold to Greyling for £120. It was not explained to witness or his wife that the document given to Mr. Hunt was a cession.

Mr. Buchanan closed his case.

Arnoldus Jacobus Greyling, the defendant, was called. He said he was bequeathed a fourth part of the farm in question by his father, subject to his stepmother's life interest. When witness's wife died he did not bring up the half-share of his interest in the farm in the accounts in his wife's intestate estate, because his attorney told him that the share in the farm did not accrue to him until after his stepmother's death. Before his stepmother died he sold his interest in the farm to his bro-

ther, and passed transfer to him after his stepmother's death in 1903. He did not then pay over the part his children were entitled to because he did not understand the position. He did not know they were entitled to any part. In 1905 Van den Heever said his wife had a claim. Witness was willing to give Van den Heever £1 a morgen, which was the price at which he sold the farm to his brother. He never received the letter said to have been written by Ross in November, 1905, notifying the cession to Hunt.

Mr. Ross was recalled and questioned as to the omission from Mr. Hunt's bill of costs of a charge for the letter which he stated was written on the 25th November, 1905, notifying defendant of the cession. He said that Mr. Hunt's practice was to charge two letters together if written on the same day and relative to the same matter. In this instance a letter was written to defendant on the previous day, and as notice of the cession should have been included in that letter, no charge was made for the supplementary letter on the 25th November.

Mr. Buchanan argued that the cession to Hunt was an out-and-out cession, that all power went out of the cedent and vested in the cessionary, and that therefore no transaction in respect of the inheritance could take place except with the cessionary. What took place between Mrs. Van den Heever and Greyling could not, therefore, bind the inheritance. Counsel quoted the cases of *Wetlaar v. General Assurance Company* (3 Juta, 86), *Trautman v. Imperial Insurance Company* (12 S.C.R., 38), *Van der Byl v. Findlay and Kihn* (9 Juta, 178).

Maasdorp, J., said he would take it that all the rights were in Hunt and none in the insolvent estate.

Mr. Buchanan said that this was so until the 14th January, 1907, when Hunt ceded his rights to the insolvent estate. They were at present in the insolvent estate.

[Maasdorp, J.: But before they got there, was there not some one else who had a right?]

Mr. Buchanan said he would submit that that could not be taken into account, because it was a transaction between the executor—who had knowledge of the cession at the time—and the cedent, from whom the rights had gone out with regard to the matter. It was a transaction behind the back of the cessionary. Counsel quoted Burge, vol. 3, p. 548, and Voet, 8, 4, 15, and 17.

Maasdorp, J., said it came back to the point whether at the time the trustee sought to get the cession ceded to him, the cessionary ought not to say that he had notice before insolvency that it was ceded to someone else.

Mr. Buchanan said the point was whe-

ther at that time there could be a valid cession of the same thing when all the rights had gone out of the cedent to the cessionary.

Mr. Burton contended that in the particular form of action now brought the trustee of the insolvent estate had no *locus standi*. Independently of Hunt's position, the cession could not be regarded as an asset by the trustee, since the debt due to the insolvent by the defendant, as executor of his wife's estate, had been discharged before insolvency, and *bona fide* discharged, and the insolvent had given an acquittance. Counsel quoted the case of *Fryer v. Farquhar's Trustee* (1879, Buchanan, 226), and referred to the 30th section of the Insolvent Ordinance. As to the point whether the insolvent estate could claim the balance due under the cession after satisfaction of Hunt's claim, he submitted that in those circumstances the estate would be receiving the money twice, for before insolvency Mrs. Van den Heever, than whom the trustee could have no greater rights, had already received the money from the defendant. Plaintiff had no right to take the cession from Hunt. There was no asset against Greyling; he had paid. Counsel urged, further, that there was no proof of notice of the cession having been given by Hunt to Greyling.

Mr. Buchanan, in reply, referred to section 33 of Ordinance 104 of 1833, and to section 1 of Act 14 of 1864.

*Cur. Adv. Vult.*

*Postea* (June 18th).

Maasdorp, J.: The defendant, who is the executor of the estate of his late wife, Rachel Greyling, admits that in November, 1905, his daughter Maria was entitled as an heir *ab intestato* to one-third of her mother's share of the joint estate of the executor and his wife. That estate was duly liquidated, with the exception of a portion of the farm Honings Nest Kloof, which had been bequeathed to the defendant by his parents, and the defendant admits that in November, 1905, his daughter Maria was still entitled to receive from him in his capacity of executor one-third of half the value of such portion of the farm. In November, 1905, Maria van den Heever had become indebted to Hunt, an attorney at law, in certain sums of money for professional services rendered by him in endeavouring to recover her inheritance from the defendant, and it was contemplated that further costs would be incurred for the same purpose. On the 22nd day of November, 1905, Mrs. Van den Heever entered into a written agreement with Hunt, wherein, after reciting her indebtedness and her right of inheritance, she cedes, assigns, and sets over to Hunt her right to the inheritance for security of the debt already incurred and any future debts. On the



24th of November, 1905, Ross, a clerk in the employ of Hunt, wrote a letter to the defendant in the following terms: "Dear Sir,—Re estate Greyling.—Be pleased to notice hereby that Mrs. M. J. E. Van den Heever has given me full power to represent and act for her in the above-mentioned estate, consequently any payments in connection therewith must be made to me." There appears to me to be nothing in this letter to convey to the defendant any intimation that there had been a cession of Mrs. Van den Heever's right to Hunt. Sande, in his treatise, "*De Actionum Cessione*," deals with the form of a notice of cession, and inquires (chapter 12, section 18) whether, in order to prevent payment by the debtor to the cedent of the debt, it is sufficient for the cessionary to give notice to the debtor that he is not to pay his creditor, without stating the grounds of such notice, or producing the instrument of cession. After reviewing the authorities upon the point, Sande comes to the conclusion that it is sufficient to inform the debtor that a cession has taken place, without discovering the written agreement of cession, leaving it to the debtor to demand inspection if he desires it. Evidently, therefore, no formality is required beyond stating that the cession has taken place. The abovementioned letter from Hunt merely communicates to the defendant the fact that Hunt as attorney of Mrs. Van den Heever is authorised to receive what she is entitled to out of her mother's estate, and by no means implies that the debt cannot be properly paid to the heir herself. In my opinion something more was required of Hunt by way of notice of cession than the intimation contained in his letter to the defendant. Ross stated in evidence that something more was done, and that on the following day he wrote again to the defendant, upon instructions received from Hunt, expressly informing him of the cession of the debt, but the defendant denies that such letter was ever received by him. Before proceeding further with the evidence, it will be well to inquire what legal requirements have to be met in a case of this sort, and to ascertain when the cedent of the debt is divested of his right thereto, and when it vests in the cessionary; and, further, at what time it no longer remains open to the debtor to pay the cedent. It is quite clear that in our law notice to the debtor by the cessionary is not necessary to vest the ceded right in the cessionary. In that respect our law differs from the law as stated by Pothier in his treatise on the contract of sale, where he says: "The transfer of a credit, before notice of it is given to the debtor, is what the sale of a corporeal thing is before delivery. In the same manner that the seller of a corporeal

thing until a delivery remains the possessor and proprietor of it, as has been established in another place; so, until the assignee notifies the debtor of the assignment made to him, the assignor is not divested of the credit which he assigns." I mention this to emphasize the difference in our law, as it is laid down in Voet (18, 4, 15) where he says: "Certainly our modern practice, with respect to the transfer of actions, has established the view that all the rights of the transferor are extinguished by the transfer, and that thenceforth only the transferee, not the transferor can enforce the claim against an unwilling debtor, even though no notice may have yet been given by the transferee to the debtor that he is not to pay the transferor; but that a debtor who, being ignorant of the transfer, pays the transferor is entirely discharged, though it is not so if he has received notice to the contrary from the transferee." And Voet repeats this view in the 17th section of this title. But Sande lays it down that it is not only express notice by the cessionary that places it out of the power of the debtor to settle with the cedent, but also knowledge of the cession on the part of the debtor, however he may have acquired such knowledge. Sande, in his treatise on the Cession of Actions (chapter xii, sec. 19), comes to this conclusion, after reviewing the authorities and decided cases upon this point. Voet (18.4.15) somewhat modifies this opinion by saying "Indeed, even though notice should not yet have been given by the cessionary, if the debtor was not ignorant of the sale and cession of the debt, he cannot effectually enter into a compromise with the cedent, but there is nothing to prevent his making a *bona fide* payment to the cedent, and thus being released from the debt; inasmuch as he pays the person to whom he is bound, and he ought not to be prejudiced, previous to notice, by the act of a third party, and the cessionary has only himself to blame if he suffers loss the gist of Voet's modification of Sande's view of the law lies in the words *bona fide*. It is quite conceivable that there may be circumstances under which a *bona fide* payment may be made by a debtor who has received no notice, but has knowledge of a cession, but undoubtedly under ordinary circumstances such a payment could hardly be *bona fide*. In view of the correspondence put in, I am of opinion that no express notice of cession was given by Hunt to the defendant, and particularly with reference to the letters of the 6th of April and the 7th of June, in the first of which Hunt informs the defendant's attorney that no interview with himself was necessary, as Fichet had been engaged by Mrs. Van der Heever to recover the inheritance, and in the second notice is



given of the cession in terms which imply that there had been no previous notice. Had it not been for the candid admission of the defendant himself, I should have had doubts whether he had actual knowledge of the cession, but his admission is in terms so explicit that it cannot be explained away. Defendant did undoubtedly speak of the letter of the 24th of November, which contains no notice of cession, as the one in which he was informed of the cession, but in my opinion he associates knowledge otherwise acquired by him with this letter. However, his evidence is too clear to be misunderstood where he says, "when on the 23rd of May I asked Fichat, 'What must I do with that thing of Hunt's,' I was referring to the cession of Hunt's." And again he says, "I got the document of security because I knew of Hunt's cession." I therefore come to the conclusion that although no express notice was given by Hunt to the defendant, the defendant was well aware on the 23rd May that Mrs. Van den Heever had ceded to Hunt her inheritance in her mother's estate. On the 23rd of May the defendant paid out to Mrs. Van den Heever what she claimed from the estate, and received an acquittance from her, and a promise to pledge certain goods as security in case Hunt should make a claim upon him. This is what the transaction, in fact, amounted to, notwithstanding the form of the documents put in evidence. The defendant, having knowledge of Hunt's cession, could not prejudice his rights by the payment to Mrs. Van den Heever, but on the other hand, Mrs. Van den Heever had every right to cede to the defendant any moneys she would ultimately become entitled to when Hunt's debt was satisfied, and a balance remained over to be repaid to her. This right so ceded would become vested in the defendant, at the time of the cession and not at the time Hunt enforced his claim. The settlement of the 23rd of Van den Heever's claim in so far as it was not prejudicial to Hunt, to a cession to Mrs. Van den Heever's claim of the balance to the defendant. In another view of the case it might be said to be simply a settlement of Mrs. Van den Heever's claim in so far as the executor would have money of hers available after satisfying Hunt. But, technically, the other view would be more correct, since Hunt, although his claim was for a less amount, had cession of the whole inheritance, and could enforce his claim for the whole. And it is only after he recovered the whole, that he became obliged to pay over the balance to Mrs. Van den Heever. Although the balance only then became payable, it was within her power to dispose of and transfer her right to such balance at any time. Hunt, upon recovering the inheritance, was entitled

to retain enough to cover his claim, but the rest he would hold as trustee for Mrs. Van den Heever, and the moneys which he might be expected to become possessed of in that way may be the subject of a cession, which would take effect when the cession was made. On the 23rd of May, Mrs. Van den Heever was divested of all claim to the inheritance, and it vested partly in Hunt and partly in the defendant. Upon the insolvency of Mrs. Van den Heever, and when Hunt ceded to the trustee the cession he held, he could cede no more than he was himself entitled to, and, although, technically, as a matter of procedure, he could sue for the whole claim, a portion of it must be taken as vested in the defendant. That portion, which exceeded Hunt's claim, having already vested in the defendant, could not become an asset in the insolvent estate. There is authority for saying (see *Sande* 12, 10) that though the debt vested in the cessionary even before notice is given by him, a creditor of the cedent, who before notice procured the attachment of the money in the hands of the debtor is preferred to the cessionary. But whatever the effect of the adjudication of insolvency might be in this respect, there is abundant evidence that Hunt, and, of course, the executor, had express notice of the settlement between Mrs. Van den Heever and the defendant before insolvency. It was contended that the trustee exceeded his powers in taking cession of rights from an outsider, and consequently did not acquire a right upon which he could sue as trustee; but Hunt could hardly be called an outsider, and this claim to the inheritance can hardly be regarded as falling outside the scope of his duties as trustee, because it might well have been that the estate was entitled to some benefit from it after all claims were satisfied. I am of opinion that the trustee is entitled to recover from the defendant what the insolvent owed to Hunt and was ceded by Hunt to him, and no more, amounting to £34 4s. 5d. It appears from the evidence that the defendant, under the belief that he was entitled to do so, has appropriated personally the proceeds of the property in question. Judgment is therefore given against him personally for the amount, and seeing that he is the only person interested in the defence of the action, he is ordered to pay the costs *de bonis propriis*.

On the application of Mr. W. Porter Buchanan, plaintiff was declared a necessary witness.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BORCHARD V. DILLON. } 1907  
 } June 11th.  
 } " 25th.

This was an action brought by August Carl Borchard, a wagon builder, residing at Claremont, to recover from Hannah Dillon, of Rondebosch, a Cape cart, or £30 10s. 1d., balance due thereon.

The plaintiff's declaration stated that he was a wagon builder residing at Claremont, and the defendant was a domestic servant residing at Rondebosch. In 1905 he sold to John McCreery a Cape cart valued at £60, on an agreement that McCreery was to pay him £30 on account, and while the balance remained due the Cape cart was to remain the property of plaintiff. In January last McCreery disappeared, and on his disappearance from the Cape Peninsula the defendant took possession of the Cape cart, and the balance due had not yet been paid.

The defendant's plea denied the statements made in the plaintiff's declaration, and stated she bought the Cape cart along with other things from McCreery.

Mr. Roux appeared for plaintiff, and Mr. Douglas Buchanan for the defendant.

The plaintiff stated he was a wagon builder, residing at Claremont. He sold a Cape cart to John McCreery for £50, £30 of which was paid down, and an agreement was entered into for the payment of the balance in four months. It was further agreed that the cart should remain the property of witness until the balance was paid off. Witness did other work for McCreery to the extent of £20. McCreery paid him another £15 on account of the cart, and when witness asked for security for the open account, McCreery said, "You can take the £15 off the cart account, and put it to the credit of the open account." Witness saw McCreery very often, but in January last McCreery disappeared, and witness looked for his cart. He found it at Reynolds's store.

Mr. Roux: We are in a peculiar position, my lord; we have just had a telegram from Reynolds, stating he cannot attend the court, as his sister died last night.

Mr. Buchanan: We admit that the cart found at Reynolds's store is the cart in question.

In reply to the Court, witness said he had not entered up the cart transaction in his books.

In cross-examination, witness admitted that a page in the ledger in which McCreery's account was entered had been lost.

Mr. Buchanan: I put it to you that the full amount has been paid, and if page 33 was here it would prove it.

[Hopley, J.: Where is page 33?]

Witness: I cannot say. I bought the book at an auction, and the page must have been out.

Mr. Buchanan: But in the index you have page 33 entered opposite McCreery's name.

In further cross-examination, the witness said he had received altogether £76 6s. from McCreery. McCreery did not sign any agreement authorising witness to place the £15 received on the Cape cart account to the credit of the open account. McCreery promised to make a new agreement, but did not do so. The total amount McCreery owed him was £36 10s. The agreement was that the amount was to be paid in four months, but McCreery told him he could not pay at once, so witness allowed the matter to run on.

Mr. Roux began to explain to the Court his version of the various accounts in the ledger.

When His Lordship said: "Yes, Mr. Roux, you have got it off very glibly, but if these people had set about trying to make a Chinese puzzle, they could not have done better. Someone ought to have writt'n out a copy of this account."

Mr. Roux: My lord, I was—

[Hopley, J.: I do not say you should do it, but it should have been done.]

Mr. Roux: I intend to call Mrs. Borchard who kept the books.

[Hopley, J.: Well, I suppose you will in time, but I do not see that she can do much.]

In re-examination, the witness said that he kept a separate account for every cart or vehicle on which he did work for McCreery.

[Hopley, J.: But where is it? The numbers "one" and "two" seem to have been written in afterwards.]

Mrs. Borchard, wife of the plaintiff, who kept his accounts, explained with much detail how it was that £30 was still due on the purchase price of the cart.

Mr. Buchanan cross-examined the witness at some length, to prove that the cart had been paid for, and that the balance due by McCreery was for other work done by plaintiff.

Mr. Roux closed his case.

Before calling evidence for the defence, Mr. Buchanan applied for absolution from the instance.

Mr. Roux having replied,

The defendant was examined, and stated that McCreery was her second cousin. She came to South Africa about four years ago for her health. In May, 1905, she lent him £50. He went to Ireland, and returned with a cart and started a livery stable. She lent him another £25, and in January, 1906, she gave him another £50 for the

things mentioned. She returned them to him, and in January last he gave her possession of the whole thing, as he could not meet the debt he owed her. She had sold the things, but lost money over the deal.

[Hopley, J.: Where did you get the money? Did you save it?]

Witness: No; I had some private means. (Continuing) She knew nothing of the circumstances under which McCreery bought the cart.

In cross-examination, witness said that when she lent McCreery the first lot of money, he was looking after her carts.

[Hopley, J.: When you lent him the first £50, what security did you get?]

Witness: He gave me no security for that amount.

In further cross-examination, the witness said that when she lent McCreery the money, she did not know that he was hard up. The sale of the horses, carts, etc., only realised £90. The horses alone fetched £46.

Hopley, J., said the question he had to consider was whether this man had been paid for the cart or not. He would go into the figures.

*Cur. Adr. Vult.*

*Postea* (June 25th).

Hopley, J.: On July 29, 1905, the plaintiff sold a new Cape cart to one McCreery, a cab-driver and carrier, for the sum of £60, of which he received £30 in cash; and he thereupon delivered the cart. The sale was, however, one with a suspensive condition, to wit: that the cart remained the property of the vendor until the full purchase price had been paid, and the delivery was made subject to such condition. The defendant is a cousin of McCreery's. She had come to this country in about 1903, partly in search of health and had brought with her a little money. In May, 1905, McCreery borrowed from her £50, without security, and later in the same year he borrowed two further sums amounting to £25. In January, 1906, he applied for a further loan of £50, and she agreed to lend it to him if he would give her security for the total amount of his indebtedness of £125. This he agreed to do, and he accordingly delivered to her, as in pursuance of a sale by him to her of the said articles, the said cart, together with his other vehicles, horses, and harness. After keeping them for a few days, she handed them back to him for the prosecution of his business. In January, 1907, he told defendant that he was unable to repay her the loan, and he finally handed over to her the said property, which she at once set about realising. She sold the other property, and had handed the Cape cart to an auctioneer for sale, when the plaintiff, learning of what was happening, obtained an interdict to prevent her and the auctioneer from parting with the cart

or its proceeds, pending the result of an action which he was bringing to establish his claim thereto. The auctioneer, it appears, disposed of the cart for £24, and the present action is to determine whether plaintiff or defendant is entitled to this amount. The sum total realised by the assets handed over by McCreery to defendant is less than the £125 which he borrowed from her, and it is admitted that she has acted *bona fide* and in ignorance of the condition under which McCreery had received the cart from plaintiff. Had the sale and delivery of the cart been an isolated transaction between plaintiff and McCreery, and had it been satisfactorily proved by plaintiff that he had received only £30 for the cart, there is no doubt that he would have been entitled to succeed in this action, whatever hardship such a result might have entailed on defendant; but plaintiff, who is a blacksmith and cart builder and trimmer, had, during 1905 and 1906, done considerable work for McCreery, from whom he had received in payment from time to time considerable sums of money, amounting in the aggregate to over £80, and his books show that the account for the cart had been merged in the general account for work and labour. As the payments were made, they do not seem to have been clearly appropriated to any particular account, and the general state of the books, as far as the accounts with McCreery are concerned, does not exhibit either a clear or creditable system of bookkeeping. In so far as the items charged against McCreery and the payments made by him are shown, they appear on pp. 5, 278, 275, 87 of the account book. No reason is given for this dodging about in the book, and there is no possible reason why the accounts should not have been carried forward in an intelligible manner on consecutive folios. In so far as payments are shown, there is considerable force in the contention that if they be attributed to the more onerous debt or to the older debt, then the amount due on the cart would have been paid off before delivery to defendant took place. But beyond this uncertainty there is another very unsatisfactory feature in the plaintiff's case. There is a rough index at the beginning of the book, from which it would appear that McCreery's account should be found on folios 5 and 33. Folio 5 is undoubtedly the one on which the account started, but when folio 33 is sought it is plain that it has been carefully removed from the book. The binding of the book has not come loose, and all the folios are in it save only the pages bearing folios 33 and 34 and folios 37 and 38. These have been carefully removed, and the corresponding portions of the sheets in the book to which they were attached are still in their proper places—e.g.,

33-34 were attached to 51-52, which are in their proper place. No explanation of this has been given, and in the circumstances it is a very suspicious feature in the case. The onus of proving that the purchase amount has not been paid and that consequently the cart is still his property rests on the plaintiff. The books show payments which would wipe out this debt. Across payments amounting to £15, which, apparently before the merging of the accounts were made specifically an account of the cart have been written the following words "Subs." (? subtract) "this £15 from old repairing work, leave the full amount open still." This entry is undated, but it was made on 6th December (so it is said by plaintiff and his wife). That must, therefore, if the entry be a genuine one, be 6th December, 1906 (since the last item of £15 was paid on 11th January, 1906). If that be so, it seems to me that by that time on a due appropriation of payments and in view of the fact that the accounts had been merged it would have been impossible for the plaintiff to have contended that the cart was still his, and that if any such arrangement was made with McCreery it was merely an attempt to get a pledge without a delivery of the article pledged. In view of the above facts, and especially in view of the suspicious removal from the book of the folio containing McCreery's account, I do not feel convinced that plaintiff had any legal claim to the cart when he procured the interdict. There will, therefore, be judgment of absolution from the instance with costs.

### THIRD DIVISION.

ADMISSION. { 1907.  
June 11th.

### ADMISSION.

Mr. P. S. T. Jones moved for the admission of Egbertus le Roux as an attorney, notary, conveyancer, and translator in English and Dutch.

Application granted, oaths to be taken before the Resident Magistrate of Oudtshoorn.

### PROVISIONAL ROLL.

#### GLUCKMAN V. BURGER.

This was an application for provisional sentence on a mortgage bond for £500, with interest at 8 per cent. from the 19th November, 1906, bond due by reason of non-payment of interest;

counsel also applied for the property hypothecated to be declared executable.

The defendant's affidavit stated that he had received a summons for payment of the capital, without having had previous notice of the interest being due. He intended to sell the property in the division of Riversdale by auction, but if the property were sold in execution, it would be greatly to his prejudice. The plaintiff's action was malicious, and was wholly due to defendant having refused to sell him a certain piece of land. Payment of the interest due on the bond had been tendered to plaintiff since the issue of the summons.

Plaintiff's answering affidavit denied that he had acted maliciously, and said that he was anxious to protect his own interests as holder of a second and third mortgage bond. The farm had previously been offered in November last, but no bid had been received. Defendant was making away with his movables.

Defendant's replying affidavit said that he considered there was a good prospect for the sale of the property at Robertson at an early date.

Dr. Greer for plaintiff. Mr. Van der Byl for defendant.

Counsel submitted that plaintiff had been guilty of sharp practice in this matter. The interest was due on the 19th May, and summons was issued on the 27th May, leaving five business days in the interval, on account of Sundays and public holidays. Plaintiff's conduct gave some colour to defendant's allegation that he had been actuated by malice, because the latter refused to sell certain piece of land, which seemed to have become a sort of Naboth's vineyard. Counsel cited *Rymer v. White* (14 C.T.R., 30).

Dr. Greer submitted that plaintiff was entitled to judgment. The case quoted could, in four distinct particulars, be distinguished from the present case.

Buchanan, J.: This is an application for provisional sentence on a mortgage bond for £500 and interest and costs. The bond itself was executed in July, 1906, but the interest was to be reckoned from the 19th May, 1906. In the first place the bond has not been in existence one year. The bond, however, contains the usual clause, which requires the interest to be paid half-yearly, and provides that unless the yearly interest is paid on the date it falls due, the principal and arrears of interest shall be considered as legally claimable and due without notice. The first half-year's interest on this bond was paid 11 days after it became due, and was accepted by the plaintiff. It was, in fact, deducted from the purchase price of certain mules bought by plaintiff from the defendant. There was no

objection to that settlement 11 days after the due date of the interest. There is therefore no year's interest unpaid, only six months' interest. When the second half-year's interest became due, no demand was made upon the defendant. I am not prepared to say that a demand was necessary. The defendant was responsible for the interest on a certain date, and in strict law, I think, it was the duty of the defendant to seek out his creditor, and not the duty of the creditor to seek out the debtor. The interest was due on the 19th May. As stated, no demand was made before the summons, which was served on the 29th May on the defendant. I see from the Sheriff's return that this summons was served at the defendant's residence during his absence. It appears that immediately on learning about the summons the defendant instructed his attorney in Cape Town to tender the amount of interest due, with costs, to date. Considering that the interest had been tendered a few days only after the due date, and considering that no previous demand had been made, and that, immediately upon summons being issued, the interest was tendered, I think that provisional sentence should be granted only for the amount of interest, with costs, and not provisional sentence for the principal sum also. It will be open for the plaintiff, if he chooses, to go into the principal case if he wishes to recover the principal, which by the bond is to become payable upon three months' notice being given or received; but at the present no order will be made beyond provisional sentence for interest with costs, to date of tender. If the principal case is not gone into, the plaintiff must pay the costs after date of tender.

DE VILLIERS V. MYBURGH.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,800, with interest from the 1st July, 1906, less £31 16s. 5d., paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted

EDMUNDS V. DAVIS.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BOARD OF EXECUTORS V. MCARTHUR.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £3,500, with interest from the 1st July, 1906, bond due by reason of non-pay-

ment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

DE VRIES V. DU PLESSIS.

Promissory note overdue—Holder—*Compensatio*.

This was an application for provisional sentence on a promissory note for £110, less £64 15s. paid on account, with interest from the 27th November, 1903. Plaintiff sued as legal holder.

The defendant's affidavit denied indebtedness. He said that he gave the promissory note to De Vries Bros., and that he made certain payments, which left an amount of about £42 still owing, and that a claim which he had against De Vries Bros. for grazing certain cattle should go in reduction of the balance due on the note.

The answering affidavit of A. H. de Vries (the plaintiff), stated that a few months ago he bought the stock-in-trade and outstanding debts of the firm of De Vries Bros., and that he took over the promissory note sued upon without any knowledge of the contra claim. A further affidavit by a member of the firm of De Vries Bros. was read, alleging that defendant owed the late firm another debt, far in excess of any claim that he might have for the grazing.

Mr. Pohl moved; Mr. De Villiers for defendant.

Mr. De Villiers said that the plaintiff became holder of the note long after it was overdue. It was taken by plaintiff with all the equities. Could De Vries Bros. on this note claim payment? Defendant pleaded compensation. It was not clear whether the whole of the amount had been wiped out or a large portion merely. Defendant had had no account from De Vries Bros.

Mr. Pohl submitted that plaintiff was entitled to provisional sentence on this liquid document. If defendant had any contra claim, he could proceed by action to assert that claim. He, however, recognised that it was impossible on motion to ascertain what was the true position of accounts.

Buchanan, J.: Provisional sentence is prayed for balance of a promissory note for £110, due March, 1903, made by Du Plessis in favour of De Vries Bros. De Vries Bros. and Du Plessis had transactions, and several notes and money payments passed between them. On this particular note several payments were made, and the last payment of £40 in cash was made in November, 1904. Shortly before that time the firm of De Vries Bros., the payees of the note, sent certain cattle to defendant's farm to graze. These cattle were attempted to be sold, but



ments were made, the last pay- were not sold, and were sent back to defendant's farm, where they continued to run for a considerable time. By June, 1905, an amount of £58. 18s. was claimed by Du Plessis against De Vries Bros. for the grazing of these cattle. There is no dispute that the cattle were grazed on the farm for the period claimed. It is said that originally defendant wished to charge 2s. per head per month, and that afterwards he reduced the charge to 1s. 6d., which De Vries wished to have reduced to 1s., but the defendant never agreed to less than 1s. 6d. This claim of £58 is still made by Du Plessis against De Vries Bros. This claim would more than wipe out the balance against him on the note. This is a claim which it is competent to the defendant to set-off, and the effect of such compensation is to extinguish the debt altogether. Afterwards, in 1905, there were other transactions between the parties, and there still seems to be an open account between De Vries Bros. and Du Plessis. In March, 1907, this year, the present plaintiff, another De Vries (A. H.), took over the business of De Vries Bros., and this note came into his possession as part of the assets of that business then taken over by him. He now sues upon the note as legal holder, but he became legal holder years after the due date of the note, and he could be in no better position in respect of his rights on the note than De Vries Bros. were. De Vries Bros., under the circumstances disclosed in the affidavits, could not have sued for the balance of the note, because it had already been liquidated by the contra claim, and the plaintiff is in no better position than they would be in. There may be a matter of account between the parties, but as far as the promissory note is concerned, there seems to have been a contra claim, which arose two years ago, which would wipe out the total amount of the balance claimed upon the note. Provisional sentence must be refused, with costs. If the principal case be gone into, the costs may be sued for then. It would seem that the proper course now would be to have a debate of accounts between the parties, and to sue for the balance of such account.

#### ILLIQUID ROLL.

PIENAAR V. PIENAAR. { 1907.  
June 11th

Mr. Benjamin moved for judgment for £151 and costs, in terms of consent paper.

Order granted in terms of consent.

SILBERMAN V SILBERMAN.

Mr. Lewis moved for a decree of divorce in default of the defendant's

compliance with an order of restitution of conjugal rights. Substituted service had been given. Counsel called the Court's attention to a defect in the service in consequence of some confusion due to the fact that the matter had been several times before the Court. Publication had not been made in the "Cape Times" as ordered.

Buchanan, J.: Publication should have been made in the "Cape Times" as well as in the "Government Gazette." The return day will be extended until the 3rd July, and on the extension it will be sufficient to publish it once in the "Cape Times."

#### GROBBELAAR V. GROBBELAAR.

Mr. Howes moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights, with custody to plaintiff of the minor children.

Rule absolute, with costs.

#### TOWNSEND V. TOWNSEND.

Dr. Rainsford moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Rule absolute, with costs.

#### GENERAL MOTIONS.

##### *Ex parte* EDWARDS.

Mr. De Villiers moved for leave to petitioner to sue her husband, Ernest H. Edwards *in forma pauperis* for divorce by reason of his alleged adultery with some person or persons unknown.

Petitioner appeared, and said that she was without means with which to institute an action.

Mr. De Villiers said that he was prepared to certify in favour of the application.

Rule nisi granted, returnable on the 18th June; personal service.

##### *Ex parte* HOFFMAN.

Mr. Lewis moved for leave to petitioner to sue the Cape Town Municipality *in forma pauperis* for £200 damages.

Petitioner said that on the 15th June, 1906, a fire broke out on certain premises, No. 53, Harrington-street, where he occupied two rooms, one of which he used as a storeroom. He intended to remove the goods, and while he was doing so certain workmen employed by the Corporation of Cape Town entered the premises, and although a special constable, whom he had placed there to guard his goods, warned them that petitioner had goods on the premises, they pulled down a wall forming part of the storeroom and damaged and rendered

worthless his goods. Petitioner immediately thereafter instructed his attorney to institute an action against the Municipality of Cape Town for recovery of the sum of £200, the amount of damages sustained. He paid his attorney the sum of £21 16s. 3d. towards the expenses, but his attorney did not issue summons. He thereupon withdrew the matter from his said attorney and handed it over to another attorney, with instructions to institute immediate proceedings. He prayed for leave to prosecute the suit *in forma pauperis*.

Buchanan, J.: You may take it as a direction from the Court that this affidavit should be sent to the Law Society, with the name of the attorney referred to, so that they may investigate your complaint. The application will be referred to counsel for certificate, and, on certificate being given, rule to issue, returnable on the 18th June.

*Ex parte* VAN DEN BIGGELAAR.

Mr. Toms moved for leave to petitioner to sue her husband, Cornelis Johannes van den Biggelaar, *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce. Petitioner had not heard anything from her husband for a few years. She had six children.

Petitioner appeared, and said that she maintained herself and family by taking in boarders.

The matter was referred to counsel for report.

*Ex parte* WOODMAN.

Mr. De Villiers moved for leave to petitioner to sue her husband, William Alfred Woodman, by edictal citation for restitution of conjugal rights, failing which a decree of divorce, with forfeiture of his half-share in the property. Respondent had been recently heard of in Southampton, England.

Leave to sue by edict granted, citation returnable on the 12th August, personal service, failing which one publication in the Government Gazette and in the "Daily Telegraph" (London), copy of citation to be sent by registered letter to respondent's brother, with leave to serve *intendit* and notice of trial with citation.

*Ex parte* GRAY.

Mr. Howes moved for an order authorising petitioner, who is liquidator of the Imperial Brick and Tile Company, to take transfer of certain landed property registered in the name of the company, which he had bought at public auction.

Leave granted to Registrar of Deeds to pass transfer as prayed.

LEWIS V. TRUSTEE. INSOLVENT ESTATE WILLIAMS.

This was an application upon notice to the trustee in the insolvent estate of James E. Williams to show cause why he should not be ordered to hand over to applicant, W. M. Lewis, of Longmarket-street, Cape Town, certain property which had been taken possession of on behalf of the insolvent estate at the premises, Saxmundham, Sea Point.

Dr. Greer was for applicant; Mr. Close was for respondent.

Applicant claimed that he was entitled to a billiard table and contents of the billiard room at Saxmundham, which, he said, he had bought in August last from insolvent for £125, and to four oil paintings, two Japanese screens, book-cases, etc., which he had bought from insolvent for £75. He had not removed the goods from the premises, but he claimed to have exercised possession by locking up the rooms where the goods were obtained for a certain period and then returning the keys to the insolvent. The original receipt given by insolvent had been lost, but he had issued a copy. Cheques drawn by applicant in favour of Williams for the amounts named were also put in.

Respondent complained that he had been rushed into this matter, and that the case had been brought into the Court prematurely, and unnecessary costs incurred. In any case, he submitted that the matter was one which could only be determined by action.

Applicant said, in reply, that he had given Mr. Currey due notice of the application, and that he had afforded him facilities for recognising the genuineness of his claim.

Mr. Close said that he had not come into Court prepared to go into the case, but he submitted that the matter was one in which applicant should be ordered to proceed by action, as the Court had decided in the previous application of a similar nature by Mrs. Williams. Unless this were done, he should have to apply for a postponement.

Dr. Greer contended that the facts were sufficiently set forth on the affidavits to enable the Court to come to a conclusion, and it was especially desirable that the matter, if possible, should be decided now as the applicant, he understood, intended to leave by the Home-going mail steamer to-morrow.

Buchanan, J.: The estate of Williams was surrendered in March last, and respondent was appointed as trustee. At the time of the surrender of Williams's estate, a certain billiard-table and fittings, oil paintings, and books were found in the possession of Williams, the insolvent. Lewis, the present applicant, gave notice to the Master that he claimed this property. The ordinary proceedings in insolvency followed, and the present re-

spondent was appointed trustee. But until the 5th June this year no formal demand was made by Lewis upon the trustee for the delivery of these goods. Correspondence then ensued, in which certain receipts were alleged to have been given in a transaction, which took place between Williams and Lewis before insolvency. The originals were demanded, but were never produced to the trustee. Certain cheques which were passed and paid by Lewis to Williams were produced, showing that money had passed between the two. It was alleged by Lewis that there had been a transaction in the nature of a sale between Williams and Lewis some months before insolvency. The goods alleged to have been sold remained on the premises of Williams, where they were found on the surrender of his estate. Application is now made upon notice of motion for an order to compel the trustee to deliver up this property. There is no virtue specially in an action in a case in which all the facts can be brought before the Court by notice of motion, and there is no reason why an order of this kind should not be given upon notice of motion if the facts are sufficiently before the Court to enable it to come to a conclusion. But there are several disputable points in this case which I cannot now decide without hearing witnesses. I do not think it desirable to discuss the disputed points, seeing that an action will have to be brought to decide the ownership of this property. As I, therefore, cannot make an order now, I will not go into the details of the affidavits, as I do not wish to express any opinion as to the result of any action which may yet be brought. I would suggest, however, that the applicant in this case should submit his case fully to the trustee, and the trustee, I am sure, will take a reasonable view of the matter, and it will be far better for all the parties if they can come to a settlement. I think if this had been done in the first instance, this application to the Court would not have been necessary. If further proceedings are taken, there is no objection to the notice of motion standing in place of summons. No order will now be made, and the question of costs will stand over, pending further proceedings.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MOSES V. WEBB.

{ 1907.  
{ June 12th.

#### Contract—Breach.

*A hired servant who receives instructions from his master to perform certain services is not a contractor in respect of those special services.*

This was an appeal from a judgment of the Resident Magistrate of Matatiele in a case in which the plaintiff (now appellant), summoned defendant, who was a servant of his, for breach of contract. Plaintiff was Robert Webb, a farmer, and the defendant was a servant of his named Moses. The action in the Court below was to recover damages fixed at £2 10s. in respect of an undertaking in regard to the transport of a load of goods. The appeal was based on the grounds that the Magistrate had given his judgment on a ground which was not claimed on.

From the evidence given in the Court below it appeared that Moses was employed by Webb to transport a load of goods from Matatiele to Umzimkulu, and to bring back another load. It was alleged that Moses, when he got to Umzimkulu, found that there was not a load there for him to take back, so he hired himself to one Strachan to take a load to Modderfontein stables, and charged £3 12s. for doing so. By the action of the defendant the plaintiff had suffered loss to the amount of £2 10s. The defendant's plea was that he did everything in the interests of his employer, and that when he returned he paid over to his master £2 12s., and accounted for the balance by stating that he had spent it on incidental expenses. This the plaintiff denied, stating that he only received £1, and in this was corroborated by his wife.

The Magistrate, in his reasons, considered the conduct of the defendant most unsatisfactory, and gave a decree for £1 13s. 6d., the amount due to plaintiff.

Mr. Long, for the appellant; Mr. P. S. T. Jones for the respondent.

Counsel having been heard in argument,

Hopley, J.: It seems clear that the Magistrate has travelled beyond the issues that were raised before him in

the case as it was presented before him in his Court. The only question raised by the summons in the Court below was whether there had been a breach of contract by the native servant of the plaintiff, whereby the native servant had agreed, as a contract between himself and his master to receive delivery of a certain load at Umzimkulu, consigned to Taylor Bros., of Matatiele, and bring it back to Matatiele, and whether by such breach of contract he had caused the plaintiff damage in the sum of £2 10s., which was claimed. It would appear from the evidence that it was not a matter of contract at all between these parties, but that Mr. Webb sent his own wagon and oxen with his own native servants, chief of whom was the defendant Moses, to do certain bidding of his, that is, to go down to Umzimkulu, deliver there a load which he had on the wagon, to wait there, and on his return to bring back a load to the same firm, which he would find waiting or arriving for them at Umzimkulu. It does not seem to me that there was a contract at all; it was a case of a hired servant having to obey the orders of his master. However, the man was in a certain position of responsibility, and had to use his own judgment, as the agent of Mr. Webb, and finding at Umzimkulu that there was no load waiting, and after waiting for a considerable period, and no load arriving for him to take back to Matatiele (whether or not he acted under instructions from Mr. Strachan, and whether or not a message came from Mr. Webb), he took from Messrs. Strachan and Co., the post-cart contractors, a load of forage to be delivered at one of their posting stations. After the native had accounted to him for certain money and expenditure, plaintiff brought an action, not for an account, and not for the money had and received, but for a breach of contract whereby he was damaged. Now, that is what the Magistrate had to enquire into, and it is perfectly clear that the first thing he had to do was to settle whether there were such final instructions to this servant that he must look upon them as an absolute order to wait for the load for Taylor Bros., and, if he did not do so, whether the plaintiff was thereby damaged in the amount of £2 10s. The fact that the defendant took Strachan's load and received certain money for it, might very well be taken into consideration as part of the evidence on an attempt to ascertain the *quantum* of damages, if there were any damages at all.

In the circumstances, I think it is extremely improbable that the Court ought to have found that defendant had committed a breach of contract at all. He had simply used his judgment to the best of his ability in the interests

of his master, and had taken the load which, apparently, was a fairly paid load, and done certain work with his wagon which his master would not have objected to at all if he had received the full amount of the money according to his view of the matter. Therefore, on that point alone, I think the case for the plaintiff should have failed as presented, but the matter went further, and the Magistrate inquired into the other contract that defendant had undertaken, and on an estimate of the moneys spent and earned for and on behalf of plaintiff, he gave judgment as though the whole action had been conceived as a matter of account for moneys had and received by defendant on behalf of the plaintiff.

Now, it is said that no injustice is done to defendant by such a course, that substantial justice has been done, and that the Magistrate had a right to look broadly at the matter. It is by no manner of means clear to me that no injustice may be done to defendant by the course adopted by the Magistrate, because it appears that he did not come into Court to meet the case, which was actually decided against him, seeing that he did not come into Court to fight a matter of account, but a question of whether by an alleged breach of contract the opposite party had sustained damage. The class of evidence that you might collect for the one case is not necessarily the class of evidence you would collect for the other case. At all events, though a good deal of laxity is allowed and a great deal of latitude given to inquiries in Magistrates' Courts in such cases, and though one does not wish to interfere with their findings, I do think they must not be allowed to go too far or to travel outside the case before them for their consideration. When the breach of contract had not been proved, when the damages had not been proved resulting from the defendant's alleged breach of contract, I think the proper course for the Magistrate would have been to have said: "Whatever case you may have against this man as a matter of account, you have failed in the case you have put before me, and I give absolution from the instance." I think that is what the Magistrate ought to have done, and that is what this Court will do.

The appeal will be allowed, and the Magistrate's judgment changed to one of absolution from the instance, with costs in his Court and costs in appeal.

#### KHAN V. DEENIK.

This was an appeal from a judgment of the Resident Magistrate of Wynberg, dismissing a claim for £20 damages, made by Khan against Deenik, in respect of the latter's negligence and failing to keep to an agreement,



It appeared that in February last plaintiff was indebted to defendant in the sum of £1 1s. 8d., and defendant issued a summons against plaintiff for recovery of that amount. On receipt of the summons, plaintiff called on defendant, and paid him the amount due, and defendant agreed to withdraw the summons. This defendant failed to do, and as a result plaintiff's name appeared in "Dunn's Gazette," and that caused his credit to suffer to such an extent that many firms refused to supply him with goods, and he was summoned by several other firms. In the Court below, evidence was called to show that plaintiff's credit suffered.

The defendant's plea was that he wrote to the Magistrate's office, authorising the case to be withdrawn, but that the letter must have miscarried.

The Magistrate, in his reasons, found that an agreement had been entered into, but also found that Deenik had taken all the necessary steps to apologise, and, therefore, dismissed the case.

Dr. Greer for appellant; Mr. Uppington for respondent.

Dr. Greer submitted that all the necessary steps had not been taken. The defendant agreed to withdraw the case, and he should have taken proper steps to do so, communicating either with the Magistrate's clerk personally, or sending directions by registered letter.

Mr. Uppington contended that there was no agreement to withdraw the summons, it was only a voluntary offer. With such an offer there was a certain obligation, but that was not enforceable as an agreement. If it could be shown that there was anything amounting to gross negligence or a breach of contract, then it was possible that there was a remedy in law.

Dr. Greer having been heard in reply,

Hopley, J.: I do not think that the judgment in this case should be disturbed. The facts are simple. Mr. Deenik having a cause of action against the appellant in the Small Debts Recovery Court, summoned him therefor. There was personal service. Instead of entering appearance in the Magistrate's Court, Cape Town, to contest the case, the debtor came to Mr. Deenik's place of business and paid his debt, with the exception of a small amount which does not affect the present case, and thereupon Deenik, through his clerk, agreed to withdraw the case.

Now, had the respondent done nothing whatever, it might have been taken that he had so carelessly, negligently, or perhaps maliciously neglected to do what he had undertaken that a cause of action founded upon tortious conduct might possibly have arisen. He, however, did not neglect his promise, but immediately sent off a letter, posted by himself, asking the Magistrate's clerk to withdraw the case, and so he was in

perfect innocence as to the fact that the case had not been withdrawn by reason of some faulty step somewhere or other—we cannot at present say where. The Magistrate has found that the letter was posted, properly addressed, to the Magistrate's Clerk, Cape Town; and, either because somebody in the postal service or the messenger in the Magistrate's Court was negligent, the letter does not seem to have reached its destination, with the result that the case, both parties being perfectly innocent of the fact, was called on, and, as authorised by the Small Debts Recovery Act, the Magistrate, without requiring any persons to be present, there having been personal service, gave judgment against the debtor. There was nobody before him to say the case had been settled, and so, when the case came on, judgment was given.

The judgment appeared in a *Gazette* which is supplied to business men, and the name of the appellant was thus put into something of the nature of a black list which merchants see. No doubt he did suffer damage in consequence—damage to his credit. But, in my opinion, this is a case of *damnum absque injuria*. The appellant may have suffered damages, but nothing was done by Deenik to render him liable therefor. The case that the appellant made in the Magistrate's Court was conceived in contract. He said that there was a contract by Deenik that he would withdraw the case, and that by reason of the failure to carry out this contract he has been damaged.

I consider, however, that it has been rightly argued that there was no enforceable contract, because no consideration was given for any such contract. I think that is the correct view to take, because nothing at all that I can see was given in consideration of such a contract. The money which was paid was for the goods which the appellant had bought from Deenik, and not in consideration that he should withdraw the case. Consequently, it seems to me that any case founded upon contract must fail.

Upon tort no case arises, because, as far as I can see, upon the undertaking voluntarily made by the clerk to withdraw, he did what was reasonably sufficient under the circumstances. I do not say that if there had been a contract upon good consideration he would not have had to do something more, and not merely have relied upon the Post Office as his agent.

But when it comes to a matter of tort there must be some element of malice or fraud, or something or other of that nature, to enable the Court to give judgment against a defendant. In this case the defendant has done what is usual and customary in such matters, in writing the letter and posting it, as the Magistrate found had been



done. There was nothing in the way of fraud or malice or anything else to give rise for an action for tort. Therefore, whether the matter be viewed as an action in contract or in tort, it seems to me that the plaintiff in the Court below must fail, that the Magistrate's judgment was correct, and that the appeal must be dismissed with costs.

HARVEY V. FRANKS.

This was an appeal from the decision of the Resident Magistrate of Woodstock in a case in which the plaintiff (now respondent) sued the defendant for £1, being carriage of certain furniture from one house to another, and a counter-claim by defendant, against plaintiff for the recovery of £1 4s. 6d., the value of certain goods lost or stolen in transit.

The Magistrate found for plaintiff for 10s., and costs, and for defendant on the claim in reconvention for the full amount and costs.

Dr. Greer appeared for the appellant; Mr. Lewis appeared for the respondent.

Counsel having been heard in argument on the facts,

Hopley, J.: I do not think these appeals on small matters like costs should be encouraged, and although a good deal might be said, and has been said by Mr. Greer in support of the view that the Magistrate ought to have taken a view of the whole case and put himself into the position of the defendant in that case and have found that the defendant ought to have the whole of the costs, yet in support of the view taken by him there is something to be said on the way the pleadings were drawn and the way the case was presented to him. There was a claim for work and labour done in and about the carriage of goods, and to this claim no tender was made by the defendant; all he says is that he denies the debt, and counter-claims for £1 4s. 6d. for goods lost in transit. He had never previously demanded these goods from the plaintiff, but his brother had told him vaguely that some things were missing, but it did not follow that the plaintiff knew he was being held liable for these goods. He came into court with his own case, not knowing of this other claim, or expecting that he was to be called upon to make good the loss. The Magistrate heard the case, and because the pleadings had been filed in the way they had, he gave plaintiff judgment with costs for the claim in convention, and defendant judgment and costs for the claim in reconvention. If he had given judgment the other way I should not have found any particular reason for upsetting his decision. That is the way he thought proper to exercise his judicial discretion, and I must say that it has not been so exercised that I can disturb it. The appeal will be dismissed with costs.

THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

BRADY V. ROBERTSON. { 1907.  
June 12th.

Mr. De Villiers moved for provisional sentence on a promissory note for £30, made in favour of Marion J. Daly, with interest from the 4th September, 1906, and costs. Defendant was sued by edictal citation, personal service having been effected.

Order granted.

Mr. De Villiers moved for certain funds in the hands of the executor of estate Robertson, belonging to defendant, which had been attached *ad fundandum jurisdictionem*, to be declared executable to the judgment.

Order granted accordingly.

*Ex parte* KNOX.

Mr. Douglas Buchanan moved for leave to petitioner to sue her husband, John James Barry Knox, *in forma pauperis*, and by edictal citation for divorce by reason of respondent's malicious desertion. The parties were married at Simon's Town, and, after living together for a few years, they parted. In February, 1905, respondent went to England, and was now believed to be employed in H.M. Dockyard, Devonport.

Petitioner appeared in person, and said that she had not heard anything from her husband since he had gone to England. Respondent did not support her, while they were living together, and they thereupon agreed to live apart.

Mr. Buchanan asked the Court to grant a rule nisi on the application to sue as a pauper, and at the same time to grant leave to sue by edictal citation, and he quoted the note at 6 Juta, 61 (*Nelson v. Nelson*, *Hardey v. Hardey*, *Edgecombe v. Edgecombe*, and *Born v. Born*). He also cited Brownell's case (17 C.T.R., 446).

Buchanan, J.: I don't like this practice. It does not seem to me to be sound. A rule nisi will be granted, returnable on the 14th August, calling upon respondent to show cause why petitioner should not sue him *in forma pauperis*, personal service to be effected. It seems to me to be an improper practice to grant leave to sue by edictal citation at the present stage, before it is decided whether or not the applicant will get leave to sue as a pauper, and before counsel and attorney are appointed.

# SUPREME COURT

## THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### PROVISIONAL ROLL.

MOLL, SCHUTTE AND CO. ) 1907.  
V. TIEDEMAN. ( June 13th.

Provisional sentence — Foreign judgment—Set-off of unliquidated claim.

This was an application for provisional sentence on a judgment of the Court of Judicature of Fort William, Bombay, India, for £633 4s., with interest from the 11th December, 1906, together with taxed costs amounting to £27 2s.

Defendant, who was formerly in plaintiff's service in India, and for some time had charge of their office in Bombay, had since January, 1904, been resident in East London, where he had obtained an appointment from Messrs. Malcomess and Co. He admitted indebtedness to the amount of £351 6s. 4d., but said that the Bombay Court had no jurisdiction over him, that he was living in East London when the judgment was taken, and that he had not entered appearance to defend the action.

Plaintiffs said defendant was served with writ of summons and entered appearance in the action. They denied that defendant was entitled to any set-off.

Mr. Benjamin was for plaintiff; Mr. Close was for defendant.

Mr. Close said that the defence was: (1) That there had been no proper service upon defendant; (2) that the Bombay Court had no jurisdiction on the ground of defendant being domiciled here; and (3) that the amount claimed was not due, there being subsequent reductions. On the question of service, counsel referred to the case of *Wessels and Co. v. Venter* (17 C.T.R., 473), and submitted that the handing of documents in the purely informal manner in this case was not service in a proper sense. Counsel also cited *Acutt, Blaine and Co. v. Colonial Marine Assurance Co.* (1 Juta, 406). Defendant had not, he contended, submitted to the jurisdiction of the Bengal Court.

Mr. Benjamin contended that the defendant having entered appearance, had submitted to the jurisdiction of the Bengal Court.

Buchanan, J., said that he would like to hear counsel on the question of set-off.

Mr. Benjamin said that Moll met defendant in a very generous manner after his account had been overdrawn, and

in view of defendant's state of health. That offer, however, was conditional on Tiedeman returning to plaintiff's service in India. If defendant had a claim then he should establish it in the ordinary way. He was not entitled to set off that claim on the present proceedings.

Buchanan, J.: Provisional sentence is claimed upon a judgment obtained in the High Court of Bombay for the sum of £633 4s. An action was instituted in the High Court of Bombay. In this action a summons was served upon defendant, who was then in this Colony. The defendant instructed an attorney in India to appear, and appearance was duly entered on the defendant's power of attorney in the Court of Bombay. The particulars of the claim were demanded by defendant's attorney and served upon him. Thereafter no further steps were taken by defendant; he allowed judgment to go as undefended against him in the Court at Bombay. Provisional sentence being now claimed on this judgment, three objections are taken by the defendant. The first objection is that there was no proper service of summons upon defendant. In my opinion, there was a proper service, and if there was any irregularity in the service, it was cured by defendant entering appearance. The second objection is that the Court of Bombay had no jurisdiction over the defendant. I am of opinion that the Court had jurisdiction in this particular action. The contract which grounded the action was made in India, it was to be performed in India, and the parties were in India at the time when the contract was made, and the defendant ought to have returned to India at the expiration of the contract. He did not return; he absented himself; but he submitted himself to the jurisdiction of the Court, and the Court, therefore, had power to give judgment against him. The third objection is that the amount for which judgment was obtained was not due, but was subject to certain deductions. It is very difficult in a provisional case to determine the question whether the defendant has a right to a set-off or not. He admits that he owed the plaintiffs the sum originally sued for, but claims that a certain amount should be reduced by a set-off. Defendant does not dispute the contract made. From the statements made it appears that defendant, who was in the service of plaintiffs, had overdrawn the amount, or drawn more money than he was entitled to for salary. Plaintiffs say it was done without their knowledge; the defendant states that plaintiffs knew of it. However, he admits that he did, as a fact, overdraw the account. He says, according to the contract, he is entitled to certain salary after the date of the contract which was not paid to him. It appears that he entered into a contract not to leave India until this indebtedness had been paid

off, but afterwards, in consequence of his ill-health, plaintiffs entered into a new contract giving him six months' leave, and advancing him 600 rupees for the purpose of paying his passage money. They also allowed him salary for the months of April and May at 500 rupees, and from that time, June, July, August, and September at 200 rupees, and agreed to allow him to draw against salary for April and May 300 rupees per month, and for June, July, August, and September 200 rupees per month. The total amount of salary which would have accrued to defendant from April to the 15th November, the date on which he undertook to return to India, was 2,300 rupees. I believe this works out at the rate of exchange accepted by counsel at £153 6s. 8d. The defendant claims also further salary after the 15th November, but he is clearly not entitled to any salary after the 15th November, even if he is entitled to salary up to the 15th November, about which I will not now decide definitely. He said his failure to return was due to the fact that the plaintiffs did not forward him his passage money to go back to India, as they had undertaken to do. Well, if any breach of contract was made on their part, it may give rise to a claim for damages, but that could not be set-off against the liquid amount which the defendant owes to plaintiffs. No objection has been taken to this being a provisional case, and it is admitted that on the claim sued for the defendant is indebted to the plaintiffs in the amount sued for. The only defence is that he is entitled to a certain set-off. Defendant claims set-off considerably more than I am inclined to allow to him. I think I can deduct only the amount of salary due to defendant from April to November 15, when he ought to have gone back to India. I do not think he ought to be allowed the 600 rupees, or £40, which he claims for his passage back to India, seeing that he never returned to India. Instead of returning he took service with somebody else, and came out to this colony. On the admissions of the defendant it is clear that he is indebted to plaintiffs in £633 4s., which, less his claim for salary to November 15, viz., £153 6s. 8d., leaves an amount of £479 17s. 4d. It may well be that the plaintiffs are entitled to the whole amount of their claim, or that the defendant is entitled to a claim against plaintiffs for damages for breach of contract, but at any rate the plaintiffs are entitled to £479 17s. 4d., and provisional sentence will be given for this amount, with costs, and with interest from the 11th December, 1906. Either party may go into the principal case for any claim beyond that amount. The case which has been cited in argument of *Acutt, Blaine and Co.*, in which the Court held that a judgment of the Court of Natal

did not give any right of action against a defendant in this colony, was quite a different one from this case. In that case the defendant was not a native of Natal, and was never subject to the jurisdiction of the Courts there, and he was never served with any legal process. To found jurisdiction in that case, the Natal Court attached certain property in Natal, and it was held, that as far as the judgment of the Natal Court, given under these special circumstances, was concerned, it could only affect property attached within the jurisdiction. This is quite another case, and in no way differs from the judgment of the Court in *Wessels and Co. v. Venter*, with which I am in full accord.

#### JANSON V. JANSON.

This was an action brought by Svon Anton Janson, of Claremont, against his wife, Sarah M. Janson, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Toms was for plaintiff; defendant did not appear.

W. T. Birch, officer in charge of the marriage register, Colonial Secretary's Office, gave formal evidence of registration of the marriage.

Plaintiff said he was married to defendant in Cape Town in August, 1889. In March, 1898, his wife deserted him. He did not know what the reason of the desertion was, and in fact he had had no warning that she was going. Witness had £85 in the house on the morning when she left, and later in the day he missed the money. He went to look for his wife, but afterwards he did not bother any more. He had not had any communications with his wife since.

Decree of restitution granted, defendant to return to plaintiff on or before the 30th June, failing which to show cause on the 12th July why a decree of divorce should not be granted, with forfeiture of the benefits of the marriage.

#### MAREE V. MAREE.

Mr. Roux moved for a decree of divorce in default of the defendant's compliance with an order on respondent for the restitution of conjugal rights.

Rule made absolute with costs.

#### GENERAL MOTIONS.

*In re* THE CAPE CANNING } 1907.  
CO. (IN LIQUIDATION) } June 13th.

Mr. Benjamin presented the official liquidator's final report.

The usual order was granted.

*Ex parte* FRIEDLANDER BROTHERS.

Mr. Close applied, on behalf of the applicants, for an order authorising the cancellation of certain sales.

Mr. Howel Jones appeared on behalf of the Colonial Government.

Mr. Percy Jones mentioned that there was a similar one in which one Albrecht was concerned, and he would like it taken with the present case.

Mr. Close: In this matter of Friedlander, it is a case where a number of allotments in the township of De Aar were sold in 1902, and we wish to have a cancellation. The Court made an order for the publication of the rule in the "Richmond Era" and the "Gazette." The day after the instructions for the insertion of the notice in the papers had been made, a communication was received stating that the "Richmond Era" did not exist, and a second application was made to have the notice inserted in the "Midland News." After this order was made, it was found that the information about the "Richmond Era" was wrong, and that it did exist, so the notice was inserted in both papers. I just mention this to show—

[Buchanan, J.: The notices have appeared!]

Mr. Close: Yes, my lord. Continuing, he explained that the rule of Court was a rule nisi, calling on all persons to show cause why the sales by petitioner of the township lots in De Aar should not be declared cancelled, and why the costs of the case should not come out of the money already paid. There was a further prayer in the petition, that on cancellation of this sale that the Court would make an order relieving the applicants from paying transfer dues.

Mr. Percy Jones said his case was the same as that made by Mr. Close.

Mr. Howel Jones said he appeared to oppose the application for the return of the transfer dues. He had just seen the papers in the Albrecht case. He wished to ask the Court to consider the circumstances very carefully before the rule nisi was made absolute.

[Buchanan, J.: Go on with your second application, Mr. Close.]

Mr. Close, having explained the second portion of the petition, proceeded to argue that where the Court cancelled a sale there should be a remission of the transfer dues. He contended that they were legally entitled to ask the Court to cancel the sale, and when that was done, under the section they were entitled to a remission of the transfer dues. The duty payable would be over £200, and £150 had only been received out of the sale, and there were heavy expenses incurred besides.

Mr. Howel Jones said this was a new point, which had never before been raised.

Mr. Percy Jones made formal application for the cancellation of the sale in his case.

Mr. Howel Jones said he wished to ask the Court to be careful before they cancelled the sale. The true meaning of section 18 was where there had been fraud or some such circumstances, then the Court could remit the transfer dues, but to this case he held that the 18th section did not refer. In the case of Friedlander, it was stipulated in the conditions of sale that if the purchasers did not take transfer within a month than the sale should be cancelled. They only asked for an order confirming a cancellation that had taken place by mutual consent. It was quite unnecessary for the Court to cancel the sale.

[Buchanan, J.: In cases where no money was paid do you claim transfer dues?]

Mr. Howel Jones: Yes, my lord, if the cancellation is not exercised before six months have elapsed.

His Lordship: But would that not come under the 32nd section?

Mr. Howel Jones: Yes, my lord. His argument was that the only thing that was necessary for the Court to do was to confirm the cancellation of a sale already agreed upon, and the payment of the transfer dues would be considered by the Civil Commissioner when a new sale was effected. It was unnecessary for them to come to the Court for confirmation of the cancellation. He would ask the Court not to make an order under section 18 unless the Court had no other alternative. He contended that if Friedlanders wished to sell the lots again, they could do so, without applying to the Court for permission.

Mr. Percy Jones said a similar action to that he proposed had been granted in the Transvaal. They asked that the sale be cancelled, and the balance paid in to the Master.

Mr. Close, having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (July 12th).

Further argument was heard. Mr. P. S. T. Jones cited in argument *Ex parte Stevens* (6 C.T.R., 150), *Liquidators, South African and Orange Free State Mining Association* (1906, T.S.C., 346), *Scott v. Isaacs* (12, C.T.R., 791), and *Estate Owen* (16 C.T.R., 79, 290, and 439).

Buchanan, J.: There are three applications before the Court. In each case application is made for the cancellation of certain contracts of sale under the 18th section of the Transfer Duty Act, No. 5, 1884, which reads: "As often as any contract of sale, upon which duty shall be payable, shall be set aside, or cancelled, or declared or made void by the judgment of any competent Court, the transfer duty upon such sale, if unpaid, shall not be payable; and if paid shall be returned." I take it, therefore, that though no transfer duty is payable on a sale cancelled by the Court, the judgment of the Court may impose any condition that seems required by the justice

of the case in granting this order for the cancellation of the sale. In the case of the Fernwood Estate, the Court will order that the sale be cancelled without any further condition. The rule will be made absolute, and no condition will be imposed. The effect of the order will be that there will be no transfer duty payable at all. In that case there has been no portion of the purchase price paid. In the two subsequent applications there have been payments made on account. When we look at the two subsequent sections of the Act, we find that this Act imposes a duty upon the transfer of any land from one person to another, but where no transfer is effected, then only in certain cases is the duty payable. Under the 20th section, it is competent for the purposes of a contract of sale by mutual consent to cancel that contract within six months, and if no part of the purchase price has been paid, or no consideration given for the cancellation of the contract, then under section 20 of the Act there is no duty upon such sale. In the case of Albrecht, there was no written contract put in, and I do not think that that section applies to Albrecht's case, but it does apply to Friedlander's case. In the case of Friedlander a number of lots of ground were put up by the applicants for sale, a number of them were bought by different people, and on a number of these sales no portion of the purchase price has been paid at all. In regard to those sales, the Court, in ordering the cancellation of these sales, finds that they come under the 18th section, and the rule will be the same as the rule in the Fernwood Estate. All sales by which no purchase price of any kind has been paid will be cancelled under the 18th section of the Ordinance, and consequently no duty will be paid on those sales. In regard to the sales on which portions of the purchase price have been paid, the Court will apply the principle of the 21st section of the Act, which is to the effect that as often as a contract of sale upon which duty is payable shall be by mutual consent cancelled, and a part of the purchase price has been paid, then transfer duty shall be payable only upon the part of the purchase price which has been paid. The 21st section, it is true, is a section by which cancellation takes place by mutual consent, but where persons under written declarations of sale give the right of cancellation, if the conditions are not carried out, it is in effect a mutual consent to cancel the sale, and, therefore, in ordering the cancellation under the 18th section, I think I should follow the principle laid down in the 21st section. The spirit of the Act seems to be that where a sale is cancelled, and no portion of the purchase price has been paid, no duty should be payable, but where there has been a

portion of the purchase price paid, duty will be payable on that portion of the purchase price which has been paid, and as to the balance in Friedlander's case, any balance after the duties have been paid the seller is entitled to keep, that will be declared forfeited, and the rule will be made absolute, duty to be paid on the portions of the purchase price paid, the balance declared forfeited, with costs against the parties. With regard to Albrecht's estate, the same order will be made, and the sale will be declared cancelled, on condition that the transfer duty is paid on any portion of the purchase price which has been paid. From that amount, the sellers will be entitled to deduct their interest and costs, and the balance, if any, will be ordered to be paid over to the Master. In the Fernwood estate the rule will be made absolute, with costs; in Albrecht's case the rule will be made absolute on paying transfer duty on the amount of the purchase price paid, from the balance the sellers to deduct interest and costs, and the balance, if any, to be paid to the Master; and in Friedlander's case the sale is cancelled, on condition that the duty is paid on the amount of the purchase price paid, the balance to be forfeited, with judgment for costs against respondents.

THOMAS V. ROBERTSON. { 1907.  
{ June 13th.

Mining — Prospector's rights —  
Transfer of land subject to  
rights—Interdict.

*Respondent had agreed to sell certain prospecting rights over his farm with option of purchase for two years to applicant. It was admitted that this period was extended for at least six months. During the currency of this agreement respondent sold the farm to his brother.*

*Held, that respondent must be interdicted from passing transfer until the lapse of the agreement, unless the transferee should acknowledge applicant's rights.*

This was an application to make absolute a certain rule nisi restraining respondent from passing transfer of a certain farm, Zandkraal, in the district of George, unless there be therein a recognition of applicant's rights.

The affidavit of the petitioner (David P. Thomas) set forth that he claimed to have entered into an agreement with



respondent (Arthur Nightingale Robertson), on the 15th March, 1905, which gave him certain rights of prospecting for minerals for a period of two years on payment of £5 a year and an option of purchase at the end of that period. The rent was paid from time to time. On the 18th June, 1906, the agreement was extended for a further period of two years. Petitioner had expended a good deal of money on the property as a mineralised property. He had recently been informed that respondent had alienated the property to his brother, Frederick Augustus Robertson, but that transfer had not been passed. Applicant submitted that he was entitled to have his agreement attached to the transfer of the property, so as to protect his rights under the agreement.

Respondent, in answering affidavits, denied having entered into a renewal for two years, and said that his impression was that the contract had been extended for six months. As far as he knew, petitioner had not spent much money in prospecting, and had not done any work on the farm for a period of about ten months. Deponent had not attached much importance to the option, as applicant had gone to Europe, and had not been on the farm for some months, and when he agreed to sell to his brother, he was under the impression that the contract had only a few months to run. Respondent was in pecuniary difficulties, and the sale was entered into with his brother in order to help him out of his difficulties. It was not until after the sale had gone through, that respondent mentioned the option to his brother. It was further stated that had F. A. Robertson not come to the assistance of respondent the latter would have had to surrender his estate.

Applicant, in replying affidavits, said that he carried on operations on the farm for a period of sixteen months until he went to Europe. The work was stopped while he was away, owing to certain causes, and he was detained in Europe longer than he had anticipated.

Mr. Benjamin was for applicant; Mr. Upington was for respondent.

Mr. Upington submitted that the application was quite unprecedented. Applicant was attempting to obtain a declaration of rights under this agreement upon motion. It had never been laid down that these mining agreements were leases of land. No reason had been shown for restraining transfer in the present case. Counsel cited *Henderson and Another v. Hanecke* (20 S.C., 505), *Estate Thomas v. Carr and Another* (20 S.C., 354), *Johns v. Colonial Government* (15 S.C., 245), and *United Mines of Bultfontein v. De Beers Consolidated Mines* (17 S.C., 419). No right in the land itself was, he submitted, conveyed by the agreement with

applicant. He cited Voet 18, 1, 2. The application was to interfere with a *bona fide* purchaser for value without notice. It was not alleged that a fraudulent transaction had taken place between respondent and his brother. There was no reason whatever for making the rule nisi absolute.

Buchanan, J.: The respondent, A. N. Robertson, entered into an agreement with the applicant giving him the right to prospect on the respondent's farm and with option of purchase. This agreement was entered into on March 15, 1905, and was for a period of two years, ending on March 15, 1907. The consideration of agreement was £5 a year, which was paid. Afterwards the parties agreed to extend the agreement for an additional two years, ending on March 15, 1907. The respondent, A. N. Robertson, says in his affidavit that he was under the impression that the extension was to be for only six months, and not two years, but even that period has not yet been reached. Applicant left the country on business, and when he came back, he found that during his absence A. N. Robertson had sold the farm to his brother—the other respondent. Applicant, on hearing of the sale immediately took steps to interdict the transfer of the property from one Robertson to the other. A rule nisi was granted, and this rule is now before the Court for the purpose of being made absolute. It is contended that that agreement is not one which runs with the land, and that whether the property is transferred or not, it makes no difference to the remedy of the applicant, which is only a claim for damages. But if the transfer is allowed to pass free from the obligations under the agreement, the rights of the applicant will be entirely defeated. On the question of whether the transferee had notice of this agreement, I will not express an opinion. There are enough affidavits to show that he had. This matter will not now be decided, but if A. N. Robertson is allowed to dispossess himself of the land, he will not be able to carry out the agreement with Thomas, and as that agreement, according to the written contract, exists for two years, the interdict will have to last as long as the agreement lasts, but leave will be given to respondents to bring an action to set aside the interdict, such action to be brought within three months. It was alleged that the property was mortgaged at the time of the agreement. If so, the mortgage being prior to applicant's agreement, the agreement cannot affect the mortgagee. That question is not before the Court at present. The order will be that Thomas will be entitled to have an order restricting respondents from transferring the property while the agreement lasts, unless the transferee acknowledges the applicant's rights.

# SUPREME COURT

## THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### ILLIQUID ROLL.

MACLEOD V. ESTATE { 1907.  
BASSARDIEN. { June 14th.

Dr. Greer moved for judgment, under Rule 329d, for £33 17s. 11d., amount of a certain bill of costs, taxed and allowed between attorney and client, for services rendered and disbursements made, with interest *a tempore morae* and costs.  
Order granted.

### ANDREWS V. RAWBONE.

Mr. Van der Byl moved for provisional sentence on a promissory note for £38, and for judgment, under Rule 329d, for £1 18s., being costs of collection.

Buchanan, J.: The Court cannot grant costs twice over. Costs of this action will be costs of collection. Provisional sentence will be granted on the promissory note as prayed, but there will be no order on the other claim.

*Postea* (June 17).

Counsel repeated the application for the commission, and cited *Lindenberg and De Villiers v. Palmer* (16, C.T.R., 827).

Buchanan, J., said he did not see how the attorney could claim more than his taxed costs, and would have to refuse the application.

### REVIEW.

#### REX V. JACOBS.

Splitting of criminal charge—  
Forgery—Uttering.

*The same person cannot be convicted and sentenced on the double charge of forging and uttering one and the same document.*

Buchanan, J.: This matter came before me as Judge of the week. The case had been remitted by the Attorney-General on a charge of forgery and uttering. The Magistrate (Resident Magistrate's Court, Beaufort West), had split it up into two separate charges, and imposed two different sentences. The second sentence will be quashed, otherwise the proceedings will be confirmed.

## GENERAL MOTIONS.

*Ex parte* BEARD AND OTHERS. { 1907.  
June 14th  
„ 17th.

Municipality — Closed road —  
Owners of adjoining land.

*S.*, being the owner of land within a Municipality, sold it in lots with proper roads for the use of the owners and the roads were taken over by the Municipal Council. Subsequently one of the roads was lawfully closed by direction of Government, and *S.*, having been called upon to show cause why transfer of the land should not be made in favour of the owners of the adjacent land on both sides of the road raised no objection. The Council raised no objection but insisted upon a condition authorizing the use of the road for carrying off storm water from a cross road.

Held that, subject to such condition, the transfer should be allowed.

This was an application for a rule nisi under the Derelict Lands Act to be made absolute.

At the last hearing of the action an application was made to close the De Villiers-road, Wynberg, and that was granted. The petitioners now applied for an additional order vesting in them the title to the land over which that road originally existed. The papers showed that the lands were still vested in the estate of the late John Stewart, who died in 1882, and the result is that the land is unrepresented. The Wynberg Municipality contended that if the rights in the De Villiers-road were transferred there would be no outlet for the stormwater at the foot of Stamford-road unless some arrangements were made by petitioners for taking it away.

The petitioners contended that any provision for the carrying off of the water should be carried out by the Municipal Council of Wynberg. Hitherto no arrangements had been made for carrying off the water.

Mr. Benjamin moved

Mr. W. Porter Buchanan appeared on behalf of the Wynberg Municipal Council to oppose.

Mr. Buchanan argued that probably as soon as the petitioners got title to this road they might erect a wall or

take other steps to prevent this water from going over its present course.

[Buchanan, J.: What becomes of the water now?]

Mr. Buchanan: It runs on to this road.

[Buchanan, J.: Well, then, it will continue to run on there.]

Mr. Buchanan contended that once the road was vested in the petitioners, that they could take steps to interfere with the course of this water. It was not the duty of the Municipal Council to erect this arrangement for taking away the stormwater. The fact was that this property was either vested in Stewart's Estate, because the petitioners had not shown any cause for coming under the Derelict Lands Act or else under section 105 of Act 45 of 1882, was vested in the Municipality.

[Buchanan, J.: If it is vested in the Municipality, the transfer must be made from the Municipality.]

Mr. Buchanan submitted that if the transfer was to go through it should go through subject to the conditions imposed by the Council.

Mr. Benjamin said the petitioners should get transfer from Stewart's Estate.

[Buchanan, J.: But what claim have you against the estate?]

Mr. Benjamin: We claim that this road has been closed, and we are the adjacent owners.

[Buchanan, J.: But you have not held for 40 years.]

Mr. Benjamin argued that in view of the decision in the case of *Cape Breweries v. Whitehead* that they were entitled to claim. Under the Derelict Lands Act, they were entitled to claim by prescription or any other grounds.

[Buchanan, J.: You can't claim by prescription.]

Mr. Benjamin: Well, by grant. He submitted that the land was not vested in the Municipality, but in Stewart's estate.

[Buchanan, J.: Then what are the grounds for claiming against Stewart's estate?]

Mr. Benjamin replied that that road was there for the use of the adjoining owners, and Stewart's estate had no land there now.

[Buchanan, J.: Adjoining owners have no right to a road.]

Mr. Benjamin: They have, if they own all the adjoining lots. Every tittle of title had gone from Stewart, and this land was not vested in the Municipality, who only had a right of way. The Municipality claimed no right to the sub-soil. This road had been dedicated to the petitioners, and that was the title on which they came into court.

Buchanan, J., stated that as this case was ordered to stand over when the rule nisi was granted, to be heard before

two Judges, it would have to stand over for two Judges.

*Postea* (June 17).

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice BUCHANAN]

Mr. Buchanan argued that the Municipality claimed that some provision should be made for carrying away the stormwater from Stamford-road, which ran into the road which the applicants wished to close up. The applicants could not claim transfer of the road, because they did not allege title by prescription or contract as required by the Derelict Lands Act. The *dominium* in the road was vested either in the Municipality or in Stewart's estate.

[De Villiers, C.J.: I should like to hear Mr. Benjamin on that point. In whom is the *dominium* in the road vested?]

Mr. Benjamin: When the road was granted, it was vested in the Municipality. Subsequently, when it was closed up again, it reverted to Stewart's estate. The road was a reservation in favour of the proprietors of the adjacent lots of land. The *dominium* in the soil was granted to them. Counsel cited *Philips v. Porter* (1876 B., 192) and *Hofmeyr's Case* (1 S.C., 424). The Municipality no longer had any interest in the matter. The Colonial Secretary closed the road, and his decision, subject to the conditions he imposed by section 8 of Act 41 of 1899, was final.

Mr. Buchanan was heard in reply.

De Villiers, C.J., asked Mr. Benjamin if it would not be well for the petitioners to consent to the conditions made by the Wynberg Municipality.

Mr. Benjamin: The position we take up is that the Municipality has nothing to do with this matter.

[De Villiers, C.J.: Oh, yes; because it was on their appeal that the Colonial Secretary gave his decision.]

De Villiers, C.J.: When this application was first made, the Court was careful to provide that the notice of the application, with the rule, should be served on the executors or representatives of the late Mr. Stewart (17 C.T.R., 318). It is contended now that the *dominium* is vested in the Council, but even if the *dominium* had been at one time vested in the Council, the road has been closed by the proper authority, and the only persons who could claim the ownership are the representatives of the late Mr. Stewart. Well, now, notice has been given to them, and no objection has been raised, and I am quite prepared to treat this case as a case where the respondent is in default. It is unnecessary for the Court to decide whether this case comes under the principle laid down in the

case of *Philips v. Porter*, or the principles in the case of *Hofmeyr v. De Waal*, because it seems that no objection has been raised by the representatives of the estate concerned. It seems that there was no intention at the time of sale to retain the ownership of the land on which the road was marked out. Under those circumstances, I consider the rule ought to be made absolute. But the further question arises now, whether Wynberg Town Council had not so much interest in the matter as to appear before the Court for the purpose of pointing out what the rule nisi meant. It must be borne in mind that at the time the Colonial Secretary settled this point Stamford-road did not appear on the plans, and now, of course, some provision ought to be made for the stormwater. The Wynberg Municipal Council are quite right in seeing that some arrangement is made for carrying off the stormwater, but they are not right in saying that petitioners should do it. I think power should be given to the Municipality to carry off the stormwater which comes down the Stamford-road. Therefore the rule will be made absolute, with the condition that the Wynberg Municipality shall be entitled to use the road in question for the purpose of carrying off the stormwater. As to costs, Wynberg Municipal Council were quite right in raising the question, and therefore the costs of the Council will have to be paid by the petitioners.

Buchanan, J., concurred, and said the question of *dominium* still remained an open one.

[Before the Hon. Sir JOHN BUCHANAN.]

STARLING AND OTHERS V. { 1907.  
NANNUCCI LTD. { June 14th.

Limited Liability Company —  
Shares — Over issue — Can-  
cellation—Registration.

Three persons, N. B. and S., having three separate businesses, all engaged in the same trade, agreed to amalgamate their businesses and form a limited liability company. Each of these persons and also four others, among whom was one R., signed the Articles of Association, and one share was allotted to each. The capital of the Company was divided into 25,000 shares, and the whole of these were allotted to N., B. and S. The above seven shares were never regis-

tered, and the directors, on discovering this oversight, resolved to cancel these shares. At that time S. had ceased to be a director and had disposed of all his shares, save the share originally allotted to him. S. and R. now each applied for the registration of his original one share.

Held that, as S. had been a director of the Company and ought as such to have been aware of the over issue of shares he was not entitled to take advantage of his own negligence and obtain registration of his share.

Held further that as R. had agreed to the cancellation of the seven shares over issued, and had never before applied for the registration of his share or other shares which he had received gratuitously, his application must be refused.

One Newsome claimed the registration of 100 shares purchased from a former secretary of the Company. But as the secretary was alleged to have stolen the scrip from the offices of the Company:

Held, that Newsome could establish his rights only by action.

This was an application for an order directing that the share register of the respondent company be amended so as to show the number of shares held by each shareholder and for further relief.

The applicants' affidavit stated that the company was incorporated and registered in this colony on the 3rd August, 1899, with a capital of £25,000, for the purpose of acquiring and carrying on the business heretofore carried on by Oreste Z. Nannucci as steam-dye works and steam laundry, and certain other two businesses. Petitioners, who said they were shareholders of the company, alleged that in several respects the company had been mismanaged. They said that statutory meetings which ought to have been held at certain periods had not been held, that balance-sheets and statements of account had not been framed as required, and that Mr. Nannucci had utilised moneys of the company for purposes not connected with the business of the company. Peti-



tioners said that Mr. Nannucci had treated the business for some years past as if it had been his own, and they, as shareholders, had not been able to ascertain the true position of the company's affairs, and had been refused inspection of the books. Petitioners did not hold one-quarter of the shares in the company, and were consequently unable to avail themselves of the 116th and 120th sections of the Companies Act, 1892. Petitioners alleged that more shares had been issued than was authorised, viz., 25,007. They prayed for an order that the share register of Nannucci, Limited, be forthwith amended, so as to show the correct holdings of all shareholders, including the shares of petitioners, so that the total shares issued therein should not exceed the authorised capital of the company; that petitioners, or some person on their behalf, be given an inspection of the books; that the accounts of the company be properly made up; the books audited, and a balance-sheet prepared and submitted to the shareholders at a meeting to be held not later than a date to be fixed by the Court; that respondents be ordered to affix the common seal of the company to all share certificates held by the petitioners; and that respondents pay costs of the present application.

The answering affidavit of O. Z. Nannucci stated that it was the intention of the company to carry on the business as a co-operative concern. He entered into an explanation as to the issue of seven shares beyond the authorised capital, and said that this was done under a misapprehension, and that he had been quite ready to refund to the holders the amount they had paid. He said that meetings of shareholders had been called from time to time, but, owing to the absence of a quorum, meetings had had to be adjourned. He denied that he had ever used his position as managing director for his own private benefit, and said that the present trouble was due to one Wyndham Bishop having obtained shares evidently with the intention of inducing deponent to take over his shares at par. Deponent had been willing to discuss the affairs of the company with any person who was interested. He was quite prepared to submit the affairs of the company to the inspection of any reputable person at the expense of petitioners. He believed that the object of the petitioners was to find out trade secrets for the benefit of a competing firm or firms. An affidavit by Denis Edwards, one of the directors, was also read, in which he said that he had been well acquainted with the affairs of the company, and, as far as he was aware, no improper transaction had taken place between O. Z. Nannucci and the respondent company.

Certain replying affidavits were also read, in which Mr. Nannucci's statements were traversed.

Mr. Benjamin was for applicants; Mr. Close was for respondents.

Mr. Benjamin, in answer to the Court, said that three of the petitioners wished to have their shares registered, and all the petitioners claimed to have the common seal of the company affixed to their shares. Counsel said that the irregularities in connection with the company were sufficient to justify the petitioners in demanding an inspection, but, even apart from that, there was ample authority to entitle them to inspection. A company could not issue extra shares without the sanction of an extraordinary meeting of shareholders.

[Buchanan, J.: It was clearly an oversight. There apparently was no intention of increasing the capital.]

Counsel contended that Nannucci should forego the seven shares. With regard to the irregularity of the non-printing of the articles this was also only a detail, but under the Company Laws they were compelled to print them.

[Buchanan, J.: There is nothing in that. It was typewritten and accepted by the Registrar.]

Mr. Benjamin said that the scaling of the shares was necessary under the 82nd section of the Act. The 14th section provided for the common seal being provided. The holding of meetings was provided for under the 107th section of the Act. A very drastic penalty required that a meeting be held within six months, but in the present case over seven months had elapsed. The 108th section provided for a general meeting every year. With regard to the meetings to be held under the articles of association, these were dealt with in the 28th section of schedule "A." There was, in addition, a special provision in the articles for these meetings. Section 78 of the articles provided for the revision of accounts, and stipulated that seven days previous to the annual general meeting, a printed copy of the balance sheet was to be circulated amongst the members. With regard to the audit of the accounts, it was ordered that one auditor be appointed by the directors and the other by the shareholders.

[Buchanan, J.: How many shareholders are there now?]

Mr. Benjamin: I cannot say, my lord.

Mr. Close: Mr. Nannucci holds over 2,300 shares, and the other director holds 500.

Mr. Benjamin, continuing, said it appeared from the affidavits that no proper meetings had been held. The 97th section stipulated that auditors should have access to all the books of the company, and yet, Mr. Mouatt was unable to obtain access to them when he applied. There were further allegations



to the effect that disbursements were being made for Nannucci's private account and debited against the company in the books. With regard to those allegations they could not put anything beyond the bald statement until they had inspected the books. There had undoubtedly been irregularities. No meetings had been held except the one in 1900, when the law on the point was not complied with. The annual general meeting had not been held for all these years. They were told that one was held in December, but nothing was before them. Nannucci, in his affidavit, stated that meetings had been held, but the shareholders had not received notice of it. If Nannucci and a couple of others got together and said, "Now we are holding a meeting," that was not a meeting of the shareholders. It was impossible for the shareholders to know how matters stood when no meetings had been held. With reference to the position taken up by respondent with regard to these irregularities, counsel went on to point out that the allegation against the shares held by Newsome could not stand, seeing that they were properly endorsed and had been held throughout by Newsome since he bought them from Mrs. Harrison. The accounts had not been audited and submitted to the shareholders, as required and no attempt had been made to prove that they had. The reason put forward by Nannucci for not having this audit was absurd. He said he had had litigation but that turned out to be private, and then again he objected to an audit because of the peculiar nature of the business. That was absurd. With regard to the inspection of the books, it was urged that they were desirous of ascertaining trade secrets. That was foolish. What secrets could be learned from the accounts? The right to inspect the books was provided for under the 77th section of Schedule "A." He did not know that it was necessary to quote authority on that point, but there was authority.

[Buchanan, J.: I do not think that is disputed.]

The respondents did not decline an inspection, but they suggested that some independent accountant should make it at petitioners' expense, but Mr. Wyndham Bishop was an experienced accountant, and was also a shareholder. They applied for an inspection of the books on the 10th, and on the 14th they received a notice of the meeting to be held on the 21st to alter the articles of association. The way in which they were drafted was to allow the shareholder with the large number of shares to crush the small shareholders. It was intended under the new articles that no share should be transferred to anybody except a member without the sanction of the directors. Under the articles the majority of shareholders decided the value of the shares, and—

Mr. Buchanan: We have nothing to do with that under this application.

Mr. Benjamin said he only pointed that out, to enable the Court to see the *bona fides* of Mr. Bishop's application to inspect the books. Continuing, he read extracts from the proposed new articles of association, which he contended vested nearly all the powers in Mr. Nannucci, who was the holder of the majority of shares. He just mentioned that to show the necessity for the minority being protected, and quoted a decision on a similar point in Buckley, page 216. He submitted their only redress was to come before the Court.

Mr. Close said that if any person had a certificate which was not stamped he had a perfect right to go to the company, and have it stamped. The present application was unnecessary. The same held good with regard to registration (section 86 of the Companies' Act quoted). Counsel also cited the English case of *Trevor v. Whitworth* (12, A.C., 440). He submitted that applicants had not shown that they were aggrieved. The matter of the seven shares was purely trumpetry in relation to the affairs of the company. As to the claim for an inspection of books and accounts, counsel submitted that the petitioners had not made out a case of refusal. On the claim for the accounts to be made up, and books audited, he said that more than two meetings had been held as alleged by petitioners, and balance-sheets had been framed. The petitioners had alleged irregularities which, where they were of importance, had been answered by Mr. Nannucci, or, if they were not answered, they were of a trivial character. He did not propose to touch upon the proposed new articles of association. That was a matter for the company, and if anybody thought he was aggrieved then he could oppose the confirmation. If there was anything that the Court thought required investigation, the respondents would not take the exception under section 116, and he was prepared to consent to an investigation by an independent person. The application was wholly unnecessary, and should be refused, with costs.

Mr. Benjamin, in reply, said that his learned friend now came into court prepared to recognise the seven shares. Hitherto recognition had been refused. Petitioners were entitled to an order that their rights, so far as the seven shares were concerned, should be recognised on the share register. As to the new articles, the new articles would have been passed at the meeting on the 21st May, had it not been for the proceedings that were taken, and the petitioners would then have been deprived of redress. Mr. Bishop had been put off time after time, and he was finally told to come back on the 21st, and he would then have found that the only course petitioners could take would

have been to move to have the articles upset. In consequence of the 116th section, the petitioners had been compelled to come to the Court for redress. The Governor would not have been able to appoint a commissioner, even if Nannucci did not object, because the section clearly said one-fourth of the shareholders. With regard to the balance-sheets, it was clear that balance-sheets in accordance with the Act had not been presented. The irregularities had been going on for eight years, and the unfortunate shareholders were entitled to come to the Court for relief.

Buchanan, J.: In 1899 three persons, Mr. Nannucci, Mr. Burge, and Mr. Starling, were carrying on business in the Peninsula. These three persons resolved to float their businesses into a limited liability company, and they arranged between themselves that all the shares in the company should be taken by themselves, and that there should be no shares allotted to the public. In other words, that the capital of the several businesses should be converted into scrip capital. For the purpose of meeting the requirements of the Company's Act, in the registration of the company, it was necessary that the articles of association should be signed by seven shareholders, and for this purpose seven persons signed the articles of association, and each of these seven took one share in the company. These shareholders were the three persons to whom the property belonged, and four other persons. After the formation of the company, the whole of the 25,000 shares, which were proposed to be the capital of the company, were issued to the persons to whom the businesses had belonged, overlooking the fact that seven shares had been issued for the purpose of floating the company. Of these seven shares the Court is now asked to order the registration of the one which was issued to Starling, and one which was issued to Ross. The over-issue, as it is called, of the shares by seven was discovered at the time, and it was resolved to cancel the seven shares originally issued. Nannucci distributed certain shares gratuitously amongst certain employees. He gave Ross 15 shares, and it is alleged on the affidavits afterwards that Ross, who was absent from the Colony at the time, when it was resolved to cancel the seven shares, acquiesced in the cancellation. That is not denied. Of the other three persons, who signed the trust deed, Michelsen, who had one share, had received a gratuitous distribution of 10 shares, and had subsequently surrendered his one share to Nannucci. Dennis Edwards, the sixth person who had signed the deed, had acquired certain other shares of the company, and has become a director of the company, and he takes no part to insist upon his share being registered. The seventh signatory, E.

Nannucci, was also one of those who received a gratuitous distribution of shares, and he, too, agreed to the cancellation, and does not wish to have his one share registered. As to the share of the petitioner Starling, which it is alleged has not been cancelled he was one of the original persons for whose benefit the company was floated, and he, as one of the floaters of the company, took his portion of the shares in the company, and said nothing about his additional share. Moreover, he was one of the directors, and I do not think he can now be heard to take advantage of his own oversight as a director and claim the registration of that share. He had originally a number of shares in the company, which he had disposed of, and he has now no interest in the company, and I do not think it is equitable to allow him to come in in respect of the one share agreed to be cancelled. Ross, it is alleged, agreed to the cancellation; he had received gratuitous shares, and though he now asks for it, I think it is unnecessary to make any order on the subject, because he never before made a request to be registered in respect of the one of these shares. The more important application is that of Harry Newsome to have 100 shares registered in his name. He had nothing to do with the original floating of the company, and he alleges that he bought these shares in 1903 from the then secretary of the company, Mr. Hilliar. He did nothing at the time to get these shares registered, but towards the end of 1905 he instructed his attorney to apply to the company to have the shares registered, and he received an answer that Hilliar, who had sold him these shares, had no right whatever to sell the shares. The shares were 100 of those originally distributed by Nannucci amongst the employees, and were given to Mrs. Harrison. Nannucci purchased them from Mrs. Harrison with the object of having them transferred to Hilliar, on his paying the price of same, but it is said that Hilliar never paid the price. It is alleged on affidavits that Hilliar improperly abstracted the scrip of these shares from the offices of the company, and that he embezzled certain moneys of the company, and then suddenly disappeared. Under these circumstances the Court cannot say at this stage that Newsome has established his right to have these shares registered in his name. It will be open to Mr. Newsome to bring an action to have his right to the shares declared, should he be so advised. So far as the first prayer of the petition, therefore, is concerned, no order can be made. In reference to the application of the common seal of the company to be affixed to certain shares, it appears from the articles of association that if the common seal is affixed 1s. per certificate is to be paid to the com-

pany. If that ls. per certificate is tendered to the company, and the stamp is refused, then there may well be an application to the Court, but it does not appear that there has been any such tender, or any refusal in this case. The next thing asked for is that petitioners, or some one on their behalf, be given inspection of the books of account at such reasonable times as the Court may seem meet. Now, the only person who has made any application for an inspection of the books is the applicant Bishop, and it is not clear on the affidavits that there was any refusal to give him such inspection. An appointment was made for the purpose, and he went at a time when the respondent Nannucci was not there to keep the appointment, but an inspection was almost immediately after offered, and Bishop could have had inspection at any other time. If the company had refused to give him inspection he would certainly have been entitled to an order, because the company is bound to allow every shareholder an inspection at all reasonable times. The next prayer is that the accounts of the company be properly made up, and the books audited and a balance-sheet framed and submitted to a meeting of shareholders to be fixed by the Court. The books of the company for two years, 1903-5, were not audited, but the respondents say they are now being audited. The accounts for the past year are being audited, but no meeting has been held as yet in this year. Under the articles of association the company is bound to have two half-yearly meetings, one in February and the other in July, and the Act also requires that the accounts shall be brought up at such annual meetings to a date not more than three months previous to the date of such meeting. There has been no meeting this year. The directors are at fault here, and they should have taken more prompt action and should have had the accounts prepared and submitted to the shareholders. The applicants are shareholders, and they are entitled to have these meetings duly held, and they are entitled to come to the Court in the failure of the company to have these meetings. That is the only point on which the applicants have succeeded, and I think they are entitled to an order that a meeting of the company, which ought to have been held in February last, shall be held within a reasonable time, and I think that one month would be ample time to allow, because there will have to be a meeting in July. It is part of the duty of the directors to have the accounts printed and sent to the shareholders one week before the meeting takes place. The directors in this matter have certainly been at fault. It is alleged that there has been a good deal of laxity in the management of the company. Whether there has been

more than irregularity does not clearly appear, but the directors certainly have failed in regard to holding the meetings. As to costs, I think that as the applicants had some cause for coming to the Court, the company should pay the costs of the motion, except the costs of Starling and Newsome, which must be borne by themselves, as they have failed to establish their position. They are neither of them shareholders, and neither of them is entitled to any order. The order of the Court will be that a meeting of the company be called by the directors within one month from this date, and that the respondents submit at such meeting the company's accounts from January 1, 1901, to December 31, 1906, duly audited, the costs incurred by or against Starling and Newsome to be paid by them, the other costs of the application, that is, of the shareholders, to be paid by respondents.

[Applicants' Attorneys: Wahl, Fuller and De Klerk. Respondents' Attorney: G. Trollip.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

### GENERAL MOTIONS.

*Ex parte* TAYLOR. } 1907.  
(June 17th.

Mr. Palmer moved for leave to petitioner to sue her husband, Barnet Taylor, for restitution of conjugal rights, failing which, a decree of divorce, with custody of the child and forfeiture of benefits of the marriage. The parties were married in community of property in Cape Town last year, and respondent, it was alleged, deserted applicant in February of this year, and was residing at Kimberley. He had failed to contribute to petitioner's support.

Petitioner appeared, and said that she was without means with which to bring an action.

Rule nisi granted, upon counsel's certificate of *probabilis causa* being filed with the Registrar, rule returnable on the 2nd July.

*Ex parte* BURGER.

Mr. Roux moved on the petition of the executors testamentary of estate Burger for an order authorising a mortgage of the minors' share of certain property at Eendekuil bequeathed by testator to his three sons. The petitioners asked leave to mortgage the minors'

share jointly and equally with the shares of the other legatees in the sum of £775.

Order granted in terms of Master's report, Petrus Olthoff authorised to pass the mortgage on behalf of the minor.

*Ex parte* ESTATE COWLING.

Mr. Douglas Buchanan moved on the petition of the executrix testamentary for leave to mortgage certain property in Cape Town for the sum of £275, in order to satisfy certain debts. Petitioner, it appeared, was the sole heiress under the will. She and her late husband were married in England.

[Maasdorp, J.: Why can't she administer her own property without coming to the Court.]

Mr. Buchanan: The Registrar refuses to allow the bond to go through.

Order granted as prayed.

AJAM V. TALEBODIEN AND OTHERS.

This was an application upon notice of motion to the respondents calling upon them to show cause why an order should not be granted in the following terms: (1) Setting aside the proceedings which took place in the Bethel Hall on the 3rd April, 1907; (2) restraining you from holding yourselves out to the public as persons in authority and having power to control and administer the affairs of the Moslem Cemetery Board, and preventing you from in any way dealing with the cemetery affairs; (3) compelling Imaun Talebodiën and Abdol Cader to deliver up all books relating to the Moslem Cemetery now in their possession; (4) interdicting the Standard Bank from parting with the funds to the credit of the Moslem Cemetery Board Fund account.

When the application originally came before the Court, the Chief Justice, by consent, appointed Advocate W. Porter Buchanan as commissioner to examine the credentials of all who claimed a right to vote, to receive nominations, and to accout votes for the election of a new Board, and reserved the question of costs (17 C.T.R., 370). Mr. Buchanan had sat and received nominations and votes, and, as a result, had declared applicant and his supporters elected, the respondent and his party having retired from the field after nominations had been handed in.

Dr. Greer was for applicant; Mr. McGregor (with him Mr. P. S. T. Jones) was for respondents.

Dr. Greer said he took it that the respondents now appeared on the question of costs.

Mr. McGregor said their contention was that the applicants had taken the wrong remedy, and that they should be ordered to pay costs.

Dr. Greer briefly traced the course of events which led up to the application. On May 18, 1886, he said, the Moslem community in Cape Town purchased a burial ground, and £1,000 was raised by subscription for the purchase of the ground. There was a deed of transfer, together with certain conditions attached, and those conditions governed the election of the Board by whom the ground was to be administered, and provided that persons who subscribed to the fund of £1,000 should be electors of the Board. As a matter of fact, a Board was elected originally, and after that nothing seemed to have been done. The old Board went on from time to time, apparently filling up vacancies as they arose up to the beginning of this year, when the existing Board, as then constituted, elected as secretary one Abdol Cader. It was alleged that the secretary could only be elected by the members of the Board. As a matter of fact, Abdol Cader was not a member of the Board. Then the present applicant and his supporters said that as the then existing Board had contravened the conditions a new election must be held. An election was held. After further disputes, an action was brought in the Magistrate's Court by Ajam and his party to prevent Talebodiën and his supporters from continuing in office. The Magistrate said that as there was some doubt about the legality of the election of the Ajam Board, they should give notice of the election, and elect a fresh Board. That course was adopted, and a meeting was held on the 9th March. At that meeting, which, the affidavits said, was attended by 700 people, Ajam and his Board were elected. Notice was given in the "Cape Times" of this election. On the 3rd April a meeting was held by the respondent and his party, and applicants alleged that they were prevented from attending that meeting, that there were 73 people at the meeting, and that more than 100 people were refused admittance. At that meeting Talebodiën and some of his followers were elected as the Board.

Mr. McGregor (interposing) said that respondents contended that the second election of applicant and his party was informal, and that fourteen days' notice should have been given under rule 6, instead of seven merely.

Dr. Greer (proceeding) said that the Court appointed Mr. W. Porter Buchanan as commissioner, and he had held meetings of subscribers for the purpose of receiving nominations and votes. Both parties put in nominations at the first meeting, but before the meeting was held at which votes were received by the commissioner, Talebodiën and his supporters intimated that they retired from the contest, and at the meeting Ajam and his party were declared



elected. Counsel argued that the respondents should pay costs of the proceedings. Applicants said that they were a properly constituted Board, and that respondents by their opposition had caused needless expense. The Board elected before the commissioner was appointed was precisely the same as that which had now been elected, with one exception only, out of a total of eleven members. Counsel cited *Du Toit v. Domingo* (14 S.C., 127) and *Berhardien v. Intillah* (6 C.T.R., 41).

Mr. McGregor submitted that applicant should pay costs of the proceedings. Domingo's case could be clearly distinguished from the present case. The form of the application was wrong. Neither party apparently persisted in saying that his Board was the right one, and a new Board had to be constituted. Furthermore, the course of events showed that applicants were not the proper parties to get what they asked for in the notice of motion.

Maasdorp, J.: It appears that in this case the old Cemetery Board that managed the cemetery for the Moslem community was, in course of time, by certain irregular proceedings, rendered illegal in its constitution. It seems that all parties were satisfied that the Board could continue no longer. Thereupon the applicant and his party took it upon themselves to undertake a new election, and when the members of that alleged new Board had been elected, they proceeded against the members of the old Board in respect of certain funds. The question came before the Magistrate, and the Magistrate seems to have had some difficulty in deciding who exactly were the legal representatives of the Moslem community in respect of their interests in this cemetery, and he advised the parties to have a new election and to settle their disputes in that way. Thereupon the applicant seems to have taken it upon himself to give notice for a new election, which took place. What exactly were the powers and the rights of the applicant in taking those duties upon himself does not appear. However, his authority was not questioned so much as the nature of the proceedings. The respondent and his party contended that there had been certain irregularities in the election, and they, on their part, set about having a new Board elected. The result was that two antagonistic Cemetery Boards came into existence, and the question was raised by them before this Court as to which was the legally-constituted body entitled to represent the Moslem community. It was found necessary because of the difficulties which had been created to direct that a new election should take place, and to secure regularity and order in that election a commissioner was appointed by the Court to see that everything took place in due form. That

election has taken place, and the body elected must be regarded as the legal representatives of the community, although even now the respondent and his party do not seem satisfied with the results. The only question which this Court has now to decide is as to the payment of the costs incurred in the different proceedings. When the applicant set about making arrangements for the election of the new Board, he said not to have given sufficient notice, and that was the irregularity upon which the respondent contended that the election had been illegal. Now, it does seem to me that the respondent had some ground of complaint, but then his proper course would have been not to set about having another party election of his own, but to have had the previous election set aside on the ground of irregularity. Instead of that he sets about what seems to me to be also quite irregular and illegal, having a Board elected which, instead of representing the community, seems to me to have represented merely a fraction of the people interested. It is quite clear that there were irregularities on both sides, and that the parties could not have settled this matter without coming to court, and having the aid of the Court and the directions of the Court to clear up their difficulties. Under the circumstances it seems to me that each party should pay his own costs and half the costs of the commission.

Dr. Greer: Will your lordship declare the new Board elected? The attorneys on both sides agree that a fee of 25 guineas would be a fair fee for the commissioner, who had very hard and arduous work to do.

Maasdorp, J., said the persons mentioned in list B of the declaration would be declared duly elected as members of the Cemetery Board. The commissioner's fee would be fixed at 25 guineas.

Mr. McGregor: I take it half the costs of the commission does not mean that my learned friend's clients can take half the money standing to the credit of the Board to pay their costs.

Maasdorp, J.: They are fighting out their private quarrels, and they cannot use the money of the Board.

#### *Ex parte* ESTATE BADENHORST.

Mr. Toms moved, on behalf of the petitioners, the executors testamentary in the estate of Margaretha Elizabeth Badenhorst, of Colesberg, for an extension of six months in order to file the liquidation and distribution account, the costs of the application to be borne by the estate.

Order granted as prayed.

#### BRAUDE V. BRAUDE.

Mr. M. Bisset was for the applicant, and Mr. Benjamin was for respondent,



*Ex parte* FRIEDLANDER BROTHERS.

Mr. Close applied, on behalf of the applicants, for an order authorising the cancellation of certain sales.

Mr. Howel Jones appeared on behalf of the Colonial Government.

Mr. Percy Jones mentioned that there was a similar one in which one Albrecht was concerned, and he would like it taken with the present case.

Mr. Close: In this matter of Friedlander, it is a case where a number of allotments in the township of De Aar were sold in 1902, and we wish to have a cancellation. The Court made an order for the publication of the rule in the "Richmond Era" and the "Gazette." The day after the instructions for the insertion of the notice in the papers had been made, a communication was received stating that the "Richmond Era" did not exist, and a second application was made to have the notice inserted in the "Midland News." After this order was made, it was found that the information about the "Richmond Era" was wrong, and that it did exist, so the notice was inserted in both papers. I just mention this to show—

[Buchanan, J.: The notices have appeared?]

Mr. Close: Yes, my lord. Continuing, he explained that the rule of Court was a rule nisi, calling on all persons to show cause why the sales by petitioner of the township lots in De Aar should not be declared cancelled, and why the costs of the case should not come out of the money already paid. There was a further prayer in the petition, that on cancellation of this sale that the Court would make an order relieving the applicants from paying transfer dues.

Mr. Percy Jones said his case was the same as that made by Mr. Close.

Mr. Howel Jones said he appeared to oppose the application for the return of the transfer dues. He had just seen the papers in the Albrecht case. He wished to ask the Court to consider the circumstances very carefully before the rule nisi was made absolute.

[Buchanan, J.: Go on with your second application, Mr. Close.]

Mr. Close, having explained the second portion of the petition, proceeded to argue that where the Court cancelled a sale there should be a remission of the transfer dues. He contended that they were legally entitled to ask the Court to cancel the sale, and when that was done, under the section they were entitled to a remission of the transfer dues. The duty payable would be over £200, and £130 had only been received out of the sale, and there were heavy expenses incurred besides.

Mr. Howel Jones said this was a new point, which had never before been raised.

Mr. Percy Jones made formal application for the cancellation of the sale in his case.

Mr. Howel Jones said he wished to ask the Court to be careful before they cancelled the sale. The true meaning of section 18 was where there had been fraud or some such circumstances, then the Court could remit the transfer dues, but to this case he held that the 18th section did not refer. In the case of Friedlander, it was stipulated in the conditions of sale that if the purchasers did not take transfer within a month than the sale should be cancelled. They only asked for an order confirming a cancellation that had taken place by mutual consent. It was quite unnecessary for the Court to cancel the sale.

[Buchanan, J.: In cases where no money was paid do you claim transfer dues?]

Mr. Howel Jones: Yes, my lord, if the cancellation is not exercised before six months have elapsed.

His Lordship: But would that not come under the 32nd section?

Mr. Howel Jones: Yes, my lord. His argument was that the only thing that was necessary for the Court to do was to confirm the cancellation of a sale already agreed upon, and the payment of the transfer dues would be considered by the Civil Commissioner when a new sale was effected. It was unnecessary for them to come to the Court for confirmation of the cancellation. He would ask the Court not to make an order under section 18 unless the Court had no other alternative. He contended that if Friedlanders wished to sell the lots again, they could do so, without applying to the Court for permission.

Mr. Percy Jones said a similar action to that he proposed had been granted in the Transvaal. They asked that the sale be cancelled, and the balance paid in to the Master.

Mr. Close, having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (July 12th).

Further argument was heard. Mr. P. S. T. Jones cited in argument *Ex parte Stevens* (6 C.T.R., 150), *Liquidators, South African and Orange Free State Mining Association* (1906, T.S.C., 346), *Scott v. Isaacs* (12, C.T.R., 791), and *Estate Owen* (16 C.T.R., 79, 290, and 439).

Buchanan, J.: There are three applications before the Court. In each case application is made for the cancellation of certain contracts of sale under the 18th section of the Transfer Duty Act, No. 5, 1884, which reads: "As often as any contract of sale, upon which duty shall be payable, shall be set aside, or cancelled, or declared or made void by the judgment of any competent Court, the transfer duty upon such sale, if unpaid, shall not be payable; and if paid shall be returned." I take it, therefore, that though no transfer duty is payable on a sale cancelled by the Court, the judgment of the Court may impose any condition that seems required by the justice

of the case in granting this order for the cancellation of the sale. In the case of the Fernwood Estate, the Court will order that the sale be cancelled without any further condition. The rule will be made absolute, and no condition will be imposed. The effect of the order will be that there will be no transfer duty payable at all. In that case there has been no portion of the purchase price paid. In the two subsequent applications there have been payments made on account. When we look at the two subsequent sections of the Act, we find that this Act imposes a duty upon the transfer of any land from one person to another, but where no transfer is effected, then only in certain cases is the duty payable. Under the 20th section, it is competent for the purposes of a contract of sale by mutual consent to cancel that contract within six months, and if no part of the purchase price has been paid, or no consideration given for the cancellation of the contract, then under section 20 of the Act there is no duty upon such sale. In the case of Albrecht, there was no written contract put in, and I do not think that that section applies to Albrecht's case, but it does apply to Friedlander's case. In the case of Friedlander a number of lots of ground were put up by the applicants for sale, a number of them were bought by different people, and on a number of these sales no portion of the purchase price has been paid at all. In regard to those sales, the Court, in ordering the cancellation of these sales, finds that they come under the 18th section, and the rule will be the same as the rule in the Fernwood Estate. All sales by which no purchase price of any kind has been paid will be cancelled under the 18th section of the Ordinance, and consequently no duty will be paid on those sales. In regard to the sales on which portions of the purchase price have been paid, the Court will apply the principle of the 21st section of the Act, which is to the effect that as often as a contract of sale upon which duty is payable shall be by mutual consent cancelled, and a part of the purchase price has been paid, then transfer duty shall be payable only upon the part of the purchase price which has been paid. The 21st section, it is true, is a section by which cancellation takes place by mutual consent, but where persons under written declarations of sale give the right of cancellation, if the conditions are not carried out, it is in effect a mutual consent to cancel the sale, and, therefore, in ordering the cancellation under the 18th section, I think I should follow the principle laid down in the 21st section. The spirit of the Act seems to be that where a sale is cancelled, and no portion of the purchase price has been paid, no duty should be payable, but where there has been a

portion of the purchase price paid, duty will be payable on that portion of the purchase price which has been paid, and as to the balance in Friedlander's case, any balance after the duties have been paid the seller is entitled to keep, that will be declared forfeited, and the rule will be made absolute, duty to be paid on the portions of the purchase price paid, the balance declared forfeited, with costs against the parties. With regard to Albrecht's estate, the same order will be made, and the sale will be declared cancelled, on condition that the transfer duty is paid on any portion of the purchase price which has been paid. From that amount, the sellers will be entitled to deduct their interest and costs, and the balance, if any, will be ordered to be paid over to the Master. In the Fernwood estate the rule will be made absolute, with costs; in Albrecht's case the rule will be made absolute on paying transfer duty on the amount of the purchase price paid, from the balance the sellers to deduct interest and costs, and the balance, if any, to be paid to the Master; and in Friedlander's case the sale is cancelled, on condition that the duty is paid on the amount of the purchase price paid, the balance to be forfeited, with judgment for costs against respondents.

THOMAS V. ROBERTSON. { 1907.  
June 13th.

Mining — Prospector's rights —  
Transfer of land subject to  
rights—Interdict.

*Respondent had agreed to sell certain prospecting rights over his farm with option of purchase for two years to applicant. It was admitted that this period was extended for at least six months. During the currency of this agreement respondent sold the farm to his brother.*

*Held, that respondent must be interdicted from passing transfer until the lapse of the agreement, unless the transferee should acknowledge applicant's rights.*

This was an application to make absolute a certain rule nisi restraining respondent from passing transfer of a certain farm, Zandkraal, in the district of George, unless there be therein a recognition of applicant's rights.

The affidavit of the petitioner (David P. Thomas) set forth that he claimed to have entered into an agreement with

respondent (Arthur Nightingale Robertson), on the 15th March, 1905, which gave him certain rights of prospecting for minerals for a period of two years or payment of £5 a year and an option of purchase at the end of that period. The rent was paid from time to time. On the 18th June, 1906, the agreement was extended for a further period of two years. Petitioner had expended a good deal of money on the property as a mineralised property. He had recently been informed that respondent had alienated the property to his brother, Frederick Augustus Robertson, but that transfer had not been passed. Applicant submitted that he was entitled to have his agreement attached to the transfer of the property, so as to protect his rights under the agreement.

Respondent, in answering affidavits, denied having entered into a renewal for two years, and said that his impression was that the contract had been extended for six months. As far as he knew, petitioner had not spent much money in prospecting, and had not done any work on the farm for a period of about ten months. Deponent had not attached much importance to the option, as applicant had gone to Europe, and had not been on the farm for some months, and when he agreed to sell to his brother, he was under the impression that the contract had only a few months to run. Respondent was in pecuniary difficulties, and the sale was entered into with his brother in order to help him out of his difficulties. It was not until after the sale had gone through, that respondent mentioned the option to his brother. It was further stated that had F. A. Robertson not come to the assistance of respondent the latter would have had to surrender his estate.

Applicant, in replying affidavits, said that he carried on operations on the farm for a period of sixteen months until he went to Europe. The work was stopped while he was away, owing to certain causes, and he was detained in Europe longer than he had anticipated.

Mr. Benjamin was for applicant; Mr. Upington was for respondent.

Mr. Upington submitted that the application was quite unprecedented. Applicant was attempting to obtain a declaration of rights under this agreement upon motion. It had never been laid down that these mining agreements were leases of land. No reason had been shown for restraining transfer in the present case. Counsel cited *Henderson and Another v. Hanecke* (20 S.C., 505), *Estate Thomas v. Carr and Another* (20 S.C., 354), *Johns v. Colonial Government* (15 S.C., 245), and *United Mines of Bultfontein v. De Beers Consolidated Mines* (17 S.C., 419). No right in the land itself was, he submitted, conveyed by the agreement with

applicant. He cited Voet 18, 1, 2. The application was to interfere with a *bona fide* purchaser for value without notice. It was not alleged that a fraudulent transaction had taken place between respondent and his brother. There was no reason whatever for making the rule nisi absolute.

Buchanan, J.: The respondent, A. N. Robertson, entered into an agreement with the applicant giving him the right to prospect on the respondent's farm and with option of purchase. This agreement was entered into on March 15, 1905, and was for a period of two years, ending on March 15, 1907. The consideration of agreement was £5 a year, which was paid. Afterwards the parties agreed to extend the agreement for an additional two years, ending on March 15, 1907. The respondent, A. N. Robertson, says in his affidavit that he was under the impression that the extension was to be for only six months, and not two years, but even that period has not yet been reached. Applicant left the country on business, and when he came back, he found that during his absence A. N. Robertson had sold the farm to his brother—the other respondent. Applicant, on hearing of the sale immediately took steps to interdict the transfer of the property from one Robertson to the other. A rule nisi was granted, and this rule is now before the Court for the purpose of being made absolute. It is contended that that agreement is not one which runs with the land, and that whether the property is transferred or not, it makes no difference to the remedy of the applicant, which is only a claim for damages. But if the transfer is allowed to pass free from the obligations under the agreement, the rights of the applicant will be entirely defeated. On the question of whether the transferee had notice of this agreement, I will not express an opinion. There are enough affidavits to show that he had. This matter will not now be decided, but if A. N. Robertson is allowed to dispose of himself of the land, he will not be able to carry out the agreement with Thomas, and as that agreement, according to the written contract, exists for two years, the interdict will have to last as long as the agreement lasts, but leave will be given to respondents to bring an action to set aside the interdict, such action to be brought within three months. It was alleged that the property was mortgaged at the time of the agreement. If so, the mortgage being prior to applicant's agreement, the agreement cannot affect the mortgage. That question is not before the Court at present. The order will be that Thomas will be entitled to have an order restricting respondents from transferring the property while the agreement lasts, unless the transferee acknowledges the applicant's rights.

### THIRD DIVISION.

## ILLIQUID ROLL.

**ANDREWS V. RAWBONE.**

## REVIEW.

**REX V. JACOBS.**

**Buchanan, J.:** This matter came before me as Judge of the week. The case had been remitted by the Attorney-General on a charge of forgery and uttering. The Magistrate (Resident Magistrate's Court, Beaufort West), had split it up into two separate charges, and imposed two different sentences. The second sentence will be quashed, otherwise the proceedings will be confirmed.

Mr. Buchanan argued that probably as soon as the petitioners got title to this road they might erect a wall or



take other steps to prevent this water from going over its present course.

[Buchanan, J.: What becomes of the water now?]

Mr. Buchanan: It runs on to this road.

[Buchanan, J.: Well, then, it will continue to run on there.]

Mr. Buchanan contended that once the road was vested in the petitioners, that they could take steps to interfere with the course of this water. It was not the duty of the Municipal Council to erect this arrangement for taking away the stormwater. The fact was that this property was either vested in Stewart's Estate, because the petitioners had not shown any cause for coming under the Derelict Lands Act or else under section 105 of Act 45 of 1882, was vested in the Municipality.

[Buchanan, J.: If it is vested in the Municipality, the transfer must be made from the Municipality.]

Mr. Buchanan submitted that if the transfer was to go through it should go through subject to the conditions imposed by the Council.

Mr. Benjamin said the petitioners should get transfer from Stewart's Estate.

[Buchanan, J.: But what claim have you against the estate?]

Mr. Benjamin: We claim that this road has been closed, and we are the adjacent owners.

[Buchanan, J.: But you have not held for 40 years.]

Mr. Benjamin argued that in view of the decision in the case of *Cape Breweries v. Whitehead* that they were entitled to claim. Under the Derelict Lands Act, they were entitled to claim by prescription or any other grounds.

[Buchanan, J.: You can't claim by prescription.]

Mr. Benjamin: Well, by grant. He submitted that the land was not vested in the Municipality, but in Stewart's estate.

[Buchanan, J.: Then what are the grounds for claiming against Stewart's estate?]

Mr. Benjamin replied that that road was there for the use of the adjoining owners, and Stewart's estate had no land there now.

[Buchanan, J.: Adjoining owners have no right to a road.]

Mr. Benjamin: They have, if they own all the adjoining lots. Every tittle of title had gone from Stewart, and this land was not vested in the Municipality, who only had a right of way. The Municipality claimed no right to the sub-soil. This road had been dedicated to the petitioners, and that was the title on which they came into court.

Buchanan, J., stated that as this case was ordered to stand over when the rule nisi was granted, to be heard before

two Judges, it would have to stand over for two Judges.

*Postea* (June 17).

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice BUCHANAN]

Mr. Buchanan argued that the Municipality claimed that some provision should be made for carrying away the stormwater from Stamford-road, which ran into the road which the applicants wished to close up. The applicants could not claim transfer of the road, because they did not allege title by prescription or contract as required by the Derelict Lands Act. The *dominium* in the road was vested either in the Municipality or in Stewart's estate.

[De Villiers, C.J.: I should like to hear Mr. Benjamin on that point. In whom is the *dominium* in the road vested?]

Mr. Benjamin: When the road was granted, it was vested in the Municipality. Subsequently, when it was closed up again, it reverted to Stewart's estate. The road was a reservation in favour of the proprietors of the adjacent lots of land. The *dominium* in the soil was granted to them. Counsel cited *Philips v. Porter* (1876 B., 192) and *Hofmeyr's Case* (1 S.C., 424). The Municipality no longer had any interest in the matter. The Colonial Secretary closed the road, and his decision, subject to the conditions he imposed by section 8 of Act 41 of 1899, was final.

Mr. Buchanan was heard in reply.

De Villiers, C.J., asked Mr. Benjamin if it would not be well for the petitioners to consent to the conditions made by the Wynberg Municipality.

Mr. Benjamin: The position we take up is that the Municipality has nothing to do with this matter.

[De Villiers, C.J.: Oh, yes; because it was on their appeal that the Colonial Secretary gave his decision.]

De Villiers, C.J.: When this application was first made, the Court was careful to provide that the notice of the application, with the rule, should be served on the executors or representatives of the late Mr. Stewart (17 C.T.R., 318). It is contended now that the *dominium* is vested in the Council, but even if the *dominium* had been at one time vested in the Council, the road has been closed by the proper authority, and the only persons who could claim the ownership are the representatives of the late Mr. Stewart. Well, now, notice has been given to them, and no objection has been raised, and I am quite prepared to treat this case as a case where the respondent is in default. It is unnecessary for the Court to decide whether this case comes under the principle laid down in the



case of *Philips v. Porter*, or the principles in the case of *Hofmeyr v. De Waal*, because it seems that no objection has been raised by the representatives of the estate concerned. It seems that there was no intention at the time of sale to retain the ownership of the land on which the road was marked out. Under those circumstances, I consider the rule ought to be made absolute. But the further question arises now, whether Wynberg Town Council had not so much interest in the matter as to appear before the Court for the purpose of pointing out what the rule nisi meant. It must be borne in mind that at the time the Colonial Secretary settled this point Stamford-road did not appear on the plans, and now, of course, some provision ought to be made for the stormwater. The Wynberg Municipal Council are quite right in seeing that some arrangement is made for carrying off the stormwater, but they are not right in saying that petitioners should do it. I think power should be given to the Municipality to carry off the stormwater which comes down the Stamford-road. Therefore the rule will be made absolute, with the condition that the Wynberg Municipality shall be entitled to use the road in question for the purpose of carrying off the stormwater. As to costs, Wynberg Municipal Council were quite right in raising the question, and therefore the costs of the Council will have to be paid by the petitioners.

Buchanan, J., concurred, and said the question of *dominium* still remained an open one.

[Before the Hon. Sir JOHN BUCHANAN.]

STARLING AND OTHERS V. { 1907.  
NANNUCCI LTD. { June 14th.

Limited Liability Company —  
Shares — Over issue — Can-  
cellation — Registration.

Three persons, N. B. and S., having three separate businesses, all engaged in the same trade, agreed to amalgamate their businesses and form a limited liability company. Each of these persons and also four others, among whom was one R., signed the Articles of Association, and one share was allotted to each. The capital of the Company was divided into 25,000 shares, and the whole of these were allotted to N., B. and S. The above seven shares were never regis-

tered, and the directors, on discovering this oversight, resolved to cancel these shares. At that time S. had ceased to be a director and had disposed of all his shares, save the share originally allotted to him. S. and R. now each applied for the registration of his original one share.

Held that, as S. had been a director of the Company and ought as such to have been aware of the over issue of shares he was not entitled to take advantage of his own negligence and obtain registration of his share.

Held further that as R. had agreed to the cancellation of the seven shares over issued, and had never before applied for the registration of his share or other shares which he had received gratuitously, his application must be refused.

One Newsome claimed the registration of 100 shares purchased from a former secretary of the Company. But as the secretary was alleged to have stolen the scrip from the offices of the Company :

Held, that Newsome could establish his rights only by action.

This was an application for an order directing that the share register of the respondent company be amended so as to show the number of shares held by each shareholder and for further relief.

The applicants' affidavit stated that the company was incorporated and registered in this colony on the 3rd August, 1899, with a capital of £25,000, for the purpose of acquiring and carrying on the business heretofore carried on by Oreste Z. Nannucci as steam-dye works and steam laundry, and certain other two businesses. Petitioners, who said they were shareholders of the company, alleged that in several respects the company had been mismanaged. They said that statutory meetings which ought to have been held at certain periods had not been held, that balance-sheets and statements of account had not been framed as required, and that Mr. Nannucci had utilised moneys of the company for purposes not connected with the business of the company. Peti-

tioners said that Mr. Nannucci had treated the business for some years past as if it had been his own, and they, as shareholders, had not been able to ascertain the true position of the company's affairs, and had been refused inspection of the books. Petitioners did not hold one-quarter of the shares in the company, and were consequently unable to avail themselves of the 116th and 120th sections of the Companies Act, 1892. Petitioners alleged that more shares had been issued than was authorised, viz., 25,007. They prayed for an order that the share register of Nannucci, Limited, be forthwith amended, so as to show the correct holdings of all shareholders, including the shares of petitioners, so that the total shares issued therein should not exceed the authorised capital of the company; that petitioners, or some person on their behalf, be given an inspection of the books; that the accounts of the company be properly made up; the books audited, and a balance-sheet prepared and submitted to the shareholders at a meeting to be held not later than a date to be fixed by the Court; that respondents be ordered to affix the common seal of the company to all share certificates held by the petitioners; and that respondents pay costs of the present application.

The answering affidavit of O. Z. Nannucci stated that it was the intention of the company to carry on the business as a co-operative concern. He entered into an explanation as to the issue of seven shares beyond the authorised capital, and said that this was done under a misapprehension, and that he had been quite ready to refund to the holders the amount they had paid. He said that meetings of shareholders had been called from time to time, but, owing to the absence of a quorum, meetings had had to be adjourned. He denied that he had ever used his position as managing director for his own private benefit, and said that the present trouble was due to one Wyndham Bishop having obtained shares evidently with the intention of inducing deponent to take over his shares at par. Deponent had been willing to discuss the affairs of the company with any person who was interested. He was quite prepared to submit the affairs of the company to the inspection of any reputable person at the expense of petitioners. He believed that the object of the petitioners was to find out trade secrets for the benefit of a competing firm or firms. An affidavit by Denis Edwards, one of the directors, was also read, in which he said that he had been well acquainted with the affairs of the company, and, as far as he was aware, no improper transaction had taken place between O. Z. Nannucci and the respondent company.

Certain replying affidavits were also read, in which Mr. Nannucci's statements were traversed.

Mr. Benjamin was for applicants; Mr. Close was for respondents.

Mr. Benjamin, in answer to the Court, said that three of the petitioners wished to have their shares registered, and all the petitioners claimed to have the common seal of the company affixed to their shares. Counsel said that the irregularities in connection with the company were sufficient to justify the petitioners in demanding an inspection, but, even apart from that, there was ample authority to entitle them to inspection. A company could not issue extra shares without the sanction of an extraordinary meeting of shareholders.

[Buchanan, J.: It was clearly an oversight. There apparently was no intention of increasing the capital.]

Counsel contended that Nannucci should forego the seven shares. With regard to the irregularity of the non-printing of the articles this was also only a detail, but under the Company Laws they were compelled to print them.

[Buchanan, J.: There is nothing in that. It was typewritten and accepted by the Registrar.]

Mr. Benjamin said that the sealing of the shares was necessary under the 82nd section of the Act. The 14th section provided for the common seal being provided. The holding of meetings was provided for under the 107th section of the Act. A very drastic penalty required that a meeting be held within six months, but in the present case over seven months had elapsed. The 108th section provided for a general meeting every year. With regard to the meetings to be held under the articles of association, these were dealt with in the 28th section of schedule "A." There was, in addition, a special provision in the articles for these meetings. Section 78 of the articles provided for the revision of accounts, and stipulated that seven days previous to the annual general meeting, a printed copy of the balance sheet was to be circulated amongst the members. With regard to the audit of the accounts, it was ordered that one auditor be appointed by the directors and the other by the shareholders.

[Buchanan, J.: How many shareholders are there now?]

Mr. Benjamin: I cannot say, my lord.

Mr. Close: Mr. Nannucci holds over 2,300 shares, and the other director holds 500.

Mr. Benjamin, continuing, said it appeared from the affidavits that no proper meetings had been held. The 97th section stipulated that auditors should have access to all the books of the company, and yet, Mr. Mouatt was unable to obtain access to them when he applied. There were further allegations

to the effect that disbursements were being made for Nannucci's private account and debited against the company in the books. With regard to those allegations they could not put anything beyond the bald statement until they had inspected the books. There had undoubtedly been irregularities. No meetings had been held except the one in 1900, when the law on the point was not complied with. The annual general meeting had not been held for all these years. They were told that one was held in December, but nothing was before them. Nannucci, in his affidavit, stated that meetings had been held, but the shareholders had not received notice of it. If Nannucci and a couple of others got together and said, "Now we are holding a meeting," that was not a meeting of the shareholders. It was impossible for the shareholders to know how matters stood when no meetings had been held. With reference to the position taken up by respondent with regard to these irregularities, counsel went on to point out that the allegation against the shares held by Newsome could not stand, seeing that they were properly endorsed and had been held throughout by Newsome since he bought them from Mrs. Harrison. The accounts had not been audited and submitted to the shareholders, as required and no attempt had been made to prove that they had. The reason put forward by Nannucci for not having this audit was absurd. He said he had had litigation but that turned out to be private, and then again he objected to an audit because of the peculiar nature of the business. That was absurd. With regard to the inspection of the books, it was urged that they were desirous of ascertaining trade secrets. That was foolish. What secrets could be learned from the accounts? The right to inspect the books was provided for under the 77th section of Schedule "A." He did not know that it was necessary to quote authority on that point, but there was authority.

[Buchanan, J.: I do not think that is disputed.]

The respondents did not decline an inspection, but they suggested that some independent accountant should make it at petitioners' expense, but Mr. Wyndham Bishop was an experienced accountant, and was also a shareholder. They applied for an inspection of the books on the 10th, and on the 14th they received a notice of the meeting to be held on the 21st to alter the articles of association. The way in which they were drafted was to allow the shareholder with the large number of shares to crush the small shareholders. It was intended under the new articles that no share should be transferred to anybody except a member without the sanction of the directors. Under the articles the majority of shareholders decided the value of the shares, and—

Mr. Buchanan: We have nothing to do with that under this application.

Mr. Benjamin said he only pointed that out, to enable the Court to see the *bona fides* of Mr. Bishop's application to inspect the books. Continuing, he read extracts from the proposed new articles of association, which he contended vested nearly all the powers in Mr. Nannucci, who was the holder of the majority of shares. He just mentioned that to show the necessity for the minority being protected, and quoted a decision on a similar point in Buckley, page 216. He submitted their only redress was to come before the Court.

Mr. Close said that if any person had a certificate which was not stamped he had a perfect right to go to the company, and have it stamped. The present application was unnecessary. The same held good with regard to registration (section 86 of the Companies' Act quoted). Counsel also cited the English case of *Trevor v. Whitworth* (12, A.C., 440). He submitted that applicants had not shown that they were aggrieved. The matter of the seven shares was purely trumpery in relation to the affairs of the company. As to the claim for an inspection of books and accounts, counsel submitted that the petitioners had not made out a case of refusal. On the claim for the accounts to be made up, and books audited, he said that more than two meetings had been held as alleged by petitioners, and balance-sheets had been framed. The petitioners had alleged irregularities which, where they were of importance, had been answered by Mr. Nannucci, or, if they were not answered, they were of a trivial character. He did not propose to touch upon the proposed new articles of association. That was a matter for the company, and if anybody thought he was aggrieved then he could oppose the confirmation. If there was anything that the Court thought required investigation, the respondents would not take the exception under section 116, and he was prepared to consent to an investigation by an independent person. The application was wholly unnecessary, and should be refused, with costs.

Mr. Benjamin, in reply, said that his learned friend now came into court prepared to recognise the seven shares. Hitherto recognition had been refused. Petitioners were entitled to an order that their rights, so far as the seven shares were concerned, should be recognised on the share register. As to the new articles, the new articles would have been passed at the meeting on the 21st May, had it not been for the proceedings that were taken, and the petitioners would then have been deprived of redress. Mr. Bishop had been put off time after time, and he was finally told to come back on the 21st, and he would then have found that the only course petitioners could take would

have been to move to have the articles upset. In consequence of the 116th section, the petitioners had been compelled to come to the Court for redress. The Governor would not have been able to appoint a commissioner, even if Nannucci did not object, because the section clearly said one-fourth of the shareholders. With regard to the balance-sheets, it was clear that balance-sheets in accordance with the Act had not been presented. The irregularities had been going on for eight years, and the unfortunate shareholders were entitled to come to the Court for relief.

Buchanan, J.: In 1899 three persons, Mr. Nannucci, Mr. Burge, and Mr. Starling, were carrying on business in the Peninsula. These three persons resolved to float their businesses into a limited liability company, and they arranged between themselves that all the shares in the company should be taken by themselves, and that there should be no shares allotted to the public. In other words, that the capital of the several businesses should be converted into scrip capital. For the purpose of meeting the requirements of the Company's Act, in the registration of the company, it was necessary that the articles of association should be signed by seven shareholders, and for this purpose seven persons signed the articles of association, and each of these seven took one share in the company. These shareholders were the three persons to whom the property belonged, and four other persons. After the formation of the company, the whole of the 25,000 shares, which were proposed to be the capital of the company, were issued to the persons to whom the businesses had belonged, overlooking the fact that seven shares had been issued for the purpose of floating the company. Of these seven shares the Court is now asked to order the registration of the one which was issued to Starling, and one which was issued to Ross. The over-issue, as it is called, of the shares by seven was discovered at the time, and it was resolved to cancel the seven shares originally issued. Nannucci distributed certain shares gratuitously amongst certain employees. He gave Ross 15 shares, and it is alleged on the affidavits afterwards that Ross, who was absent from the Colony at the time, when it was resolved to cancel the seven shares, acquiesced in the cancellation. That is not denied. Of the other three persons, who signed the trust deed, Michelsen, who had one share, had received a gratuitous distribution of 10 shares, and had subsequently surrendered his one share to Nannucci. Dennis Edwards, the sixth person who had signed the deed, had acquired certain other shares of the company, and has become a director of the company, and he takes no part to insist upon his share being registered. The seventh signatory, E.

Nannucci, was also one of those who received a gratuitous distribution of shares, and he, too, agreed to the cancellation, and does not wish to have his one share registered. As to the share of the petitioner Starling, which it is alleged has not been cancelled he was one of the original persons for whose benefit the company was floated, and he, as one of the floaters of the company, took his portion of the shares in the company, and said nothing about his additional share. Moreover, he was one of the directors, and I do not think he can now be heard to take advantage of his own oversight as a director and claim the registration of that share. He had originally a number of shares in the company, which he had disposed of, and he has now no interest in the company, and I do not think it is equitable to allow him to come in in respect of the one share agreed to be cancelled. Ross, it is alleged, agreed to the cancellation; he had received gratuitous shares, and though he now asks for it, I think it is unnecessary to make any order on the subject, because he never before made a request to be registered in respect of the one of these shares. The more important application is that of Harry Newsome to have 100 shares registered in his name. He had nothing to do with the original floating of the company, and he alleges that he bought these shares in 1903 from the then secretary of the company, Mr. Hilliar. He did nothing at the time to get these shares registered, but towards the end of 1905 he instructed his attorney to apply to the company to have the shares registered, and he received an answer that Hilliar, who had sold him these shares, had no right whatever to sell the shares. The shares were 100 of those originally distributed by Nannucci amongst the employees, and were given to Mrs. Harrison. Nannucci purchased them from Mrs. Harrison with the object of having them transferred to Hilliar, on his paying the price of same, but it is said that Hilliar never paid the price. It is alleged on affidavits that Hilliar improperly abstracted the scrip of these shares from the offices of the company, and that he embezzled certain moneys of the company, and then suddenly disappeared. Under these circumstances the Court cannot say at this stage that Newsome has established his right to have these shares registered in his name. It will be open to Mr. Newsome to bring an action to have his right to the shares declared, should he be so advised. So far as the first prayer of the petition, therefore, is concerned, no order can be made. In reference to the application of the common seal of the company to be affixed to certain shares, it appears from the articles of association that if the common seal is affixed 1s. per certificate is to be paid to the com-



pany. If that 1s. per certificate is tendered to the company, and the stamp is refused, then there may well be an application to the Court, but it does not appear that there has been any such tender, or any refusal in this case. The next thing asked for is that petitioners, or some one on their behalf, be given inspection of the books of account at such reasonable times as the Court may seem meet. Now, the only person who has made any application for an inspection of the books is the applicant Bishop, and it is not clear on the affidavits that there was any refusal to give him such inspection. An appointment was made for the purpose, and he went at a time when the respondent Nannucci was not there to keep the appointment, but an inspection was almost immediately after offered, and Bishop could have had inspection at any other time. If the company had refused to give him inspection he would certainly have been entitled to an order, because the company is bound to allow every shareholder an inspection at all reasonable times. The next prayer is that the accounts of the company be properly made up, and the books audited and a balance-sheet framed and submitted to a meeting of shareholders to be fixed by the Court. The books of the company for two years, 1903-5, were not audited, but the respondents say they are now being audited. The accounts for the past year are being audited, but no meeting has been held as yet in this year. Under the articles of association the company is bound to have two half-yearly meetings, one in February and the other in July, and the Act also requires that the accounts shall be brought up at such annual meetings to a date not more than three months previous to the date of such meeting. There has been no meeting this year. The directors are at fault here, and they should have taken more prompt action and should have had the accounts prepared and submitted to the shareholders. The applicants are shareholders, and they are entitled to have these meetings duly held, and they are entitled to come to the Court in the failure of the company to have these meetings. That is the only point on which the applicants have succeeded, and I think they are entitled to an order that a meeting of the company, which ought to have been held in February last, shall be held within a reasonable time, and I think that one month would be ample time to allow, because there will have to be a meeting in July. It is part of the duty of the directors to have the accounts printed and sent to the shareholders one week before the meeting takes place. The directors in this matter have certainly been at fault. It is alleged that there has been a good deal of laxity in the management of the company. Whether there has been

more than irregularity does not clearly appear, but the directors certainly have failed in regard to holding the meetings. As to costs, I think that as the applicants had some cause for coming to the Court, the company should pay the costs of the motion, except the costs of Starling and Newsome, which must be borne by themselves, as they have failed to establish their position. They are neither of them shareholders, and neither of them is entitled to any order. The order of the Court will be that a meeting of the company be called by the directors within one month from this date, and that the respondents submit at such meeting the company's accounts from January 1, 1901, to December 31, 1906, duly audited, the costs incurred by or against Starling and Newsome to be paid by them, the other costs of the application, that is, of the shareholders, to be paid by respondents.

[Applicants' Attorneys: Wahl, Fuller and De Klerk. Respondents' Attorney: G. Trollip.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

### GENERAL MOTIONS.

*Ex parte* TAYLOR. { 1907.  
June 17th.

Mr. Palmer moved for leave to petitioner to sue her husband, Barnet Taylor, for restitution of conjugal rights, failing which, a decree of divorce, with custody of the child and forfeiture of benefits of the marriage. The parties were married in community of property in Cape Town last year, and respondent, it was alleged, deserted applicant in February of this year, and was residing at Kimberley. He had failed to contribute to petitioner's support.

Petitioner appeared, and said that she was without means with which to bring an action.

Rule nisi granted, upon counsel's certificate of *probabilis causa* being filed with the Registrar, rule returnable on the 2nd July.

*Ex parte* BURGER.

Mr. Roux moved on the petition of the executors testamentary of estate Burger for an order authorising a mortgage of the minors' share of certain property at Eendekuil bequeathed by testator to his three sons. The petitioners asked leave to mortgage the minors'



share jointly and equally with the shares of the other legatees in the sum of £775.

Order granted in terms of Master's report, Petrus Olthoff authorised to pass the mortgage on behalf of the minor.

#### *Ex parte* ESTATE COWLING.

Mr. Douglas Buchanan moved on the petition of the executrix testamentary for leave to mortgage certain property in Cape Town for the sum of £275, in order to satisfy certain debts. Petitioner, it appeared, was the sole heiress under the will. She and her late husband were married in England.

[Maasdorp, J.: Why can't she administer her own property without coming to the Court.]

Mr. Buchanan: The Registrar refuses to allow the bond to go through.

Order granted as prayed.

#### AJAM V. TALEBODIEN AND OTHERS.

This was an application upon notice of motion to the respondents calling upon them to show cause why an order should not be granted in the following terms: (1) Setting aside the proceedings which took place in the Bethel Hall on the 3rd April, 1907; (2) restraining you from holding yourselves out to the public as persons in authority and having power to control and administer the affairs of the Moslem Cemetery Board, and preventing you from in any way dealing with the cemetery affairs; (3) compelling Imaun Talebodiën and Abdol Cader to deliver up all books relating to the Moslem Cemetery now in their possession; (4) interdicting the Standard Bank from parting with the funds to the credit of the Moslem Cemetery Board Fund account.

When the application originally came before the Court, the Chief Justice, by consent, appointed Advocate W. Porter Buchanan as commissioner to examine the credentials of all who claimed a right to vote, to receive nominations, and to accept votes for the election of a new Board, and reserved the question of costs (17 C.T.R., 370). Mr. Buchanan had sat and received nominations and votes, and, as a result, had declared applicant and his supporters elected, the respondent and his party having retired from the field after nominations had been handed in.

Dr. Greer was for applicant; Mr. McGregor (with him Mr. P. S. T. Jones) was for respondents.

Dr. Greer said he took it that the respondents now appeared on the question of costs.

Mr. McGregor said their contention was that the applicants had taken the wrong remedy, and that they should be ordered to pay costs.

Dr. Greer briefly traced the course of events which led up to the application. On May 18, 1896, he said, the Moslem community in Cape Town purchased a burial ground, and £1,000 was raised by subscription for the purchase of the ground. There was a deed of transfer, together with certain conditions attached, and those conditions governed the election of the Board by whom the ground was to be administered, and provided that persons who subscribed to the fund of £1,000 should be electors of the Board. As a matter of fact, a Board was elected originally, and after that nothing seemed to have been done. The old Board went on from time to time, apparently filling up vacancies as they arose up to the beginning of this year, when the existing Board, as then constituted, elected as secretary one Abdol Cader. It was alleged that the secretary could only be elected by the members of the Board. As a matter of fact, Abdol Cader was not a member of the Board. Then the present applicant and his supporters said that as the then existing Board had contravened the conditions a new election must be held. An election was held. After further disputes, an action was brought in the Magistrate's Court by Ajam and his party to prevent Talebodiën and his supporters from continuing in office. The Magistrate said that as there was some doubt about the legality of the election of the Ajam Board, they should give notice of the election, and elect a fresh Board. That course was adopted, and a meeting was held on the 9th March. At that meeting, which, the affidavits said, was attended by 700 people, Ajam and his Board were elected. Notice was given in the "Cape Times" of this election. On the 3rd April a meeting was held by the respondent and his party, and applicants alleged that they were prevented from attending that meeting, that there were 73 people at the meeting, and that more than 100 people were refused admittance. At that meeting Talebodiën and some of his followers were elected as the Board.

Mr. McGregor (interposing) said that respondents contended that the second election of applicant and his party was informal, and that fourteen days' notice should have been given under rule 6, instead of seven merely.

Dr. Greer (proceeding) said that the Court appointed Mr. W. Porter Buchanan as commissioner, and he had held meetings of subscribers for the purpose of receiving nominations and votes. Both parties put in nominations at the first meeting, but before the meeting was held at which votes were received by the commissioner, Talebodiën and his supporters intimated that they retired from the contest, and at the meeting Ajam and his party were declared

elected. Counsel argued that the respondents should pay costs of the proceedings. Applicants said that they were a properly constituted Board, and that respondents by their opposition had caused needless expense. The Board elected before the commissioner was appointed was precisely the same as that which had now been elected, with one exception only, out of a total of eleven members. Counsel cited *Du Toit v. Domingo* (14 S.C., 127) and *Berhardien v. Intillah* (6 C.T.R., 41).

Mr. McGregor submitted that applicant should pay costs of the proceedings. Domingo's case could be clearly distinguished from the present case. The form of the application was wrong. Neither party apparently persisted in saying that his Board was the right one, and a new Board had to be constituted. Furthermore, the course of events showed that applicants were not the proper parties to get what they asked for in the notice of motion.

Maasdorp, J.: It appears that in this case the old Cemetery Board that managed the cemetery for the Moslem community was, in course of time, by certain irregular proceedings, rendered illegal in its constitution. It seems that all parties were satisfied that the Board could continue no longer. Thereupon the applicant and his party took it upon themselves to undertake a new election, and when the members of that alleged new Board had been elected, they proceeded against the members of the old Board in respect of certain funds. The question came before the Magistrate, and the Magistrate seems to have had some difficulty in deciding who exactly were the legal representatives of the Moslem community in respect of their interests in this cemetery, and he advised the parties to have a new election and to settle their disputes in that way. Thereupon the applicant seems to have taken it upon himself to give notice for a new election, which took place. What exactly were the powers and the rights of the applicant in taking those duties upon himself does not appear. However, his authority was not questioned so much as the nature of the proceedings. The respondent and his party contended that there had been certain irregularities in the election, and they, on their part, set about having a new Board elected. The result was that two antagonistic Cemetery Boards came into existence, and the question was raised by them before this Court as to which was the legally-constituted body entitled to represent the Moslem community. It was found necessary because of the difficulties which had been created to direct that a new election should take place, and to secure regularity and order in that election a commissioner was appointed by the Court to see that everything took place in due form. That

election has taken place, and the body elected must be regarded as the legal representatives of the community, although even now the respondent and his party do not seem satisfied with the results. The only question which this Court has now to decide is as to the payment of the costs incurred in the different proceedings. When the applicant set about making arrangements for the election of the new Board, he said not to have given sufficient notice, and that was the irregularity upon which the respondent contended that the election had been illegal. Now, it does seem to me that the respondent had some ground of complaint, but then his proper course would have been not to set about having another party election of his own, but to have had the previous election set aside on the ground of irregularity. Instead of that he sets about what seems to me to be also quite irregular and illegal, having a Board elected which, instead of representing the community, seems to me to have represented merely a fraction of the people interested. It is quite clear that there were irregularities on both sides, and that the parties could not have settled this matter without coming to court, and having the aid of the Court and the directions of the Court to clear up their difficulties. Under the circumstances it seems to me that each party should pay his own costs and half the costs of the commission.

Dr. Greer: Will your lordship declare the new Board elected? The attorneys on both sides agree that a fee of 25 guineas would be a fair fee for the commissioner, who had very hard and arduous work to do.

Maasdorp, J., said the persons mentioned in list B of the declaration would be declared duly elected as members of the Cemetery Board. The commissioner's fee would be fixed at 25 guineas.

Mr. McGregor: I take it half the costs of the commission does not mean that my learned friend's clients can take half the money standing to the credit of the Board to pay their costs.

Maasdorp, J.: They are fighting out their private quarrels, and they cannot use the money of the Board.

#### *Ex parte* ESTATE BADENHORST.

Mr. Toms moved, on behalf of the petitioners, the executors testamentary on the estate of Margaretha Elizabeth Badenhorst, of Colesberg, for an extension of six months in order to file the liquidation and distribution account, the costs of the application to be borne by the estate.

Order granted as prayed.

#### BRAUDE V. BRAUDE.

Mr. M. Bisset was for the applicant, and Mr. Benjamin was for respondent,

This was an application to have a rule nisi restraining the husband of the petitioner from interfering with the child of the marriage pending the result of an action for judicial separation, made absolute. The applicant, Mischa Braude, of Matjes River, Oudtshoorn, obtained in 1899 a decree of judicial separation. Thereafter she lived apart from her husband for about two years. In 1901 she was induced to return to him, and she lived with her husband until last September. Shortly after she rejoined the respondent he ill-treated her, and consequently she had to leave him. He carried a revolver, and petitioner was afraid he would injure herself and the child. On one occasion he shut the child in a sugar bin for half an hour.

Mr. Benjamin, having read affidavits, said the position he took up was that the application was quite unnecessary.

Maasdorp, J., said the rule would be made absolute, costs to be costs in the cause.

#### AUERBACH V. SCHWERS.

This was an application to make absolute a rule nisi restraining the respondent from dealing with certain goods pending the result of an action to be instituted by applicants for delivery of the goods and damages, and also restraining the respondent from holding himself out as the representative of the petitioners. It was suggested that Mr. E. C. Fitzpatrick should take charge of the books pending the receipt of a power of attorney. The respondent, in an answering affidavit, stated that there was an agreement between the applicants and himself, whereby it was stipulated that all disputes should be settled in the Hamburg Law Courts. Provision was made for a division of the profits. There was a deed of partnership between the parties, and he had control of the goods in South Africa. He had given in terms of the agreement six months' notice to terminate it, and he suggested the appointment of Mr. J. M. P. Muirhead, and that the business should go on.

Dr. Greer for applicant; Mr. Benjamin for respondent.

Mr. Justice Maasdorp: Will Mr. Schwere undertake to act under the directions of Mr. Muirhead?

Mr. Buchanan: Yes, my lord.

Maasdorp, J.: Many points are raised which the Court cannot decide upon these affidavits. The application is mainly brought on the ground that the parties living in Europe are jeopardised through the conduct of Mr. Schwere. I am not satisfied on the affidavits that it has been made out so far that Mr. Schwere's conduct has been of such a nature that his immediate removal is necessary in order to secure these interests. On the other hand, Mr.

Schwere says that it would be better the business between them should be terminated, and he himself has given six months' notice of the termination of the relationship of the parties. The only question the Court has to decide is, there being this dispute, what would be the best way of securing the interest of all the parties? Mr. Schwere was appointed to carry on the business here, and if he carries on the business under the supervision of Mr. Muirhead, as he consents to do, I think Mr. Muirhead will see that no loss was suffered by Auerbach. Under the circumstances, the Court will appoint Mr. Muirhead as receiver, pending an action, Mr. Muirhead to have control of the business, and Mr. Schwere to act in the management of the business, under the direction of Mr. Muirhead, the question of costs to stand over.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

LENSING V. POLEY. { 1907.  
June 18th

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### HOLLIDAY V. ROODE.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,400, with interest from the 2nd February, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and rents attached.

Order granted

#### WOLFE AND ARDERNE V. STAACK.

Mr. Swift moved for provisional sentence on a promissory note for £52 18s. 6d., with interest from the 27th December, 1905.

Defendant admitted the liability, but said that he could not pay the claim;

The matter arose out of a property transaction.

Order granted.

**BENJAMIN V. BARKMAN.**

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**PETERSEN V. WEBBER.**

Mr. Close was for plaintiff; Mr. W. Porter Buchanan was for defendant.

This was an application for the final adjudication of the defendant's estate as insolvent.

Mr. Buchanan applied for a postponement until Tuesday next, to enable defendant to file replying affidavits.

Mr. Close said that he could not consent to a postponement.

Ordered to stand over until later in the day.

Mr. Buchanan, at a later stage, produced an affidavit in support of the application for a postponement for 10 days, so that an accountant could go into defendant's affairs.

Mr. Close said that he would consent, provided defendant were put to terms.

Ordered to stand over till Friday week, copy of defendant's affidavit to be served on plaintiff on or before the 26th inst.

**KEMP V. STEPHAN.**

Mr. Gutsche was for plaintiff; Dr. Greer was for defendant.

Mr. Gutsche applied for a postponement to enable plaintiff to file answering affidavits.

Dr. Greer said that plaintiff asked for a postponement for two months, and defendant naturally objected to the matter being hung up for such a long period.

Mr. Gutsche said that plaintiff was in England, and defendant had made serious allegations against him, alleging that the promissory note sued upon was a swindle.

Ordered to stand over until the 24th August.

**ILLIQUID ROLL.**

**COLONIAL GOVERNMENT V. GRAAFF (AS LIQUIDATOR, SOUTH AFRICAN SUPPLY AND COLD STORAGE CO., LIMITED.)**

Domicile of Company—Jurisdiction—Exception—Liquidator—Service of process.

*The S.A.S. company recently carried on business in this*

*Colony, its head office was however in England. Thereafter the Colonial department of the business was closed and the company went into liquidation. G., the liquidator, carried on the business of liquidating in Cape Town and certain legal process relating to claims against the company was served upon G's clerk at his office. G. appeared to have certain assets of the company in his hands. He now objected to the service and excepted to the jurisdiction of the Court.*

*Held, that as the company was being liquidated in this Colony the Court had jurisdiction and that the service of process was good.*

Mr. Howel Jones moved for judgment under Rule 319 against defendant in his capacity as liquidator of the South African Supply and Cold Storage Co., Limited, for £3,774 10s. 4d., being transfer dues upon the sale made to the company from one Combrinck in regard to certain property in Cape Town.

Mr. Benjamin (for defendant) raised a question as to whether there had been service upon Mr. Graaff, and whether the Court had jurisdiction in the matter.

Mr. Benjamin submitted, on the affidavits, it would appear clearly that the defendant company, on the authorities, is not, and was not, domiciled within this jurisdiction. If the plaintiffs had any ground of action, they ought to proceed by way of edictal citation. Counsel thought he could show if they had proceeded *ad fundandam jurisdictionem*, the Court would not have granted an order. He submitted that the domicile was in London, and he referred the Court to the case of *Wallace v. Gordon Diamond Mining Company* (6 H.C.R., 43), Dicey in his *Conflict of Laws* (pp. 154-156), *Einwald v. German West Africa Company* (5 S.C.R., 86), *McLeod v. Benjamin* (9 S.C.R., 183). He submitted that the domicile of the defendant company was in London. All it had to do with the Cape Colony was that it formerly had an office here. All the assets had been sent out of the jurisdiction. Before jurisdiction could be assumed there must be attachment *ad fundandam jurisdictionem*.

Mr. Jones said when application was made for judgment the defendant came forward and filed a long affidavit, the purport of which was not quite clear, and then he raised the argument as to



the jurisdiction of the Court. It was not clear, on the affidavit, that he was objecting to the jurisdiction of the Court. The defendant did not now say he wished to plead.

Maasdorp, J.: It appears that the defendant is sued by the Government in his capacity as the South African liquidator of the South African Supply and Cold Storage Company, Limited. The first objection taken to these proceedings now is that service was not duly effected of this summons upon the defendant. It appears that as liquidator he carried on the business of the liquidation in a certain office in Cape Town and at that time one Van der Horst was his clerk in the matter of the liquidation. It is admitted that the defendant is still the liquidator, and that the place at which the service was effected is a place where he carries on some business, and it is described by the Sheriff as the defendant's office. If that be the defendant's office where he carries on business, and he carried on the business of liquidation, it was the proper place where service should be effected on him in his official capacity as liquidator. The service was effected on Mr. Van der Horst, who, in some capacity, has acted for the defendant, but it does not matter what is exactly his capacity. He is engaged in the office as a clerk, or in some other capacity, and as clerk he receives the service in the liquidator's office, and that is wholly sufficient service on the liquidator himself. The liquidator having been duly served, it became incumbent upon him to put in an appearance. No appearance was put in on his behalf, and the plaintiff proceeded to issue a declaration against him, giving him notice that unless he pleaded within a certain time he would be barred. And now, under one of the Rules of Court, as the plaintiff did not appear, but being in default of appearance and default of plea, the judgment is prayed for. The defendant now comes forward to raise objections to the jurisdiction of this Court. Now, he is described in the summons as the liquidator of the company, which had lately carried on business in South Africa. As such liquidator he is said to have in his possession certain assets belonging to the company, and in the ordinary course an order was obtained for the attachment of such assets. The objection is raised that the Court has no jurisdiction in this matter, but clearly the Court would have jurisdiction against the liquidator of a company that is being wound up if he has the full power as liquidator of a company carrying on the business of this company. That is all that is now alleged in this declaration: That lately there was a company carrying on business in this country. He is liquidator, and he has assets in his possession, and the company itself is

bound in respect of certain business carried on in this country. Now, it seems to me that all the ingredients that establishes jurisdiction are alleged in the declaration. Upon the defendant's plea he may dispute the allegations contained in the declaration, but I think he has taken the wrong course in coming before the Court to raise the question of jurisdiction in this form. It is stated he is only one of several liquidators, and it is contended that the plaintiff should have brought all the liquidators into court, but the allegation in the summons is that he is the liquidator. There is no reference in the summons to other liquidators. The ordinary procedure, if other defendants should come before the Court, is to take objection to the declaration by a plea of abatement. Then it is contended that even upon the face of the declaration itself there is nothing to show that the defendant has the power to represent the company in such form as to accept service of definite action for them in this colony. That may be so, but if a declaration is defective in that shape, then exception may be taken to it. The only question now to decide is whether the objection is raised in the present matter in the proper form, and I think the defendant has mistaken his procedure. Having been made a defendant by proper service, and there being allegations in the declaration which, if true, brings him within the jurisdiction of the Court, he can only take exceptions to the manner in which he has been brought into court upon the pleas or exception which he may hereafter plead to the declaration. None of the questions as to the jurisdiction are consequently now decided, and from what has appeared it is quite possible that the plaintiff may find himself in this difficulty: that whatever procedure he may take against the present defendant, it may be found that the present defendant does not represent the company in such a form that he can take anything by any judgment hereafter given against this defendant. That is a matter which will have to be decided when further proceedings are taken. Leave will be granted to the defendant to purge his default and plead within eight days; the question of costs will stand over, as it may turn out that the Government was absolutely wrong in taking proceedings in this form.

#### MALAN V. FURTER.

Mr. M. Bisset moved for leave to sign judgment against respondent (Furter) for not proceeding with his action within the time stipulated by Rules of Court.

Order granted,



**BOXALL V. DRAKENSTEIN MANGANESE MINING AND DEVELOPING SYNDICATE, LTD.**

Mr. M. Bisset moved for judgment under Rule 329d for (1) £24 13s. 11d., balance of a sum of £38 8s., due by the defendant syndicate to plaintiff; (2) costs from the 17th May, 1907; (3) interest on the sum of £38 a tempore morae, and (4) an order directing defendant syndicate to forthwith indemnify plaintiff in terms of special agreement in respect of certain lease rents already accrued and amounting to £22 6s. 11d., and any lease rents which may become due on or before the 18th July, 1907, plaintiff tendering delivery of the lease.

Judgment granted in terms of prayers (1), (2), and (3).

Mr. Justice Maasdorp: I am prepared to give judgment for the moneys that are due, but nothing more. Plaintiff must go on with his declaration if he wants anything more.

**CELLIERS AND OTHERS V. CELLIERS.**

Mr. Douglas Buchanan, for the plaintiff, moved for an order on the *curator ad litem* to show cause why the defendant should not be judged incapable of managing his affairs, and why a curator should not be appointed to his property.

Dr. Thomas Henry Osler stated that the defendant was mentally incapable. On one occasion, after a conversation on various topics, the defendant, who knew witness very well, asked him who he was. The defendant, in witness's opinion, was incapable of managing his affairs. The defendant abused Mr. Nel, and did not know who he was speaking to.

The *curator ad litem* did not oppose the application, as he was of opinion the defendant had no memory.

Mr. Buchanan suggested the appointment of the defendant's son Jacob Petrus Celliers, who is an attorney of Somerset West, and that he should be relieved of giving security as all the heirs consented.

The defendant was declared incapable of managing his own affairs. Jacob Petrus Celliers appointed curator to his property, costs to come out of the estate, the curator of the property to be relieved of giving security, with full powers to administer the estate.

**GENERAL MOTIONS.**

**BATE V. BRITISH STEAM LAUNDRY, LTD.**

Mr. Wallach moved to make absolute a certain rule nisi authorising the voluntary liquidation of the respondent company, setting aside the appointment of

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one Hobday as voluntary liquidator, placing the company under a winding-up order, and appointing J. M. P. Muirhead as official liquidator.

Order granted for the official winding-up of the company, and Mr. Muirhead appointed official liquidator, with powers under the 149th section of the Act.

*Ex parte* EDWARDS.

Mr. Lewis moved to make absolute a certain rule nisi authorising petitioner to sue her husband *in forma pauperis* for divorce.

Rule absolute, Mr. J. E. P. de Villiers to be counsel and Mr. Stent to be attorney to the petitioner.

*Ex parte* ADAMS.

Mr. Lewis moved to make absolute a certain rule nisi authorising petitioner to sue his wife *in forma pauperis* for divorce.

Rule absolute, Mr. Lewis to be counsel and Mr. Frank to be attorney to the petitioner.

*Ex parte* PEARSON.

Mr. Rowson moved for leave to petitioner to sue Stewart and Lloyd, Ltd., *in forma pauperis* for damages for alleged breach of contract. Petitioner said that he had received injuries whilst driving certain horses in the suburbs, and that respondents had undertaken to provide him with work, but had discharged him.

The petition was referred to counsel for report.

Maasdorp, J.: This matter requires to be very carefully looked into.

*Ex parte* KELLY.

Mr. P. S. T. Jones (with him Mr. Watermeyer) moved for leave to petitioner to sue R. P. Houston, *in forma pauperis*, for £500 damages for injuries received at Angra Pequena, and £15 wages.

The matter was referred to counsel for report.

**LAWLOR V. LAWLOR AND ANOTHER.**

This was an application brought by Henry George Lawlor for a commission to issue to take the evidence of one of his witnesses at Cofimvaba, Tembuland.

It appeared that applicant, Henry George Lawlor, was plaintiff in an action in which he claimed as against the first respondent (his wife) a decree of divorce, on the ground of her alleged adultery with one John Archibald G.

Hearns (the second respondent), against whom damages in the sum of £5,000 were claimed. The case had been set down for hearing on the 28th inst. Applicant now asked for a commission to issue to take the evidence of his brother, John Edward Lawlor, at Cofimvaba, on account of the great difficulty of his coming to the Court in Cape Town. Respondents opposed the application, and urged that the evidence of the witness was so important that it should be given under the eyes of the Judge.

Mr. Close was for applicant; Mr. Burton was for the first respondent, and Mr. Sutton was for the second respondent.

Counsel were heard on the facts.

Maasdorp, J.: Plaintiff in the case has brought his suit in the Supreme Court, and it now appears that the witnesses live at very great distances from the Supreme Court, both parties and witnesses being resident in Tembuland. It is found that it would be a very great inconvenience for one particular witness to come that long distance. The case has been set down for the 28th June, and it would be very difficult, it seems to me, that a commission should be returned before the 28th. The case has been set down by the plaintiff for trial; he has, therefore, himself put another difficulty in the way of this commission effecting the purpose of having the evidence heard by the 28th. This witness is undoubtedly, from what plaintiff has said, a witness of great importance in the case, having to give evidence on the main issue between the parties with reference to the adultery, and the Court is therefore reluctant to allow, as a rule, when the case largely depends upon the evidence of certain witnesses, the evidence of those witnesses to be taken on commission. It has been said that certain subpoenas have already been issued, and that it would be, I take it, impossible to countermand them. Here again upon the action taken by plaintiff in setting down the case the other parties have prepared for the trial, and their evidence will be heard on the appointed day. Taking it altogether, I think the Court cannot now grant this commission. The plaintiff must do his best to secure the attendance of his witness on the day of trial. If, however, owing to insurmountable difficulties, the witness, without any default on his part for which he can be called to task by the Court, does not appear, then the plaintiff may make what application he thinks fit. The case must now proceed for trial upon the day for which it was fixed. The application will be refused, with costs.

## SUPREME COURT

### FIRST DIVISION

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

SMYTH V. FURTER.

{ 1907.  
June 19th.

Purchase and Sale - Movable and immovable property - Fixtures - Brandy kettle and appurtenances.

*The plaintiff having sold and transferred a farm to the defendant under a written contract which did not mention a certain distilling kettle masoned in and affixed to the soil, afterwards claimed delivery of the kettle and its appurtenances, including the helm and coil.*

*Held, that the kettle was included in the sale and that the helm and coil although temporarily dismantled, were also so included as being essential appurtenances for the proper use of the kettle.*

This was an appeal from a decision of the A.R.M., of Wellington. The plaintiff sold to the defendant a certain farm, and he agreed to let the defendant have the use of a certain brandy kettle and its appurtenances, which were on the farm, and which were to be returned to the plaintiff when demanded. The defendant had the use of the kettle and other articles for some time, and refused to return them, and plaintiff claimed their return or £12 10s., the value thereof. Judgment was for the plaintiff for the return of the still, or its value, with costs.

The Magistrate, in his reasons, held that the defendant's plea was insufficient, that he should have pleaded specially that the still belonged to him when he bought the farm. In that case the defendant would have had to prove his case first, and the plaintiff would then have been in a position to call rebutting evidence.

Mr. Benjamin was for the appellant, and Mr. Watermeyer was for the respondent.

Counsel submitted that the Magistrate was wrong in this case. Clearly the kettle itself went with the farm, and the helm itself was handed over.

Mr. Watermeyer said it was entirely a question of fact. In this case there was a distinct dispute, and the plaintiff said he did not sell the kettle with the farm. It was entirely a question of fact which the Court could not decide without further evidence. The kettle and still were often used for other purposes on these farms. The maxim "*Quod solo radicatur solo cedit*" merely applied to immovables, which were fixed to the soil at the time, and did not apply to the accessories of these immovables, especially in a case like this. When the farm was sold the helm and the coil were not fixed on the kettle.

Mr. Benjamin, in reply, pointed out that the property was sold in 1905, and the action was not instituted until two years afterwards. He submitted that the kettle passed with the farm, and the helm passed as an accessory, and in addition to that the appurtenances passed under an expressed agreement.

De Villiers, C.J.: The plaintiff, in the summons, alleges that on the 3rd May, 1905, he sold a certain farm, his property, to the defendant as agreed. He says he let the defendant have the use of his still and its appurtenances, which articles were to be returned to the plaintiff. What was proved was that the farm itself was sold, and that nothing was said about the kettle and the appurtenances. That is to say, in the written contract which is put in there is nothing said about the kettle and the appurtenances. The conclusion, therefore, would be that whatever was fixed into the soil, was built into the soil at the time of the purchase, was intended to be sold and delivered to the purchaser, and the only question which the Magistrate had to decide was whether the plaintiff had proved his statement that there was a special arrangement that the kettle and the appurtenances were not to be delivered to the purchaser. In my opinion, the written contract put in settles the whole point in regard, at all events, to the kettle, because as the kettle was not mentioned, and it is admitted that the kettle was built into the soil by masonry, that kettle at all events passed to the purchaser. Now, it is said, on behalf of the plaintiff, that at all events the helm and the coil should be held still to belong to the plaintiff. It is admitted that these are appurtenances to the still, and I am satisfied that if they are appurtenances they should also pass if the kettle passes. Everybody knows what a still is like — the ordinary farmer's still. The helm is essential to the use of the still. It is of no use whatever without the still, and as to the coil. I do not see what possible use could be made of it except in connection with the still. The coil is firmly fixed to the down pipe of the helm, and the spirit being condensed by

the cool water outside the still issues below as brandy. Although the helm and the coil were on the farm the plaintiff claimed to be the owner, on the ground, *inter alia*, that they are not actually affixed to the kettle. But, in the ordinary course, they would be so affixed while distilling is going on, and as they are admitted in the summons to be appurtenances of the kettle, they should be regarded as part of the property sold. The mere fact that they are not actually affixed does not necessarily entitle the seller to claim their return to him. According to the Digest (19.1.17), and Voet (19.1.5), the keys of a dwelling house and moveable bars for fastening doors, although removable, are included in the sale of the house, as being part of the appurtenances thereof; and according to another passage in the digest (19.1.17, section 8), even the cover of a well, although not affixed to the soil, passes with the sale of the property. The helm is the cover of the kettle, and serves to prevent the escape of the fumes of the distilled spirit, and to concentrate them into the coil. The coil, which passes through cold water, serves to condense the fumes into the form of brandy. They are both essential appurtenances of the still; and if the kettle, which is admittedly affixed to the soil, passes, they should also be held to pass.

For these reasons I am of opinion that the Magistrate erred in his judgment, and that the appeal should be allowed with costs, and judgment entered for the defendant, with costs in the Court below.

Buchanan, J., concurred.

[Appellant's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: Le Roux and Wege.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1907.  
June 19th.

Mr. Burton moved for the admission of Wilhelm Joachim van Zyl as an advocate.

Application granted, and oath administered.

Mr. Pohl moved for the admission of Andries Christoffel de Villiers as an attorney and notary.

Application granted and oaths administered.

### BENNING V. CAPE TOWN TOWN COUNCIL.

This was an application upon notice to the Town Council of Cape Town

calling upon them to show cause why they should not be ordered to desist from continuing with the construction of a certain mole at the foot of Adderley-street, at the expense of certain funds amounting to £30,000, which funds were specifically voted for a promenade pier and bathing places.

Applicant's affidavit stated that as a ratepayer in Cape Town he strongly objected to the Town Council proceeding with the construction of a mole estimated to cost £5,400, being conducted at the expense of certain funds, amounting to £20,000 and £10,000, which were specifically voted for a promenade pier and bathing places by special meetings of ratepayers held on the 9th November, 1891, and the 20th July, 1897. Thousands of pounds had already been spent on the said mole. The declared object of the work was to afford protection by way of breakwater to the fishermen at Rogge Bay from rough seas, and the mole could not in any sense be found necessary for the ultimate erection of a promenade pier and bathing places. As a Town Councillor, he had endeavoured to procure the cessation of the said works; but without avail. Applicant attached to his affidavit a copy of the draft Bill proposed to be submitted to the ensuing session of Parliament by the Council.

The answering affidavit of the Town Clerk, J. R. Finch, quoted from the Mayor's Minutes of 1891 and 1892 and the resolutions adopted at the ratepayers' meetings. Mr. Finch also quoted a report from the Markets Committee, who had recommended that the work should be carried out, inasmuch as the committee and Council were of opinion the formation of the mole would be the first step towards securing the means of access to any promenade pier which might hereafter be constructed at the foot of Adderley-street. This report was adopted at a meeting of the Council held on the 28th September, 1905. Deponent went on to say that the work was essential to the formation and beginning of what was required in the event of a pier being completed for the purpose of a promenade and sea baths. The work which had been carried out was a solid construction forming a mole, sea wall, or promenade, and was now used by numbers of the citizens of Cape Town for such purpose, although unfinished. Applicant had not exhausted the rights and remedies open to him as a member of the Council to procure the cessation of the works in question, and he was not entitled to come to the Court unless and until he had brought up the alleged irregularity before the Council for consideration. The action of the Council was absolutely legal, and the money in question was being expended in direct furtherance of the objects for which it was intended.

Applicant's replying affidavit denied that the work which was being carried

on was essential to the beginning of the works which had been sanctioned by the ratepayers when they granted the loan. He was under a misapprehension in stating that the amounts voted were £20,000 and £10,000, and he should have said £20,000 and £25,000. Applicant said that when he raised the question at a recent meeting of the Council he was ruled out of order. He claimed that he was within his rights as a ratepayer in bringing the present application.

Mr. Burton for applicant; Mr. McGregor for respondent.

Mr. Burton contended that no such thing as a mole or a sea wall had been sanctioned. What the ratepayers authorised at the meetings in 1891 and 1897 was the construction, from the foot of Adderley-street by way of extension from the old central wharf or jetty, of a pier or promenade. The draft Bill which had been prepared on behalf of the Council for submission to the ensuing session of Parliament contemplated an entirely different state of affairs from that which was authorised in 1891 and 1897. In that Bill the Council asked for powers for what they were already busy doing. They were proposing to construct harbour works for the better protection of the fishing industry, and for affording better protection for pleasure yachts. The works which were going on were part of a reclamation scheme, and by-and-bye all the land would be reclaimed beside the filling in, and there would be no promenade pier at all, thus defeating the object of the ratepayers in sanctioning these loans.

[Maasdorp, J.: I hope they will go beyond the Rogge Bay fishery, because that is not a very healthy place.]

Mr. Burton: Quite so; I have no doubt that was intended by the people who authorised the expenditure of the money originally.

Mr. McGregor said that where a body was engaged in administrative duties the Court only on very good ground shown, fraud or *ultra vires*, interfered. Where there were administrative acts of an elective public body, the Court did not readily interfere so as to make itself a kind of supervisor. The ratepayers in 1897 voted funds for a promenade pier, "with the necessary approaches thereto." Respondent said that the work was essential as a beginning or foundation for a promenade pier. Applicant denied this. Counsel cited *Short v. Cape Town Council* (15 S.C., 119), and submitted that the matter was not one in which the Court could adjudicate by way of motion. The question of fact was too important to be decided on motion for a permanent interdict. Applicant should bring an action. It was rather late in the day for applicant to come to the Court, seeing that so much of the work had been done, and that it was already being partially used by the ratepayers. In matters of internal management which



were within the province of the Council, one could not come to the Court and ask it to interfere.

Mr. Burton, in reply, submitted that applicant, first as a Councillor and afterwards as a ratepayer, had acted timeously throughout. *Prima facie*, it did not appear that this mole was part of the promenade pier. Respondent said that it was part of the promenade pier. This applicant denied. At all events, as matters stood now, he contended that temporary relief could be granted until the question could be decided by action.

Maasdorp, J.: The applicant in this case moves for an order interdicting the respondents from continuing the construction of a certain mole at the foot of Adderley-street, Cape Town, at the expense of certain funds, amounting to £30,000, which funds were specifically voted for a promenade pier and bathing places. It appears that in the past certain meetings of ratepayers were held at which the Council was authorised to expend certain moneys for the construction of a promenade pier and bathing places, and the applicant has stated that, in so far as the objects there authorised are concerned, he raises no objection to the Council performing the necessary work. But he sets forth his objection in the following form: "My main objection is that the said works, the estimated cost whereof is £5,400, are being conducted at the expense of certain funds amounting to £20,000 and £10,000, which funds were specifically voted for a promenade pier and bathing places by special meetings of the ratepayers of the said City." The applicant contends that the respondents are now undertaking certain works, and are illegally expending upon those works the moneys which were voted by the citizens for another purpose. Now, it is quite clear that if it is conclusively proved that the Council is doing an illegal act or threatening to do an illegal act, the Court will interfere to prevent it, and the question the Court will have to decide is whether it has been satisfactorily proved that such illegal act is being done in order to justify the Court in using its powers by means of an interdict. This is certainly a very large question raised by the parties both as to the question of fact and as to matters of law. Now, as a rule, the Court will not grant upon motion a perpetual interdict. In the ordinary course, it would have to form the subject of an action, but there are cases in which it has been made to appear to the Court that no additional facts could be placed before the Court by resorting to a trial, and that the matters which appear to the Court clear upon the affidavits are such that the Court can dispose of the matter upon motion. But that is not the case here; there is a conflict of evidence upon the affidavits as to matters of fact, which

the Court cannot now dispose of. The question arises whether the work which is being done at present by the Council forms part of the works which were authorised by the ratepayers, and if that is so the applicant raises no objection to their being continued. But he, on his part, states that the work that is being done is of a different description altogether; instead of its amounting to the building of a sea promenade or pier, it is really the filling in of a place it is really the filling in of a place called Rogge Bay, and constructing a mole for the purpose of protecting the fishery there. Now, it does appear that a sea-wall is being constructed of a certain description, and that a mole is being made, and it is stated that that sea wall will ultimately be a portion of the sea promenade, and it is also stated that this mole will ultimately be a necessary work for the erection of a pier. The Court cannot now decide that the works which are being carried on are not portion of the work contemplated by the ratepayers, and that they will not ultimately be constructions going towards the completion of the sea promenade, and of the pier. I find myself unable to decide whether a pier may or may not be constructed upon the mole, and I am unable to decide whether the material that is being thrown into a portion of Rogge Bay is not of such a character that it will necessarily form part of a future sea wall. It is contended that it clearly appears that this mole when built would protect the fisheries. Undoubtedly it may assist that purpose and at the same time be a necessary part of the pier. Under these circumstances, there is a serious dispute as to the nature of the works that are being carried on, and, as I have already said, the Court cannot decide that they will not form very useful parts of the works that were contemplated by the ratepayers. The Bill has been referred to for the purpose of showing that the Council had in contemplation very large works. That may be so, and it may be that they are contemplating what Parliament will sanction, but it is said that they are really doing the work, that they are at present executing in anticipation of the work which is to be sanctioned by Parliament. That is also denied. It is said whatever work may be sanctioned by Parliament hereafter, this will, nevertheless, be a portion of the sea wall and of the pier. Besides the disputed facts, I think there are very large questions of law which may be raised in this case as to the authority of the Council. The Court will, therefore, not now grant a perpetual interdict. Then, it is suggested that, if the applicant is not entitled to that, a temporary interdict should be granted, pending some further steps that he may take in the future. Now, for the purpose of a tem-



porary interdict, which only serves for a limited period, it is necessary for the applicant to show that he has made out a clear right which has been infringed by the respondent, and not only that, but he must show that the wrong which has been done is of an irremediable character, which cannot be rectified hereafter by action. Now, I think, for the purposes of a temporary interdict, he has failed to establish those points. The right to interfere with the action of the Council, in doing the works which they are actually doing now, is not clearly established, and I do not think that any particular ratepayer will suffer an irremediable injury from the works which, I have no doubt, will, whatever their object may be in future, serve some useful purpose. I only mention that now as showing that there is no irremediable wrong being done to the applicant. Consequently, the Court will not grant a temporary interdict either. It is quite possible that the applicant will persist in an action in the future. I don't suggest that he would have very strong grounds to support his action. That is a matter for him to consider. Anyhow, if he does so, then I think the present proceedings can stand as a summons in those proceedings. The Court will, therefore, make no order in this case, and make no order as to the present payment of costs, but will give the applicant an opportunity, until the end of this term, to proceed with his action, and if he then fails to do so, then he should pay costs of this application. It does not necessarily mean that he must proceed to trial this term. He must file declaration before the end of this term, or pay costs of this application.

[Applicant's Attorneys: Centlivres and De Villiers. Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

#### GENERAL MOTIONS.

*Ex parte* ATTENBOROUGH. { 1907.  
{ June 19th.

Mr. Gutsche moved for leave to petitioner to sue her husband, Louis Henry Attenborough, by edictal citation for restitution of conjugal rights, failing which a decree of divorce, on the ground of malicious desertion. The matter had previously been before the Court, and had been standing over for further evidence as to the alleged malicious desertion. Counsel now read a further affidavit by petitioner. Respondent was believed to be in Australia, his last letter being dated from Sydney.

Leave to sue by edict granted, citation returnable on the 13th September, personal service to be effected, failing which one publication in the "Government Gazette" and in the "Sydney Morning Herald" and the "Times of

New Zealand," or other newspapers circulating in Sydney, N.S.W., and Wellington, N.Z.

#### *Ex parte* ALANE.

Mr. Gutsche moved for an order authorising the sale to petitioner of certain land in an estate of which he is executor. The heirs all consented to the proposed sale.

Order granted as prayed.

#### *Ex parte* SAAYMAN

Mr. Louwrens moved, on the petition of Mrs. Saayman, as mother of the children of her marriage with her late husband, Cornelis Kleynhans, to sell the minors' shares in a certain farm by public auction, and to invest the money in another farm, and to pay the balance, if any, after the necessary expenses have been paid, to the Master of the Supreme Court for account of the minors.

Leave granted to sell the property for a sum of not less than £150, unless the Master approves, and to pass the necessary transfer, and to purchase the land mentioned in the petition at not more than 27s. 6d. a morgen, unless the Master approves, and to take transfer and pay the balance of the proceeds to the Master.

#### TUENBULL V. GILLITT.

Dr. Greer moved for an order upon respondent to forthwith hand over to one V. W. Russell, applicant's duly authorised agent, certain articles of furniture and a piano, referred to in a hire purchase agreement.

Respondent appeared in person, and said that he claimed to have a landlord's lien over the property. He also raised a question as to whether the applicant was solvent.

The matter was ordered to stand over till Friday next to enable respondent to file affidavits.

#### IMPERIAL COLD STORAGE AND SUPPLY CO., LTD., V. DISTRIBUTING SYNDICATE FOR COLD STORAGE

This matter came on for argument upon a reference from the referee appointed in the action brought by the plaintiffs to recover certain moneys from the defendants for goods supplied under a certain agreement.

It appeared that in the course of the proceedings before the referee appointed by the Court (Mr. A. T. Hennessy) certain questions had been raised as to the construction of the sixth clause of the agreement (annexure M), which is as follows: "The said syndicate shall be bound and obliged to purchase and ob-

tain all their supplies of frozen or chilled meat or articles of chilled or frozen food from the company's cold storage works and from no other person or company, and shall pay therefor such sum as the said supplies shall cost laid down in the company's stores at Cape Town or Woodstock, plus one-eighth of a penny per lb. and 10 per cent., and the said syndicate shall be credited with any trade discounts on cost price and freight, in respect of all goods purchased by the said company and supplied to the said syndicate."

The referee, in his statement of the case, said (2) that the plaintiffs contended that, in reference to paragraph 6 of annexure M, the 10 per cent. therein referred to must be calculated on the one-eighth of a penny per lb. as well as on the cost laid down in the company's stores at Cape Town or Woodstock.

Defendants contended that 10 per cent. must be calculated on the latter amount only. (3) Plaintiffs contended that they were entitled to lead evidence to show that by the custom of trade the expression, "cost laid down," included the items referred to in schedule B. Defendants denied such contention. (4) Plaintiffs contended that they were entitled to lead evidence to show the significance attached to the expression, "cost laid down," by the course of dealing between the parties prior and subsequent to the date of the said annexure M. Defendants disputed such contention. (5) Plaintiffs contended that, irrespective of the evidence referred to in paragraphs 3 and 4, the referee must take into account in determining the cost laid down in the company's stores at Cape Town or Woodstock, as referred to in paragraph 6, the items included in schedule A, part 1, and a reasonable proportion of the charges referred to in part 2 thereof, and a reasonable proportion of the charges referred to in schedule "b." Defendants contended that only the charges referred to in schedule A must be taken into account. The defendants' representative had set out their contentions in the following terms: "Defendants object to general management charges and salaries of managers and clerks, etc., who are not employed in actually laying down supplies in the cool chambers. They object to expenses of working the company being charged to cost laid down. They maintain the one-eighth of a penny and the 10 per cent. in clause 6 of agreement cover all expenses after the supplies have been laid down. They maintain that the general staff exists for the numerous purposes of such a company, and that the agreement does not contemplate the allocation of either the salaries of any particular officials or a proportion of all salaries to the cost laid down. Such cost was to be ascertained from the particulars in Schedule "A."

The referee reported that he ruled that the intention of the agreement was that the 10 per cent. should be calculated on the "cost laid down," plus one-eighth of a penny per lb. As to the question of what was the cost laid down, the syndicate objected to any part of the London office or Cape Town administrative expenses being calculated in the "cost laid down." He considered that it was impossible to draw a line in the manner in which defendants proposed. The whole machinery in existence to handle these supplies, whether indoor or outdoor, must be included. Whether the whole of the men's time so employed was spent on the supplies coming under the contract or only a portion of it was purely a question of the proportion of their wages or salaries to be charged to the "cost laid down."

The defendants were dissatisfied with these rulings.

Mr. Burton appeared for the Imperial Co.; Mr. McGregor appeared for the Distributing Syndicate.

Mr. McGregor submitted that 10 per cent. mentioned in the agreement was 10 per cent. of the cost laid down. Counsel went on to discuss the question of what constituted "cost laid down."

[Maasdorp, J.: Was not that decided in the case of *the Bulawayo Electric Light Company*?]

Mr. McGregor: The point of cost was raised, but the matter is not disposed of by that case, because that was not a matter of commerce, but of manufacture. In this case we are dealing, not with a firm of manufacturers, but a big firm of importers. Counsel proceeded to contend that the defendants should not in the calculation as to "cost laid down" be debited with a proportion of the establishment charges. The clause went on to say that a trade discount should be allowed to the syndicate. That was important as showing that what was meant was the cost price, not the sum of the amounts necessary to bring the goods to the market. The referee had evidently overlooked the provision as to trade discount, and that was the flaw in his finding. Counsel quoted the *Encyclopædia of Accounting*, Vol. 2, pp. 252-267, and submitted that, this being a non-manufacturing concern, the establishment charges did not come in.

[Maasdorp, J.: Was not the question of London office expenses in relation to cost raised in a railway case?]

Mr. McGregor said that *Hills v. Colonial Government* (20 S.C., 107, and 21 S.C., 59) was a special case, and stood on a different footing from the present matter.

Mr. Burton contended that it was clearly intended by the agreement that the 10 per cent. was to be charged on the cost, and the eighth of a penny per lb. As to what constituted the cost laid

down, he submitted that the expenses of the London office must be taken into account. The carcasses had to be bought, and if the company did not do their own buying they would have to employ a broker. All the plaintiffs wanted was to take a reasonable proportion of the various expenses against the "cost laid down." The existence of the London office was a direct connection for the supply of this meat to the company. The London office was kept for the purpose of arranging freights, and, if it did not exist, then the defendants would not get the benefit of the trade discounts, rebates, etc. As to the Cape Town office expenses, the line drawn by the defendants between the expenses they admitted and the expenses they repudiated was incomprehensible.

Mr. McGregor, having been heard in reply,

Maasdorp, J.: The question at issue between the parties arises upon the construction of the sixth paragraph of their agreement, which is to the following effect: "The said syndicate shall be bound and obliged to purchase and obtain all their supplies of frozen or chilled meat or articles of chilled or frozen food from the company's cold storage works and from no other person or company, and shall pay therefor such sum as the said supplies shall cost laid down in the company's stores at Cape Town or Woodstock, plus one-eighth of a penny per lb. and 10 per cent., and the said syndicate shall be credited with any trade discounts on cost price and freight, in respect of all goods purchased by the said company and supplied to the said syndicate." This matter having been referred to the referee in order to ascertain how much the syndicate is indebted to the company, the referee has laid down certain principles upon which he intends to ascertain what the cost of the meat supplied to the syndicate by the company would be as laid down in the company's stores in Cape Town. For that purpose the referee says he intends to include what it costs the company to keep their office in London, and the cost of the officers whom they have in London. He also intends to include the cost of the employment of officers for the purpose of carrying on this work in Cape Town and the offices in which they carry on their work. The object of the company is to buy goods in foreign ports and import these goods into the Colony. For that purpose, it is quite clear that they would require officers somewhere out of the Colony, and if they have officers to carry on certain work, it may not be impossible, from the ordinary business point of view, to have men doing work without contemplating at the same time that they would require to do their work in certain buildings. The referee intends

to consider what it costs the company in the employment of these officers and in the use of such premises in London, and, in his opinion, that should be included in the cost which is to be taken into account of the meat when laid down in the stores in Cape Town. He has given his reasons for the position he takes up in the matter, and I do not think that it is necessary for me to add much to what he has said. Generally, I think I may say he acts upon a correct principle. In order to ascertain what the meat costs the company as laid down in their stores here, it is necessary to take into consideration the expenditure they have in the employment of officers at the place where the meat is bought. It appears that in this case it is considered that London is the most convenient place for carrying out the business of the company, and there they employ those who purchase the meat, and who despatch the meat, and who enter into the necessary contracts for the purpose of placing the meat at the disposal of the syndicate here. It appears that those who are there employed are in a position, in their contracts with those from whom they purchase, to arrange for discounts, and that they are in a position to make arrangements for rebate to the trade, and obtain both freight and meat at the cheapest possible rate, and it is provided here that when their officers in their work manage to get these advantages, the benefit of those advantages should be allowed to the syndicate. It is contemplated that these very officers, in their employment in London, do something actually for the benefit of the syndicate themselves. They work in reduction of the prices which the syndicate will have to pay. I come to the conclusion, therefore, that the principle laid down by the referee is correct—that the expenses of the London offices and offices should be allowed and the expenses of the Cape Town officers and offices should be allowed, and in the manner in which he has to allow these expenses, of course, he will use his discretion. He ascertains what they are, and then only a fair proportion is to be allocated so far as the syndicate is concerned. If, in carrying out his principle in practice, he should allow what the syndicate considers ought not to be allowed even under his own principle, then that question can be raised afterwards. The only person who can deal with the general matter and ascertain the cost, and use his reason as to the proper proportion is the referee. Then, there is a further question raised upon the following phrase: "The said syndicate . . . shall pay (for the meat) such sum as it shall cost laid down in the company's stores at Cape Town or Woodstock, plus one-eighth of a penny per lb., and 10 per cent." Now, there

is a difference between the parties as to what the 10 per cent. is to be calculated upon, and, as has been rightly said, it is not a matter which allows any wide scope of argument, or for comparison of phrases and words which might throw light upon the matter. The whole question is confined in a very small compass. The words are that the cost is to be paid, plus one-eighth of a penny per lb., and then after that it is said that there is to be an additional 10 per cent. I use the word "additional," and it may mean, it conveys this meaning, that after it was arranged that the cost and one-eighth of a penny per lb. should be paid, it was then considered that you have a sum now to deal with, that is, the cost plus one-eighth of a penny, and dealing with the cost, plus one-eighth of a penny, the parties agreed that something more should be paid, that is 10 per cent. on that sum.

On the sum which had been calculated, a further 10 per cent. was to be paid, and what was calculated up to that point was the cost laid down in the company's stores, plus one-eighth of a penny. Here, again, I think the referee was correct in the conclusion he arrived at—that the 10 per cent. must be reckoned upon the cost, together with one-eighth of a penny per lb. The direction of the Court, as required by the referee, is, therefore, in accordance with the view he has already taken in the matter. Costs of this application will be costs in the cause.

[Plaintiff's Attorneys: Van Zyl and Busissinné. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

*Ex parte* BISHOP AND OTHERS. ( 1907.  
June 20th.

Mr. Benjamin moved, as a matter of urgency, on the petition of Wyndham Bishop and others, for an order in reference to the affairs of Nannucci, Limited. Counsel said that when the matter was last before the Court, Mr. Justice Buchanan said that there could be no objection to Mr. Bishop or other representative of the shareholders mak-

ing an inspection of the company's book of accounts. It appeared, however, that a meeting of the shareholders had been held, at which it had been resolved that certain new articles of association should be adopted. This resolution was to be submitted for confirmation at a further meeting of the company this (Thursday) afternoon. Mr. Bishop had applied for leave to inspect the books, and had been to the company's office at Woodstock for that purpose, but had been unable to complete his investigations owing to having been molested by the managing director, Mr. Oreste Z. Nannucci. If the proposed new articles of association were passed and confirmed, then the petitioner and other shareholders would be deprived of the right of inspection of the books. One of the proposed regulations read: "No member shall have the right to inspect any account, or book or document of the company, except as conferred by statute or authorised by the Board or by a resolution of the company in general meeting." Counsel added that he understood that the shareholder who went to inspect the books was actually assaulted, and was refused permission to inspect the books.

Maasdorp, J., asked what the petitioners' prayers were.

Mr. Benjamin said that the prayers were for a rule calling upon the respondent to show cause why certain provisions of the new articles should not be declared *ultra vires*, and why the company should not be interdicted from confirming the special resolution passed on the 5th June, 1907.

[Maasdorp, J.: If they are *ultra vires* or illegal, you can move at any time.]

Mr. Benjamin said that petitioners also prayed that they, or someone on their behalf, should forthwith be given an inspection of the books.

[Maasdorp, J.: That can be done after notice.]

Mr. Benjamin: It will be too late after the resolutions have been confirmed.

Maasdorp, J.: The Court cannot prevent this company from amending their articles of association as long as they do it in a regular and lawful manner, and there is nothing now put before the Court to show that they intend to have recourse to any unlawful action. If the articles be found to be of such a description as to characterise them as *ultra vires* or illegal, then at any time redress can be obtained by the parties who are injured by the new articles of association. If the applicant wishes to have an inspection of the books, he must give the ordinary notice calling upon respondents to show cause why such inspection should not be granted. It is said that if the resolution is passed it will be out of the power of the Court to amend



such an order. I think that would be rather an extraordinary position to take up, if it is contended that the Court under circumstances where a shareholder proves that he is likely to be injured, could not grant redress, and that he can never obtain inspection of the books, should he be refused simply because the company is making a rule that no such inspection should be granted. I express no opinion upon that: I merely say it would be an extraordinary position if it were so. Applicant should give notice if he wishes to have inspection of the books, and then the question can be considered whether the resolution which may be passed to-day will debar the Court from granting redress. No order will be made.

### PROVISIONAL ROLL.

#### ORLANDINI V. KLUGMAN.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £900, with interest from the 1st July, 1905, less £15 paid on account, and for premiums of insurance, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated, and the rents accruing to be declared executable.

Order granted.

### ILLIQUID ROLL.

#### CLAREMONT MUNICIPALITY V. HUDSON.

Mr. M. Bisset moved for judgment, under Rule 329d, for £53 17s. 11d., with interest, and £53 12s. 11d., with interest, being Municipal rates overdue and unpaid, with costs.

Order granted.

#### CLAREMONT MUNICIPALITY V. HUDSON.

Mr. M. Bisset moved for judgment, under Rule 329d, for £128 6s. 3d., less £60 paid on account, with interest, and for £120 6s. 3d., with interest and costs, for Municipal rates.

Order granted.

### GENERAL MOTIONS.

*Ex parte* ESTATE TEBB. } 1907.  
{ June 20th.

Mr. Upington moved for an order authorising the release of Messrs. Van Zyl and Buissinne from office as executors, administrators, and guardians of the minors, if any, of the testator. It

appeared that the estate was being administered by the Colonial Orphan Chamber, and the petitioners thought it was desirable in all the circumstances to leave the matter entirely in the hands of the Orphan Chamber. The testator's widow was dead, and there was no issue of the marriage, but it appeared that a considerable time would elapse before the estate was finally distributed, i.e., after the death of the usufructuary.

Order granted as prayed.

#### *Ex parte* ESTATE CONRADIE.

Mr. De Waal moved on behalf of petitioner, as tutor of certain minors, for confirmation of a certain partition, and leave to raise a loan on mortgage of the property. The Master reported favourably.

Order granted in terms of Master's report.

#### *Ex parte* SOUTH AFRICAN NEWSPAPER CO., LTD.

Mr. Burton moved, on the petition of the chairman of the South African Newspaper Co., Ltd., for an order authorising the reduction of the company's capital. Petitioner stated that the company was formed with a capital of £30,000, which was subsequently increased to £60,000, of which 54,000 shares had been issued and fully paid up. Subsequently the directors were authorised to dispose of a reserve of 15,000 preference shares. Of these, 14,000 were issued. On the 20th May, 1907, the following resolution was passed at an extraordinary meeting of shareholders, and duly confirmed at a subsequent meeting held on the 6th June, 1907: "That the directors of the company be authorised to cancel the preference on the 1,000 unissued £1 preferred shares still held by the company; that they be authorised to cancel the preference on the 14,000 preferred £1 shares already issued, upon obtaining consent thereto from the present holders; that the capital of the company be reduced from £60,000 to £30,000 £1 ordinary deferred shares, whereof 13,500 shall be distributed, in the proportion of one for every four shares of the 54,000 shares at present issued, between the shareholders as registered on the day of confirmation hereof by shareholders, in lieu of and in full satisfaction of their then holding in the capital stock of this company; that all fractions of shares accruing out of the distribution of the 13,500 shares to existing shareholders shall be pooled, and vested in the directors of the company, for them to sell and dispose of as they shall deem best, and the proceeds thereof shall be paid out proportionately to the persons to whom such fractions belonged; that 6,500 shares be held in



reserve, not to be issued unless directors be specially authorised thereto at a duly-convened meeting of shareholders of the company; and that the directors be empowered to offer for subscription at par and to allot the remaining 10,000 shares, at such time or times, in such number or numbers, on such conditions or terms, and to such person or persons as they, the said directors, may deem fit." The consent of the holders of 13,997 of the 14,000 preferred shares of £1 each to the cancellation of such preference had been obtained by the company. The holders of the remaining three shares resided in Greytown, Natal (two shares), and in Matatiele, Griqualand (one share). The above shareholders had been written to asking their consent to the cancellation of the preference on their shares, but no reply had been received. Ample provision would, however, be made for securing their rights should they eventually refuse to waive their preference. Petitioners prayed for an order confirming the reduction of the capital of the company, as set forth, and dispensing altogether with the necessity of adding the words "and reduced" as the last words of the company's name, and provided for in section 32 of the Companies' Act, 1892.

Maasdorp, J., asked what would be the precise effect of the resolution adopted by the company?

Mr. Burton said that originally there were 60,000 shares, of which 54,000 were subscribed, so that the shareholders in bulk held 54 sixtieths in the were content, instead of holding 54 sixtieths, to hold 13½ out of 30. In that way they released 10,000 of the 30,000 shares for the purpose of getting further capital. The matter was one in which the creditors of the company would not be in any way affected.

Maasdorp, J., granted a rule nisi, returnable on the 12th August, calling upon the two shareholders in question to show cause, if any, why the prayer of the petition should not be granted, and also authorised the omission of the words "and reduced" from the company's title.

*In re* EAST LONDON DAILY NEWS PRINTING AND PUBLISHING COMPANY, LTD.

Dr. Greer presented the third report of the liquidators, and applied for the usual order as to lying for inspection and as to publication.

Usual order granted, one publication in the "Cape Times," S.A. News," and "East London Dispatch."

*Ex parte* KORTJASS.

Mr. P. S. T. Jones moved, on behalf of petitioner, as guardian of her minor

children, for leave to mortgage certain farms in the estate of her late husband. Petitioner desired to retain two of the farms, and proposed to mortgage the properties in the sum of £800. The other farm had been sold, and the proceeds applied to the payment of debts, the mortgage being required to pay the balance of the debts. The executor dative in the estate did not object to the application. The Master, however, was of opinion that it would be better to sell two of the farms and pay the debts, and retain one farm free from debt.

Maasdorp, J.: The matter had better stand over, so that further inquiries may be made as to whether there is any reason why the two farms cannot be treated separately, and why, if one only is kept, it might not be for the benefit of the family.

BOYES V. BOYES.

Mr. Do Waal moved for an extension of time of the return day to sue by edictal citation for restitution of conjugal rights, failing which, a decree of divorce. The defendant had moved from one town in India to another, and the papers had not yet been returned. Counsel asked for an extension until July 12, 1907.

It was ordered that the trial day be postponed until July 12.

*Ex parte* PROVIDENT LAND TRUST.

Mr. Benjamin moved for an order confirming a special resolution of the directors of the company to extend its objects in the memorandum of association. It was resolved *inter alia* to take over the assets and liabilities of any building societies and any going concern, to carry on the business of a building society in any place in South Africa, to constitute a fund by means of periodical instalments, to acquire interest in any land, and to undertake the building for people acquiring land. The proposed extension was to enable the company to carry on its business more efficiently. All the shareholders had had notice setting forth the special resolution, and they had accepted the notice.

Order granted as prayed.

*Ex parte* ESTATE MULLER.

Mr. Gutscho moved for the removal of the executor testamentary, on account of his lunacy, and for the appointment of an executor dative in the estate of the late Daniel Muller.

Order granted, the Master to take the necessary steps for the appointment of another executor, costs to come out of the estate.

## PIENAAH AND CO., LTD., V. ROSE.

Mr. De Waal moved for an order extending the return day of the citation until Tuesday, August 6, and for substituted service.

Order granted, substituted service to be effected as allowed by the previous order.

*Ex parte* BRANDON.

Mr. Wallach moved for leave to the petitioner to sue her husband, Charles Edward Brandon, by edictal citation, for the restitution of conjugal rights, failing which a decree of divorce, and custody of the child of the marriage. The marriage took place on the 16th October, 1905, in St. George's Cathedral, Cape Town, and there was one child of the marriage. Three days after the marriage the defendant deserted the petitioner, and stated that he was leaving Cape Town to escape arrest on a warrant. Three months afterwards he was arrested and brought to Cape Town, and sentenced to seven months' imprisonment. Upon his release he called on the petitioner and endeavoured to obtain money from her and her mother, which was refused. He then said he would have nothing to do with her, and departed. She had received information that he had been resident in Durban, Natal. He had recently completed a sentence of three months' imprisonment for store breaking in that town. Since the marriage she had received nothing towards her maintenance. Counsel moved for leave to be granted for substituted service.

Leave granted to sue by edictal citation, return day 5th August, personal service if possible, failing which one publication in the "Gazette" and one in the "Natal Mercury," interdict and notice of trial to be served at the same time.

*Ex parte* HYDE.

Mr. J. E. R. de Villiers moved for an order authorising the petitioner to pass transfer of certain property by virtue of a certain power of attorney passed by the mortgagors to the petitioner.

Order granted.

*Ex parte* ESTATE DE VILLIERS.

Mr. Louwrens moved for an order confirming, on behalf of certain minors, an agreement entered into between the executors in the estate. The major heirs had consented. The Master's report was favourable.

Order granted as prayed.

## O'CONNOR V. STANBURY.

This was an application for an order calling on the respondent to hand over certain furniture, the property of the applicant, Mrs. Mary O'Connor, of Commercial-street, Cape Town, which petitioner was desirous of removing from the Gloucester Arms Hotel, of which the respondent was the licensee, but the respondent refused to release the furniture, stating that the furniture belonged to the deceased son of the petitioner.

The answering affidavit of the respondent set out that the articles claimed were not in his possession. The furniture was claimed by Elizabeth Mary O'Connor, daughter of the respondent, and executrix in the estate of her late husband, Michael James O'Connor, son of the applicant.

Mr. Howes was for the applicant, and Mr. P. S. T. Jones was for the respondent.

Maasdorp, J.: I do not think the Court can dispose of this matter upon the application in this form. The ownership of the property in dispute will have to be decided by action. From the affidavits put in it appears that both the parties, the applicant on the one side, and the daughter-in-law on the other, claim the property, and although it happens to be on the premises of the respondent, it is the applicant's daughter-in-law that lays claim to the property for herself. That dispute will have to be settled before the Court can give any order in the matter. It seems to me—it is a question upon which I cannot speak with certainty—if she brings an action for this property, that her costs may exceed the value of the property, and if the costs exceed the value of the property and she succeeds in recovering the costs from her daughter-in-law, then there is something gained by her. If she ascertains she will get nothing from her daughter-in-law, she will spend more in the suit, and get nothing. I merely point out this circumstance for her to consider whether there should not be some effort now to settle this matter. It does appear that the daughter-in-law had the handling of this property, had kept it in repair from time to time, and that she has exercised some rights of ownership. It may be that she was only the possessor while her mother-in-law remained the owner. I think that the parties should consider the position, and those who advise them, otherwise everything may be swallowed up in costs. Perhaps the offer made by the claimant is a reasonable one, that she will pay what has been spent in repairs, and take the property if it belongs to her. The Court will make no order on this property. It does appear that as far as the matter of costs is concerned, the respondent must be treated as in the

place of his daughter. It is quite clear that he took active proceedings in preventing the goods being taken by the present claimant, and it is now said that he represented to her that he himself would raise no difficulties to the property being taken. I am quite sure if that had been represented in a definite form, so that the Court should accept it as a renunciation of any claim he might previously have made, the proceedings would not have gone on further against him. The Court will refuse this order, and will make no order as to costs. The applicant was herself wrong in pressing these proceedings, when she had ascertained that the claim was made by her daughter-in-law; but, on the other hand, the respondent was wrong in aiding his daughter to resist the claim.

JOSEPH AND CO., AND OTHERS V.  
FOURIE.

Mr. M. Bisset, for the plaintiff, moved for the removal of case to the Circuit Court at Oudtshoorn, for the benefit of all parties concerned.  
Order granted.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

SUTHERLAND V. ROBERTS. ( 1907.  
( June 21st.

Mr. Douglas Buchanan moved for provisional sentence on a Magistrate's Court judgment for £22 2s. 1d., being £20 for work and labour done, and £2 2s. 1d. costs. Counsel said that a writ had been issued, and a return of *nulla bona* had been made, and the defendant had left the jurisdiction of the Magistrate's Court.

[Maasdorp, J.: You want to follow up the defendant for purposes of civil imprisonment?]

Mr. Buchanan said that that was so. Maasdorp, J., said his attention had been called to the fact that there was a question as to whether the Sheriff had effected service of the writ

in a proper manner. It did not appear from the Sheriff's return that a copy of the judgment of the R.M.'s Court had been served with the writ.

The matter was ordered to stand over pending a fuller return by the Sheriff.

### ILLIQUID ROLL.

#### CAVANAGH V. NISBET AND ROWE ROWE

Mr. Struben moved for judgment, under Rule 329d, for £74, amount of account for rent due and money paid, with interest *a tempore morae* and costs.

Order granted.

#### HARRIS V. GAUL.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £52 9s. 2d., for work and labour performed, with interest *a tempore morae* and costs.

Order granted.

#### CAPE TIMES LTD., V. CRANE.

Mr. M. Bisset moved for judgment, under Rule 329d, for £451 5s. 6d., printing work done, etc., with interest *a tempore morae*, and costs.

Order granted.

#### OLIVER V. OLIVER.

This was an action brought by Martha Oliver, of Observatory-road, against John Anton Oliver, of Potchefstroom, Transvaal, for restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits of the marriage.

Mr. Pohl was for plaintiff; defendant did not appear.

From plaintiff's evidence, it appeared that the parties were married at Genadendal, district of Caledon, in 1876. They lived together for 21 years. About ten years ago defendant left his wife at Rosebank, but they continued to correspond for some years. The last letter that she received from defendant was in March, 1903. Defendant had failed to support her both before and subsequent to the desertion. She was aware that defendant was at present confined in gaol at Potchefstroom.

Ordered that conjugal rights be restored by defendant on or before the 24th July, failing which, that he show cause on the 6th August why a divorce should not be granted, with forfeiture of the benefits of the marriage and costs of suit.

## GENERAL MOTIONS.

*Ex parte* SMITH. { 1907.  
June 21st.

Dr. Greer moved to make absolute a certain rule nisi admitting petitioner to sue *in forma pauperis* the Imperial Cold Storage and Supply Co. in an action for £2,000 damages, for injuries alleged to have been sustained owing to the negligence of respondents or their servants. The rule had been served upon respondents, but no appearance was entered on their behalf.

Rule absolute, Dr. Greer to be counsel, and Messrs. Friedlander to be attorneys to the petitioner.

*Ex parte* LIQUIDATORS, REYNOLDS VEHICLE AND HARNESS FACTORY, LTD. (IN LIQUIDATION).

Mr. Benjamin, K.C., moved for leave to the petitioners to accept a compromise proposed to be entered into with Cecil H. Willmot, who had been placed on the list of contributories to the company in respect of 250 shares of £1 each. The petitioners proposed to accept a compromise of £100 in full satisfaction of liabilities.

Ordered that notice be published in the "Cape Times," and lie for fourteen days at the office of the liquidator. In case no objections are lodged by the expiration of fourteen days, the compromise to be allowed, this part of the order to appear in the notice. Costs to be paid out of the funds of the company.

*Ex parte* ESTATE FRASER

Mr. Close moved, on the petition of the *curator bonis* of estate Fraser, for leave to sell and transfer such landed property as may be necessary to satisfy liabilities, or pass a mortgage bond not exceeding £3,000. The curators, it appeared, had, in terms of their appointment, power to administer the estate, but had no power to deal with any of the landed property, except so far as collecting the rents was concerned.

Leave granted to sell enough of the landed property or to raise sufficient moneys on mortgage to pay the debts mentioned in the petition, and to pay the costs of this application.

Maasdorp, J.: It will be in the discretion of the curators to mortgage or sell.

## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

REX V. JACOBS. { 1907.  
June 24th.

Juvenile offender—Acts 7 of 1879 and 8 of 1889.

*A juvenile offender over the age of 16 can neither be sent to a reformatory nor apprenticed as a juvenile offender under Act 8 of 1889; but must be treated as an adult.*

Buchanan, J., said a case came before him in review, that of the King against Jacobs, in which the accused was convicted of stock theft and sentenced to be detained in a reformatory or to be apprenticed. The Magistrate said the youth was about sixteen years of age, but from subsequent information it transpired that this same youth was convicted in 1905, two years ago, at the age of fifteen, and he is now seventeen instead of sixteen. The Act No. 7 of 1879, which provides for the punishment of juvenile offenders, allows the Magistrate to send a juvenile offender to the Porter Reformatory until he is of the age of sixteen. The subsequent Act 8 of 1889 authorises the apprenticeship of such juvenile offender until he is of the age of twenty-one, but in that case the accused must be under the age of sixteen. In this case the accused will have to be treated as an adult. The conviction is in order, but the sentence will be set aside and the case remitted to the Magistrate to pass a proper sentence.

REX. V. ISMAIL.

Perjury—Setting out in indictment foreign words actually used—Evidence of interpreter—Magistrate's finding on evidence.

*Appellant had been convicted in an A. R. M. Court of perjury committed in the S. C. One of the grounds of appeal was that he was said to have spoken in Indian and that the actual Indian words used when committing the alleged perjury were not set out nor was the*

*interpreter called to prove the correctness of his translation.*

*Held on appeal, that in an indictment for perjury it is sufficient to set forth in English the substance and effect of the words used, and that the notes of the official short-hand writer are sufficient evidence of the substance of such words.*

*The appeal was, however, allowed on the ground that the conviction was against the weight of evidence.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town, in a case which was heard on the 8th May last, and in which the appellant, Sheik Ismail, was charged on three separate counts with perjury in connection with a civil action which was heard in the Supreme Court sitting as a Divisional Court, before Mr. Justice Hopley (16 C.T.R., 266). The accused was found guilty on all charges, and sentenced to six months' imprisonment, with hard labour. The grounds of appeal were that there was no, or insufficient, evidence adduced by the prosecution to warrant the finding of the Magistrate, that the offence was alleged to have been committed and sworn to by the appellant in the Indian language, whereas the prosecution adduced no evidence to that effect. The accused never uttered a word in the Indian language, and he gave the evidence in question either in the English or Dutch language, and consequently the prosecution failed to prove the charges. The prosecution failed to prove that the statements alleged to have been uttered and made by the appellant were material to the issue. The conviction was contrary to law, and against the weight of evidence. The evidence of the witnesses for the prosecution was unreliable and illegal.

Mr. Upington, with him Dr. Greer, was for the appellant; Mr. Nightingale appeared for the Crown.

Counsel said he was not prepared to support the third ground as to the material nature of the evidence. The second ground was not very artistically stated, but on that ground counsel intended to urge a further point, which really was included, and that was that the interpreter who interpreted the evidence in the Supreme Court gave no evidence to show either what the actual words used were, or that the words were correctly interpreted by him. That link in the evidence was absent. The interpreter was called for the defence, and he gave general

evidence that the prisoner spoke either in the English or Dutch language, partly in English and partly in Dutch, and the charge was that he spoke in the Indian language. The charges were as follows: That upon the 22nd August, 1906, the trustee in the insolvent state of C. Allie complained that Sheik Ismail owed the estate £847, being the amount of moneys paid by C. Allie on behalf of the accused. Ismail, being duly sworn, stated in the Indian language to the effect (in the English language): "I was not there (Tulbagh-road) on the 8th January or 9th January, when Allie bought sheep from Olivier. I did not go to Olivier's shop about the 8th or 9th January with Allie to purchase sheep, whereas in truth and fact Ismail well knew that he was at Tulbagh-road on the 8th or 9th January, and that he did go to Olivier's shop on the 8th or 9th January to purchase sheep, and thus Ismail did commit the crime of perjury. The second count alleged that he unlawfully deposed and swore in the Indian language, in substance, and to the effect in the English language, "I never said anything about a telegram that Snyman would get £150 before sunset," or used the words, "What does the baas think of us?" He well knew he promised the payment of £150 to Snyman, and that he used the words: "What does the baas think of us." He also swore in the Indian language that "on the 19th December I did not buy oxen from Niehouse," and he well knew he did buy oxen on the said date there. The charges arose out of an action in which the trustee in the insolvent estate of Allie sued Ismail for £800 odd, being moneys which were alleged to have been disbursed by Allie on behalf of Ismail in connection with certain sheep transactions, and he set forth that in December, 1905, an arrangement was entered into between Allie and the defendant whereby it was arranged that the former should proceed to various country towns in this colony in order to select sheep for the defendant, Allie to notify him when he found sheep suitable for such purchase, and Allie to buy the sheep at a price to be fixed by the defendant. In December, 1905, in pursuance of the agreement, Allie concluded the purchase of sheep, and the defendant paid Allie the purchase price and also a commission and his expenses. Allie purchased 200 sheep from Olivier, at Tulbagh-road, on behalf of the defendant, who took the sheep over for £195, and agreed to give him 5 per cent. commission on the purchase. The defendant, however, had not paid anything in respect of this purchase, and he owed some £200 thereon. On the 23rd January, 1906, Allie, under the agreement, purchased 391 sheep from Snyman, at Ceres, for £381, which the defendant took for £391. The defendant paid to Allie £330 in respect of



this transaction, and still owed the estate £61. On the 7th February, he purchased 432 sheep from Snyman for £475 4s., the defendant took over the sheep from Allie at the same price, and agreed to pay him commission. The defence was a denial of the agreement. He denied that Allie had any authority to purchase the sheep, and he had no knowledge of these transactions, and denied that he authorised Allie to make the purchases. The position taken up by him was that Allie carried out these transactions on his own behalf, and then sold to him at a profit and otherwise. Mr. Upington said in the case of a charge of perjury it was necessary to have the evidence of at least two competent and credible witnesses before a person could be convicted. Bearing in mind the defence the accused made to the charge, it was important to note the delay that had taken place. The civil case was heard on the 22nd August, 1906, and apparently the first intimation of any prosecution that was given to the accused himself was on the 24th January, 1907. The crime of perjury was one that required the strictest proof, and in the first place the charge itself stated in the baldest manner that certain evidence was given by the accused in the Indian language, and that evidence given in the Indian language when rendered into English was to a certain effect. There was no proof to his mind that evidence was given in the Indian language, and had there been any such evidence he submitted the correct procedure should have been that the interpreter who interpreted the evidence should have been called for the Crown, and deposed that evidence was given, and correctly interpreted by him. The intermediary should have been called to fill up the gap in the evidence. Counsel referred to the practice laid down in Odgers (pp. 119, 580). There it was stated where the words spoken were in a foreign language the original words should be set out in a statement of claim, with an exact translation, and, if that was true in a statement of claim, it was doubly so in a criminal charge. If the words were in a foreign language, they should be set out verbatim. Counsel also referred to *Rex v. Goldstein* (3 Brodrick and Bingham, 201), Tredgold on Criminal Law (p. 377).

Mr. Nightingale referred to an extract from Archbold (27th Edition, p. 64), as to what the law required in an indictment. There could have been absolutely no prejudice to the prisoner in this case. Allie was made insolvent, and at first treated as the principal by the creditors. Allie stated that he was only acting in all these transactions for an undisclosed principal, and that undisclosed principal was the accused. It was necessary for the accused to prove that any transactions he had with Allie were indepen-

dent ones, and not under any agreement. Counsel submitted, with reference to the form of the indictment, that it was not of such a form as to prejudice the prisoner.

Buchanan, J.: This is an appeal from a conviction obtained in the Resident Magistrate's Court for the district of Cape Town, in which the appellant was charged on three counts with having committed perjury in a civil case which was tried in August last year. The issue in that case was whether one Allie, who has since become insolvent, acted for himself or for the defendant, Sheik Ismail, in the purchase of certain stock. The sheep and oxen referred to were bought from one Snyman, one Olivier, and one Niehaus.

The accused, on being convicted and sentenced, appealed, and gave notice to the Attorney-General of several grounds of appeal. They are objections to the form of the indictment, and objections on the merits of the case. The indictment or charge sheet sets forth that the accused gave evidence in a certain case "in the Indian language, in substance and to the effect following, that is to say, in the English language," and then setting out the evidence given at the civil trial. Objection was taken that it was not proved that the accused did give evidence in the Indian language, and that no interpreter was called to say that what accused was alleged to have said in the Indian language was correctly interpreted. What has been proved was, the notes of the shorthand-writer of the evidence, and in these notes are to be found the allegations set forth in the different charges of perjury. As a matter of fact, it transpires, not from the case for the Crown, but from the evidence called for the defence, that the accused did not speak in the Indian language, but that he spoke partly in English and partly in Dutch, when giving his evidence. It was argued that on the analogy of cases of defamation it is necessary to set forth the exact words used by the accused, and in the language in which he uttered them. During the course of the argument, I called attention of counsel to the case of the *King v. Thomas*, which had been decided in the English courts, where the difference was drawn between an action for defamation and an indictment for perjury. In the case of *Rex v. Thomas*, the indictment charged that the defendant at an investigation before a Magistrate, had sworn "in substance and effect the following: that is to say," and set out in English in the first person the words alleged to have been used by the defendant. It was proved that the defendant in that case was examined in the Welsh language through an interpreter, and that his examination was translated into the English language, taken down in writing, and signed by

the accused, a procedure similar to our preparatory examination. It was argued that the indictment should have set forth the exact words used in the first person. The presiding judge, Vaughan Williams, J., said that it might be necessary in the case of libel where proof of the precise language was necessary, to set out the actual words used, but that in a criminal charge for perjury it was only necessary to prove the substance and effect, and in that case conviction followed, and there does not seem to have been any appeal. That case has been frequently quoted in the textbooks since. Therefore, as to the first objection, which is one as to the form, I think the charge-sheet or indictment in this case must be taken to be sufficient. In my opinion it is not necessary, where the evidence given at a trial is in a foreign language, to set forth the *ipsissima verba*, but that it is sufficient if a correct translation in the English language is given of the words used. That disposes of the principal objection as to the form. At the same time, the statement in the charge sheet is erroneous, and should have been corrected at the trial, which was not done. On the merits, a great deal of argument has been addressed to the Court as to the effect of the evidence which was led. Though several objections are stated in the notice given to the Attorney-General, they may more or less all be summarised into one, that the conviction was contrary to the weight of evidence. It is, no doubt, obligatory on the Court, in cases of criminal appeal, to see whether any illegality or irregularity which has been committed at the trial has prejudiced the prisoner, and if the prisoner has not been so prejudiced, the Court is required by the statute not to set aside the conviction in consequence of such irregularity. One objection on the ground of irregularity contained in the notice is, that evidence had been improperly admitted, but that ground has not been strongly relied upon in argument. There was another objection, and a serious one in all indictments for perjury, that the portion of the evidence upon which the charges have been founded was not material to the issue before the Court, but the learned counsel has, I think, properly abandoned this ground, and I need not further consider it, but assume that the evidence was material. It is necessary, therefore, to see in what the alleged perjury consists. The charges are three in number, and the first one refers to the dealings with Olivier. As to these transactions, the accused said: "I was not there on the 8th or 9th January when Allie bought sheep from Olivier. I did not go to Olivier's shop about the 8th or 9th January with Allie to purchase the sheep." This evidence was clearly material to the issue, because the question at the trial was whether

Allie or Sheik Ismail bought the sheep. On this point, Olivier, who was called for the Crown, merely stated generally that the extract from the evidence of accused, given in the indictment is not true, yet he goes on to state that when he sold the sheep in question he sold them to Allie and not to Ismail, that he dealt with Allie and took promissory notes for the price from Allie, and when Allie became insolvent he proved in Allie's estate, making no reference to Ismail, and in his affidavit of proof he stated that no one else except Allie was indebted to him for the amount. This evidence, I think, should have received more consideration from the Magistrate. In a question of mere credibility of the witnesses it is almost impossible for a Court of Appeal to decide against the finding of the Magistrate. He has the witnesses before him, and is the proper person to decide if a witness is or is not to be believed. But the statement of Olivier in so far as it implied that the accused was with Allie on the 8th or 9th January was positively contradicted by witnesses, who very strongly support the evidence given by the accused at the trial, and contradict the charge made in the indictment. It is in this connection that the Court may well draw a distinction between the mere credibility of witnesses and whether the evidence is sufficient to support the conviction. We have Olivier himself proving that he dealt only with Allie, and gave credit only to Allie, and that he proved only against Allie's estate. And on the point whether or not the accused was present on the 8th and 9th of January, at Olivier's shop, at Tulbagh Road, evidence, which was not put before the Court at the original trial, very strongly supports the statement of the accused. The evidence of the bank clerk, who is an altogether disinterested witness, makes it appear that the accused on the 8th January was at the Bank of Africa, in Cape Town, on three separate occasions on that day, and deposited money to his credit on slips signed by himself, so that it is almost impossible for him to have been at Tulbagh Road on the 8th January. Then, as to the 9th January, we have cheques put in signed by the defendant on the 9th January, and cashed by the bank. These cheques, which are *bona-fide* documents, could not have been manufactured for the case, which had not then arisen. We have the evidence of Mr. Blaine, the manager of the slaughter-house at Matland, who says from his books it appears that the accused on the 8th January purchased from him sheep, and again on the 9th January, he purchased sheep, and he says: "I believe I sold to him personally." If the Magistrate had given due weight to this evidence and to these documents produced before him, I think he ought, at least, to have

said that it was not sufficiently proved that the accused was at Olivier's shop on the 8th or 9th January. The evidence of contemporaneous documentary writings is so very strong that I think the Magistrate was not justified in coming to the conclusion that this charge was proved. The second charge is as to a transaction with one Snyman, and the charge is that the accused had said to Snyman, "I never said anything about a telegram, and that Snyman would get £150 before sunset; nor did I use the words 'what does the baas think of us?'" In a way, this was material to the issue in the civil action, though not very directly connected therewith. In his evidence, Snyman himself says: "Allie was the man with whom I did the business. The accused was present, and he and Allie spoke. I sold the sheep to Allie." He never stated he spoke to the accused. Allie signed the promissory note, and as to the £150 it was sent by telegram. Accused later got the money from Allie. He says later in his evidence: "I thought they were both Allies." It does appear in the course of the case that there were other Indians engaged in sheep transactions beside the accused, and Snyman, instead of considering that Ismail had anything to do with the transaction, said "I got two promissory notes from Allie." He also claimed on the estate of Allie on the notes, and in his proof of debt said that no other person but Allie was liable to him for the price. He further says, "I arranged the price of the sheep with Allie." Upon the issue as to whether the accused or Allie bought the stock, this evidence is strongly in favour of the accused, as showing that Allie was the purchaser and not the accused.

The third charge is that the accused said: "On the 19th December I did not buy oxen from Niehaus." Niehaus says, "Allie said he and accused were partners. I did not speak to accused. I had a promissory note from Allie for the previous transactions. The receipts I gave in the name of Allie." In addition to this there is the evidence of the station-master at Porterville-road that the stock bought was consigned by Allie to Allie, and that the name of the accused did not come into the transaction at all. I think, on the evidence of the witnesses for the prosecution, that on this third charge also the Magistrate was not justified in finding the accused had bought the oxen from Niehaus. Under these circumstances I do not think any Court should say that the accused's evidence was false when he said that he did not buy the oxen from Niehaus.

These are the three charges against the prisoner. Although the conviction has taken place, it does not entirely depend upon a question of credibility. Looking at the way the charge has been brought, and the additional evidence

supplied at the criminal trial which was not led in the civil case, I think the proper verdict of the Magistrate should have been a verdict of acquittal. The appeal must be allowed and the conviction and sentence quashed.

[Appellant's Attorney: C. Brady.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ESTATE WILKINSON V. { 1907.  
WILKINSON. { June 24th.

Mr. Howes moved for a certain rule interdicting a certain sale of a farm, stock, and movables in Griqualand West to be set aside. Counsel said that the rule was granted on the application of the present respondent, who was now in court, and prepared to consent to the interdict being removed, on condition that certain personal property should not be sold. Wilkinson was the adopted son of the deceased Mr. Wilkinson, and he claimed against the estate under a will which he said was privileged.

Respondent appeared and said that he consented to the sale being proceeded with on condition that the personal property set out in the list produced should not be sold.

Rule set aside by consent, applicants undertaking that the goods in question be not sold, with leave to telegraph the order of the Court, costs to come out of the estate.

## PROVISIONAL ROLL.

SUTHERLAND V. ROBERTS.

Mr. Douglas Buchanan produced an amended return of service in this matter, and moved for provisional sentence on a Magistrate's Court judgment. Counsel explained that the matter was before the Court on Friday last, and was ordered to stand over for a fuller return by the Sheriff. The summons stated that a writ had been issued, and a return of *nulla bona* made, whereas it should have said that a writ was issued, and, the defendant having left the jurisdiction of the Magistrate, it was impossible to serve it. The Sheriff now reported that he had served the summons, and also a copy of the judgment therein by fixing it to the front door of the defendant's last known place of residence.

[Hopley, J.: Ought you not to have served defendant with a copy of the writ? That has not been done.]

Mr. Buchanan: It could not be served because he had left the jurisdiction.

Hopley, J.: Why not serve it in the same way as you served the other processes, by fixing it at his last known place of residence? However, this is only a provisional matter, and he can come and contest it if he thinks fit. There are informalities in the matter, and, of course, no extra costs involved by these informalities will be allowed against the defendant. Provisional sentence will be granted, with costs of one appearance only.

ESTATE SIMPSON V. ESTATE GRESSE  
AND ANOTHER.

This was an application upon notice to the executrix testamentary in the estate Gresse and Cornelius Ford to show cause why the applicants, the executors testamentary of the late Samuel Arthur Simpson, should not be granted leave to sub-let to one P. J. Truter the farm of Spitzkop, together with a portion of the farm Van Staaden's Kraal, as leased by respondents to the said Simpson, since deceased, under written agreement of lease dated the 8th September, 1904, and why the applicants should not be authorised to grant to the said Truter the right of occupation and use of the said farm until the 30th June, 1908.

Mr. P. S. T. Jones was for applicant; Mr. M. Bisset was for respondent.

Affidavits having been read,

Mr. Jones, in argument, cited *De Vries v. Alexander* (Foord, 43) and *Van der Kessel* (674), and referred to the ninth article of the Placaats of 1658.

Mr. Bisset cited *Green v. Griffiths* (4 Juta), the "Cape Law Journal," vol. 3, on the ninth article of the Placaats, and Nathan, vol. 2, p. 284.

Mr. Jones, in his reply, quoted Grotius (3, 19, 9).

Hopley, J.: I think I may again express my regret that the parties have come into court in this matter, at all events at the present stage of matters between them, because it does seem to me that from the requests made in the notice of motion and upon the general aspect of the case as between the applicant and respondents, it would be very difficult for the Court to do more than simply express an opinion that might guide the parties in the future, but which cannot possibly settle the matter between them in the way in which the Court is asked to do. It would appear that the late Mr. Simpson, who seems to have died in the course of this year, had hired from the respondents for three years a farm Spitzkop, and another farm, the two together being known for the purpose of the lease as Spitzkop, and that he had paid the rent, as far as one can follow from the papers and

affidavits, for the whole term of the lease, expiring on the 30th June, 1908. After his death in April, his executors advertised a sale of his assets, and among other things they advertised that they would sell the unexpired lease of the farm Spitzkop. Now, an objection was made a day or two before the sale, which was to take place on the 1st May, that they had no right to sell this farm, because it was a *praedium rusticum*, and there was no right to sub-let in the agreement of lease. That, of course, has been the recognised law of this colony for a considerable time, and if the decisions of this Court be correct, as we are bound to hold that they are correct, and in view of the decision in the case of *De Vries v. Alexander*, then it has been the law of this colony ever since the occupation of this country by a civilised race. That being the case, the present applicants, the executors of Simpson, when they received the protest, knowing that a sale of this leasehold would be contrary to the terms of the law—and they must be supposed to have known the law—ought to have abandoned the sale, and to have kept the matter back for further consideration, but they decided to disregard the protest, and they sold provisionally to Mr. Truter, for a sum of £80 odd, the right of the unexpired portion of the lease, and, in spite of the protest which had been made, Mr. Truter thereupon put some stock upon the farm. Subsequent correspondence took place, and the respondents seem to have asserted that they had rather larger rights over this land than I am inclined at the present stage to think they had. They appear to have taken action before the Circuit Court, and asked leave to sell this very farm. It appears that the widow Gresse had got into some money difficulties, and that she applied to the Court on Circuit for leave to sell this farm to meet pressing liabilities to the Divisional Council and other creditors, and that she had been accorded such leave, judging from the statement of counsel, on the ground that an existing *fidei commissum* should be transferred from this farm to the town property, which had not been burdened. That sale, as I understand, has not yet taken place, and it is now said that, notwithstanding that there was this existing lease over the farm, the respondents maintain that they have a right to sell this farm absolutely free of any claim that the estate of Simpson may have over it until the 30th June, 1908, by virtue of this lease. There, it seems to me, they are wrong. They cannot sell like that. If they sell, even under an order of Court, they will have to sell subject to the rights of the lessees, and it seems to me that under those circumstances the sale of the farm would in all probability be damaged, so that I think it would have been better for



them to have agreed with the executors of Simpson to settle their claim on the farm and pay them out. I can only say, as a matter of advice, that it would probably be a wise thing at this stage and in the present position of affairs, to settle with the lessees before they put up the farm for sale by auction, because I do not see any reason why the applicants should recede from their rights. I cannot see what there is to prevent the applicants from saying, "At all events the ground is ours, and we have paid for it until the 30th June, 1908; you may now conduct your sale, but subject to our lease, and no purchaser of the place shall set foot upon that farm until the 30th June, 1908." I cannot see any reason why they should not take up that attitude, and that would necessarily damage the sale of the farm to a large extent. So it seems to me to be eminently a case for a compromise. I do not see why respondents did not accept the reasonable offer made in the correspondence by the applicants of a proportionate amount of money which had been paid by Simpson in advance during his lifetime. However, that was not accepted, and the respondents seem to me to have claimed larger rights over the property than they will be able eventually to establish. But what I have at this moment to consider is whether I can give any relief to the applicants in the present form in which they ask for it. I have said perhaps more than I need say upon what I think will be the position of the parties, but I am asked in this notice of motion to decide whether the applicants should be given leave to sub-let the farm to Truter. As to that, I do not see that the Court can do anything in the matter. That portion of the application cannot be granted. Then the respondents are called upon to show cause, otherwise, why the applicants should not be authorised to grant to Truter until the 30th June, 1908, the right to occupy and use the said farm. This is simply asking the same thing in another form. The Court clearly cannot grant that part of the application either. Then the applicants ask for general relief, but it seems to me that it is not so specifically set forth what sort of alternative relief they require as to put the respondents on their guard and to authorise or make it possible for the Court fairly to say there should be any order as to the return of the money, or anything of that kind, which has already been paid by way of lease. As the matter comes before the Court to-day, I do not think I can grant the applicants any relief whatever, and the application must be refused and no order made. I would only add that I hope that this case, in which the parties are spending money that they can ill afford, will not be heard of here again, but will be settled out of court. The application must be refused, however, with costs.

## GREEVE V. KEAL.

Mr. Roux moved in this matter for directions as to the service of a certain citation in an action to be brought by petitioner against respondent, Herbert Sidney Keal, late of East Griqualand, to recover damages for alleged seduction. When the matter was last before the Court it was stated that respondent, who was a minor, had left for the Argentine, and that his address was not known to petitioner. It was ordered that certain moneys standing to his credit in the Guardians' Fund should be attached *ad fundandam jurisdictionem*, and that the question of service should be mentioned later. (17 C.T.R., 314). Counsel now presented an affidavit by petitioner's attorney, giving respondent's address in the Argentine Republic.

Ordered that service be effected on the *curator ad litem* (respondent's elder brother), and also by registered letter, addressed to respondent at the address given in the attorney's affidavit, citation returnable on the 24th October, with leave to serve notice of trial and intendit with citation.

## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

MCKINNON V. MCKINNON. { 1907.  
June 25th.

This was an action brought by Elizabeth Gordon McKinnon, of Woodstock, against her husband, John Hutton McKinnon, for a decree of judicial separation by reason of the defendant's cruelty.

The plaintiff's declaration set out that she was married to the defendant out of community of property at Aberdeen, Scotland, on 18th January, 1896. There were issue of the marriage two boys and two girls, aged respectively ten, eight, seven, and six years. About 1896 the defendant came to reside permanently in this colony, and later the plaintiff joined him, and the parties had since resided in this colony. About six years ago the defendant began to give way to intemperate habits, and in consequence began to abuse plaintiff by threats of violence, use of opprobrious



terms towards her, and by physical ill-treatment, and his conduct had become increasingly violent. In September, 1903, defendant violently beat plaintiff and struck her savagely in the face, as a result of which both plaintiff's eyes were blackened and her face contused and cut. In August, 1904, he again violently assaulted her and bruised her face and back, threw water on her, threatened to kill her with a razor, and turned her out of the house. In January, 1906, defendant again violently assaulted plaintiff and threatened to kill her, and plaintiff was forced to leave the house in fear of her life. On various dates in May, 1906, he assaulted plaintiff and threatened to kill her if she did not leave the house, and plaintiff left the house in fear of her life. Thereafter defendant came to plaintiff and threatened to make it hot for her if she attempted to return to the house. On several occasions the defendant had accused her of immorality, for which accusations plaintiff said there was no foundation in fact. By reason of his cruelty and threats she feared if she returned to live with him it would be with bodily risk and to the danger of her life. Plaintiff claimed a decree of judicial separation, custody of the minor children, and such order for maintenance as the Court might seem fit and suitable.

The defendant, in his plea, denied the allegations of cruelty, and stated he was willing and desirous that the plaintiff should return to him, he being prepared to meet her and let all that had passed be forgotten, notwithstanding the fact that she had forsaken him and their children and refused to cohabit with him. For a claim in reconvention he claimed that the defendant be ordered to restore to him his conjugal rights with the alternative relief of a decree of divorce and costs of suit.

The replication was general.

Dr. Greer was for the plaintiff, and the defendant appeared in person.

Elizabeth Gordon McKinnon, plaintiff, stated that on the 18th January, 1896, she was married at Aberdeen, Scotland. After her marriage she went to London, and lived there for a while. Her husband came out to South Africa the same year, and witness followed him. After the marriage the defendant from time to time ill-treated her, and had given her many a blow. About 1902 she resided at Regent-street, Woodstock, with her husband, and there, after her return, she was about to visit a party who was sick when the defendant followed her, pulled her back to the house by the hair, and struck her in the face.

[Buchanan, J.: was he sober at the time?]

Witness: Not altogether. Defendant's action was a surprise to her. In August, 1904, he threatened witness

if she returned to him he would break every bone in her body. Witness climbed the back yard wall, and was able to go through the window, when the defendant caught hold of her and struck her on the face. He dragged her by the hair into the house, and threatened to cut her throat with a razor. Subsequently he threw buckets of water over her in the yard, and pursued her to a neighbour's house, where he hammered her on the back until she expectorated blood. Finally, he said if she came back he would not repeat the ill-treatment. In January, 1906, he resumed his violence, and accused her of misconduct with other men, which accusation was entirely unfounded. He again threatened to cut her throat, and do "several things of that sort." Witness left the house for a few days, when the defendant made further promises, and witness returned, only to find a repetition of the violence, which on this occasion was accompanied by kicking. On the 19th May he said: "If you don't get out of the house before I come back for dinner, I will put you out." When he came back he said, "You are still here!" Witness said, "I intend to remain." Then defendant put her out of the house, and then she finally left him. Witness had been earning for eight months £5 3s. 4d. a month as a cook on Robben Island. Witness's friends would take care of the children until she had permission to take them to the Island. Witness was desirous of a separation being arranged without coming into court.

Cross-examined by defendant: We will start from the beginning. Just turn your face this way please. Did you not get a bad name until I married you?

[Buchanan, J.: You have no right to put that question. It is not relevant to the case at all.]

Defendant: You asked me to marry you?

[Buchanan, J.: Do not answer that question. (To the defendant) If you want to set up anything of that kind it is all cured by the marriage, and it is not raised in the pleadings in any way.]

Defendant: I only wish to show her character.

Defendant: When the row occurred did you not take a hat-pin and stick me?—No, you struck me a blow in the face, and when you ran at me the second time, I held a hat-pin out.

On the second row, did I not find you in Mr. Shand's bedroom?—No.

Did I not object to your going into his bedroom?—You were always in my company when I went there.

Finally, when you did leave me, we had an agreement if Shand was to get married I would not take proceedings

against you?—I do not understand you.

You know perfectly well we had a verbal agreement to that effect, and that I would not take proceedings against you and damages against Shand?—What has Shand got to do with it?

Continuing, the plaintiff denied throwing a looking-glass at the defendant, and on one occasion lying down with the children when her clothes were full of mud.

[Buchanan, J.: I see by the affidavits you have an inheritance left to you in Scotland.]

Witness: Yes, it is not quite settled yet.

Have you got the money?—Not yet.

What is the amount?—£50.

He wanted you to go to Scotland?—Yes.

What is your objection to go there?—People might say I was cleared out of the country.

You do not wish to leave the colony?

—No.

If there is a separation, would it not be as well to let him have the two boys, and you have the two girls?—I should like to have the two boys.

Mrs. Hopkins and Mrs. Marshall also gave evidence of the defendant's ill-treatment.

James Shand, a shipwright, stated that on an occasion in September, 1902, the defendant came into witness's house, and asked if he had seen his wife. Shortly afterwards the plaintiff came in with some letters in her hand, and gave witness his letters. The defendant said a letter was for him, and then he ran after the plaintiff to her own house, when witness shortly afterwards heard shouting. When he went out plaintiff was at the kitchen door, and defendant was striking her. Witness said "No fighting here," and shoved the defendant outside the door. The plaintiff was bleeding about the mouth. He denied the allegations of the defendant that he had misconducted himself with the plaintiff.

Dr. Greer closed his case.

James Mills, who lived with the defendant in 1903, stated that on one occasion the defendant told him he had been stuck by a hat-pin by the plaintiff. The defendant then dragged her into the front room, and kept her there until her temper was down.

Defendant: Will you describe a typical Saturday in our house?—You got up in the morning. You made the breakfast, gave the children their breakfast, and the plaintiff her breakfast. When you came home you bathed the children, and made her supper when she came back.

Very often she was out when we came home to dinner?—Very often.

The dinner was simply left anyhow?—Yes.

Sometimes the dinner was just "slung" on the table?—Yes.

The majority of times you came to the house you found her in Shand's room?—Yes.

Other witnesses for the defence gave evidence as to the relationship between plaintiff and defendant, a coloured servant amongst them stating that the defendant did more than most husbands would do for a wife.

The defendant's sons, boys of nine years and eleven years respectively, also gave evidence unfavourable to their mother, and stated they would rather remain with their father.

The defendant went into the witness-box, and said that he had always worked hard for the plaintiff. When they came out here plaintiff made the acquaintance of a woman who had given her wrong impressions as to her duty towards her husband. Subsequently he removed from his place of residence, but the plaintiff continued to visit this woman much against his wishes. Shand subsequently came to live beside them, and witness, becoming suspicious, advised the plaintiff to stay away from Shand, but this she refused to do. Subsequently they had several rows about the matter.

[Buchanan, J.: Is there no chance of your wife and you coming together?]

If she tries to lead a genuine life and get clear of these people.

Dr. Greer submitted it was perfectly clear from the evidence that it was impossible for these two people to live happily together. The plaintiff seemed quite justified in assuming her life would be in danger. The plaintiff was entitled to the custody of the two children, at any rate, the two younger ones.

Buchanan, J.: The plaintiff in this case, the wife, sues for a judicial separation, on the ground of cruelty. The defendant, the husband, denies the cruelty, and claims in reconvention a decree for the restitution of conjugal rights, failing which, a decree of divorce. The parties have been married some eleven or twelve years. They were married in Scotland, and came out to this colony. The husband is a man in good occupation, earning 12s. a day. After hearing the evidence, the charges in the declaration, I think, have been greatly exaggerated, still sufficient has been disclosed to show that there had been blows struck and threats made by the defendant against the plaintiff. There may be faults on both sides, there usually are in such a case. Under the whole of the circumstances of the case, I do not think that I can give the defendant a decree for the restitution of conjugal rights. I think sufficient has been disclosed to show that the plaintiff is entitled to a decree of judicial separation. This decree does not divorce the parties. They still remain husband and wife, and if at any time the parties make up their differences and live together again, this decree will not prevent them from

doing so. As long as the judicial separation lasts, I think plaintiff should have the custody, at any rate, of the two younger girls, and the defendant have the custody of the two boys. As long as the two girls are in the custody of the plaintiff, or until a further order, the defendant will pay to the plaintiff £1 a month for each child until it attains the age of sixteen, the first payment to be made on July 1 next, and thereafter on the 1st of each succeeding month. The defendant at any time in the future will have leave to apply to the Court for the custody of the two girls, if they are not properly taken care of by the mother, or if not properly treated. I think this separation of the children is one which the parents should consider in the interests of their children, if not in their own interests. The plaintiff is to have access to the two elder children, and the defendant to have access to the two younger children at all reasonable times and places, the defendant to pay the costs of the action, including the costs of the exception.

### THIRD DIVISION.

[Before the Hon. Mr Justice HOPLEY.]

ADMISSIONS. { 1907.  
                                { June 25th.

Mr. Long moved for the admission of Dominick Eckley McCausland as an advocate.

Application granted, and oath administered.

### PROVISIONAL ROLL.

LA COMPAGNIE COMMERCIALE DES  
COLONIES V. LEVY.

Mr. Wallach moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

JACOBSON BROS. V. JACOBSON.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ELIASON V. KATZ.

Mr. J. E. R. de Villiers moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £35, with interest and taxed costs.

Defendant said that he was unable to satisfy the judgment or make any offer. He earned £8 or £9 a month, and had to maintain a wife and four children. Witness was already paying £2 a month to other creditors out of his wages.

By the Court: Witness would endeavour to pay £1 a month out of his wages. It would take another ten months to satisfy the other debt at the rate of £2 a month.

Decree of civil imprisonment granted, with costs, execution to be suspended upon payment of 15s. per month, first payment to be made at the office of the plaintiff's attorney on the 1st July, with leave to plaintiff to move for an increased order when so advised.

CYONA PRESS V. ANDERSON.

Mr. M. Bisset moved for a decree of civil imprisonment upon an unsatisfied judgment for £35 19s. 6d., with interest from the 8th May, 1906, and £11 1s. 9d. taxed costs.

Defendant said that he was absolutely penniless. He had only had occasional jobs for the past nine or ten months, and he was at present without employment.

Cross-examined: Witness's father owned about 12 houses at Woodstock and elsewhere. He was living in one of the houses, and, in place of paying rent, he did repairs where required. Witness's partner had left him with about £100 of debts to meet.

Hopley, J.: It does seem a discreditable sort of thing that you should be just living on.

Witness: Yes, but I cannot find work. I cannot get work even at a low wage. No order was made.

### ILLIQUID ROLL.

VAN RYN WINE AND SPIRIT CO.,  
LIMITED, V. KLAASON.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £46 1s. 11d. for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

SUTHERLAND V. ROBERTS.

Mr. Douglas Buchanan applied for an extension of the return day of a certain writ of arrest. Defendant was, it was alleged, about to leave the jurisdiction and take his departure by the Marathon, but the ship had not yet arrived, and it was necessary that the return day should be extended.

At a later stage, Mr. Buchanan said that the boat had arrived, and an arrangement had been made between

plaintiff and defendant whereby the latter would proceed by the *Marathon*. Counsel applied for costs of the writ.

Hopley, J., said that he could not grant an order for costs on an *ex parte* application.

### GENERAL MOTIONS.

*Ex parte* ESTATE WEBBER. { 1907.  
June 25th.

Mr. Inchbold moved for an order authorising the transfer of certain estate property in the division of Bedford to a firm of which one of the partners is an executor in the estate. The land had been bought at public auction by the firm.

Order granted as prayed.

*Ex parte* JACKSON.

Mr. Palmer moved, on the petition of the tutor of the minor children of the late Captain Charles Henry Jackson, for an order authorising the Master to pay from the inheritance due to the minors certain sums for their maintenance and education.

Order granted authorising the Master to pay to the tutor the allowances specified, viz., £60 for Charles G. Jackson, £100 per annum for Munton F. Jackson, until his majority, and £70 per annum for Reneira C. Jackson until her majority, as required from time to time upon proof that the moneys have been properly expended for the said minors in each case, and that they are properly provided for.

*Ex parte* KAFFRARIAN STEAM MILL COMPANY, LIMITED.

Mr. Close moved, on the petition of the Kaffrarian Steam Mill Company, Limited, of King William's Town, for the registration of a certain deed of settlement. Petitioners stated that the company was registered under the Act 23, 1861, and was constituted under a deed of settlement which had from time to time been altered or amended, the powers of the company having been enlarged and the capital increased. It had been considered expedient, in the interest of the company, to consolidate the original and supplementary deeds of settlement, and to increase its powers to a certain extent, and to make provision for an increase of capital if the same should be required hereafter. At a meeting of shareholders on the 27th March last, it was resolved that the capital should be increased from £100,000 to £250,000 by the creation of 150,000 shares, and that the deed of agreement and the various additions be

repealed, and a new and consolidated deed of settlement submitted to the meeting be substituted. The Registrar of Deeds, however, took various objections to the documents tendered to him, the principal being that under section 8 of the new deed it was stated that the capital of the company was increased. The Registrar objected that the provisions of section 6 of Act 23, 1861, had not been complied with with regard to the increase of capital. It had not been the intention of the company to actually increase its capital at the present time, nor had it been intended to advertise or hold out in any way that the capital had been increased unless and until it had been done in accordance with law. The various objections taken by the Registrar had been met, and in particular in respect of section 8 of the new deed. The wording thereof had been altered so as to provide for an increase of capital in future if necessary, so that it did not appear that the capital was represented to have been increased without compliance with the provisions of section 6. The Registrar of Deeds, in his report, said that the document was originally laid before him within the time prescribed in section 7, but, when re-lodged subsequently, the period fixed by the section had expired, nearly a month having elapsed since the document was first tendered. He declined to register the deed unless authorised by the Court.

[Hopley, J. (to Mr. Close): The Court, I suppose, has by practice the right to amend the laches of the company in not applying in absolute correct form?]

Mr. Close said he understood that there had been several precedents.

The Registrar of Deeds (in answer to the Court) said that there had been several cases previously where the Court had authorised registration under similar circumstances.

Order granted as prayed.

*In re* ORANGE RIVER IRRIGATION CO., LTD.

Mr. Sutton presented the second report of the official liquidator, and applied for the usual order as to lying for inspection and also as to publication. Counsel called the Court's attention to a letter which had been addressed to one of the judges in relation to the matter, in which he urged that some joint action should be taken, in conjunction with the English shareholders, for the reconstruction of the company. This letter had been referred to the liquidator, whose observations thereon were also read. The liquidator, in his third report, recommended confirmation of the acceptance of a bid of £5,500, which had been received at a sale of the company's properties and assets, and



that he be given power to distribute the proceeds in the legal order of preference.

Order granted, report to lie for inspection at the office of the liquidator for six weeks, and to be published once in the "Cape Times" forthwith.

CALEDONIAN LANDING, SHIPPING, AND SALVAGE CO., LTD., AND ANOTHER, V. EAST LONDON HARBOUR BOARD.

This was an application for an amendment of the order granted by the Court in an action brought by applicants against respondents for damages arising out of a freshet in the Buffalo River. (16 C.T.R., 792.)

Mr. Benjamin, K.C., was for applicants; Mr. W. Porter Buchanan, K.C., was for respondents.

Mr. Benjamin said that the actions came before the Chief Justice and Mr. Justice Hopley, and damages were given against defendants in the one case for £3,000, and in the other for £250. The order of the Court was, however, silent as to interest, and now the applicants asked that interest should be added to the judgment. He (counsel) was not aware whether under the circumstances it would be the desire of the Court that the matter should be heard when their lordships were both sitting.

Mr. Justice Hopley: You ought to have asked for interest at the time. You got your judgment. Why did you not execute? I do not think you will find that the Chief Justice will want to add interest at this date. I do not think we had in contemplation at the time that interest should be given.

Mr. Benjamin said that the affidavits set forth the reasons for the delay in executing.

After further argument,

Mr. Justice Hopley said that he would try and arrange so that the application could be heard before the Chief Justice and himself, though he might say that he had no particular sympathy for the application at the present moment, but, of course, when he had heard the affidavits, he might see some reason for changing his mind. The matter would, therefore, stand over for the present.

*Ex parte* GARLICK.

Mr. Benjamin, K.C., moved, as a matter of urgency, for an order restraining J. and A. Rae from removing certain goods from certain premises in Strand-street, Cape Town, leased by petitioner to respondents. Petitioner said that respondents owed him £135 for arrear rent, under a lease dated January, 1906, for a term of eight years, and that at the end of this month a further sum of £45 would become due. He

had reason to believe that it was respondents' intention to abandon the lease. He did not wish to hamper unduly their business, and suggested that in order to enable them to execute orders, they should be allowed to remove goods from the premises, on condition that the proceeds should be placed under suitable control, so as to be available in lieu of the articles.

Ordered that the respondents be restrained from removing the goods in the said premises, pending payment of arrear rent, or result of an action for such rent, the said interdict not to prevent ordinary business transactions, provided that sums of money received in such transactions be placed to a special account in a bank to abide the order of this Court, or be paid to plaintiff on account of the said debt, or be paid to the Registrar of this Court, respondents to have leave to move to set aside this order.

LIPSCHITZ AND TOOCH V. SAPIERO.

Mr. Burton, K.C., moved, on behalf of defendant in the action (Sapiero) for an order for the removal of the case to the Water Court at Oudtshoorn or the next ensuing Circuit Court at Oudtshoorn.

Mr. Close (for the plaintiffs) opposed the application.

Mr. Burton said he felt that he could not press the matter so far as the Water Court was concerned, but he submitted that the case might properly be removed to the Circuit Court.

Mr. Close submitted that, in view of the great delay which might take place before the Circuit Court sat at Oudtshoorn it would be a convenience that the case should be heard in the Supreme Court, and there was also the question of plaintiff's right to select his forum.

Hopley, J.: While I am inclined to agree with Mr. Close as to the right of plaintiff to choose the forum in which the case should be tried, where two or more forums are open to him, I am also in accordance with his remark that when good cause is shown the Supreme Court will remove a case which has been brought in it to the Circuit Court if that be a more convenient course, and I think in this present case it is a more convenient course. It is a paltry matter, as far as the amounts of damages are concerned, and it is not to my mind a fair thing for the plaintiff to bring the defendant at great expense to Cape Town to a much more expensive court than the one which is the natural forum for such trifling disputes, and put him to the great expense of defending an action at the distance which the Supreme Court is from Oudtshoorn. I am not saying anything as to the time of this Court, which, of course, should be at the disposal of all litigants, and I do



not think in the present term we are so pressed for time that we need consider that, but at the same time it seems to me very much more likely that at the place there the Circuit Judge would meet with the evidence and be able to appreciate it probably quite as well as, if not better than, we here in the Supreme Court would be able to do, and both on that ground and on the ground of expense and the comparative smallness of the dispute between the parties, it seems to me that the case ought to be removed. The fact that a period of about three months has still to run before the Circuit Court sits does not seem to me to be a very important element in the matter, and in fact it may be an advantage, because the parties may come to their senses in the meantime and put this matter before an arbitrator. The case will be removed to the next Circuit Court at Oudtshoorn, costs to be costs in the cause.

*Ex parte* GREEN AND CO., LTD.

This was an application for leave to reduce the company's capital.

The petition was as follows: E. K. Green and Co., Ltd., and reduced, hereinafter styled the company, was incorporated and registered as a company under the provisions of the Companies' Act, 1892, on the 30th day of May, 1901. The registered office of the company is at No. 21, Somerset-road, Cape Town. The original capital as incorporated was £160,000, divided in 16,000 shares of £10 sterling each, of which 14,400 were ordinary shares and 1,600 were preference shares. On the 17th April, 1903, the capital was increased from £160,000 to £200,000, divided into 20,000 shares of £10 sterling each, of which 14,400 are ordinary shares and 5,600 are preference shares as will be seen from an extract of the company's minutes hereto annexed marked "C." The further 4,000 preference shares at £10 each were also fully issued and paid up. The said increase of capital was confirmed in general meeting on the 4th day of May, 1903. The further capital introduced in 1903 was necessary in order to provide for the development of the company's business. In consideration for securing the additional capital of £40,000 to the company, and waiving certain rights provided by the memorandum and articles of association, there was reserved to preference shareholders the right to apply for and to have their preference shares converted at par into debentures to be covered by a mortgage duly passed and registered against the assets of E. K. Green and Co., Ltd. The said option or right to claim to have their holdings converted into debentures secured by a mortgage was confirmed in general meeting of the company on the 17th

April, 1903. The preference shareholders have notified the company that they have decided to exercise their right to have their preference shareholdings converted into debentures. For a time negotiations were carried on to issue debenture bonds in order to satisfy the requests of preference shareholders in terms of their option previously referred to, but it was found to be inadvisable and inexpedient to issue debenture bonds inasmuch as the company can obtain better terms. A sum of £56,000 has been offered to the company on loan at a favourable rate of interest on condition that it cannot be called up for thirty years, but that the company may at any time redeem the said loan. The company is a family concern. Its shares were originally apportioned in terms of an agreement registered with the Registrar of Deeds, Cape Town, in terms of section 97 of the Companies' Act, 1892, copy of which is hereto appended marked "G" (clause 3). The company's shares are at present exclusively held by the members of the families of Edward Knolles Green, Abraham Frederick Green, and Helperus Ritzema Kuys Green, no shares being held by the public outside of these holders, and, moreover, certain rights of pre-emption exist whereby any shares intended for sale must first be offered to existing shareholders at a fixed price. The books of the company are balanced and audited monthly, and allow the company's financial position to be accurately ascertained as on the 31st May 1907. The books of the company have been so audited as will appear from the sworn declaration and certificate of Mr. Maynard Nash, the company's auditor. The financial position of the company has not undergone any appreciable change since the 31st May, 1907. The only bond over the company's properties is one for £25,315 19s. 2d., passed in favour of the estate of the late Edward Knolles Green, the founder of the business and the ancestor of its present directors. The procedure adopted by the company in discharging its liabilities is as follows: (a) All purchases made by the company from wine farmers are paid for in prompt cash; (b) All purchases and imports from Europe and elsewhere are paid at sight of draft accompanying the documents of shipment, except where the imports partake of the nature of consignments. (c) Local purchases are made upon the usual 30 days' terms, and paid for promptly during the succeeding month. Although the company acquired the business in 1901, when prices of landed property were inflated, the prices paid for all landed property taken over under the agreement marked "G" was at actual cost to the late partnership notwithstanding the fact that several such properties were transferred to the late E. K. Green as far

back as 1859 to 1869. The goodwills of the company's businesses are not valued or in any way shown in the company's books. Licenses, wherever held by the company are, however valuable, not taken into account in the company's books of balance-sheet. The maturation and increase in value of the company's stocks are not taken into consideration, and the value of its stock as shown on its financial statements is at actual cost. Over and above such provisions, there is a substantial reserve fund. The company has since 1901 experienced prosperous years. At the close of each of the company's financial years, when dividends are regularly declared, it has been the uninterrupted practice of shareholders to re-invest their dividends with the company upon deposit at a rate of interest, and in aggregate the ordinary shareholders have become the company's largest creditors. The only creditors of the company are: (a) Depositors of cash who have invested their moneys with the company. (b) Current creditors of local purchases, which will be paid during the month of June or July. (c) Creditors for current expenses such as salaries, rates, and other charges of a similar nature, none of which are due. There are ample funds to meet all liabilities, and if the company's assets, properly valued, were taken into account, there would be a substantially large surplus between its liabilities and assets over and above its actual capital. In consequence of all these facts, the directors of the company have for some time past realised that the company's capital of £200,000 is largely in excess of the wants of the company, and it was therefore decided by the directors to call a special general meeting of its shareholders together with a view of ascertaining their wishes in the matter. The articles of association of the company, annexed hereto marked "B," contain a power to reduce the capital of the company (article 56). Notices, a certified copy of which is hereto annexed marked "H2," were sent to the several shareholders of the company concerning an extraordinary general meeting. It was the unanimous feeling of such meeting that in view of the facts hereinbefore stated, it is desirable to reduce the capital as proposed, and the necessary resolutions were carried. A further special or extraordinary general meeting of members of the company was thereafter convened under the provisions of section 110 of the Companies' Act of 1892, in terms of the notice, which meeting was held as notified on Thursday, the 20th June, 1907, when the resolutions passed at the meeting held on the 5th June, 1907, were duly confirmed. All members of the company, without exception, are either resident in the Cape Colony or represented by duly authorised representatives. The various notices herein-

before referred to were in terms of section 66 of the articles of association of the company, duly delivered to all members or their representatives. A very large proportion of the company's creditors have notified their approval and sanction of the reduction in the company's capital. The creditors, according to the list, who have approved of the reduction in the company's capital, represent over 89-96ths of the company's total liabilities. The remaining creditors, representing about 1-90th of the company's liabilities, are creditors who are either not resident in the Cape Colony or whose indebtedness will be discharged during the current month, and in the usual course of business, or who are creditors from whom consignments of goods have been received on terms that the amount is payable on realisation. All preference shareholders, as well as the Colonial Orphan Chamber and Trust Company, as agents for the executors of the estate of the late E. K. Green, have approved of and sanctioned the reduction in the company's capital. The form of minute proposed to be registered is as follows: "The capital of the company is £144,000, divided into 14,400 ordinary shares of £10 each, instead of £200,000, divided into 5,600 preference shares of £10 and 14,400 ordinary shares of £10 each. At the time of the registration of this minute the sum of £10 has been, and is, to be deemed to be paid up on each of the said 14,400 ordinary £10 shares." Wherefore your petitioner, the company, respectfully prays that your lordships may be pleased to grant: (1) That an order may be made confirming the resolution for the reduction of the capital of the company, and approving the minute heretofore set out, and that for that purpose all proper directions may be given. (2) That the addition of the words "and reduced" to the name of the company and notices by advertisement may be dispensed with. (3) That failing such dispensation, all necessary and proper directions may be given, and that a day may be fixed on and after which the addition of the words "and reduced" to the company's name may be dispensed with. (4) Or that such other order may be made in the premises as to the Court shall seem meet.

Mr. Benjamin, K.C., for the applicants.

Mr. Benjamin said that all the creditors had consented, except a few who had not been consulted, and who were either not resident in the Colony or whose liabilities were simply the current liabilities to be met during the course of the month. The claims of these creditors were very small amounts.

[Hopley, J.: You say these are current creditors?]

Mr. Benjamin: Yes, current creditors, or creditors who have consigned goods on realisation.

[Hopley, J.: What I don't understand is, what is the object of reducing the capital of this company, seeing that it is a flourishing concern?]

Mr. Benjamin said the fact was that they had got too much capital; they had more capital than they actually required.

[Hopley, J.: What harm is there in that?]

Mr. Benjamin: The proposal is to return this capital to the shareholders, as not being required any further in the business; it cannot be profitably utilised in the business.

[Hopley, J.: Instead of having £200,000 of capital which they do not require, they want to pay out the cash to the shareholders, who are willing to receive it?]

Mr. Benjamin: That is so. As a matter of fact, the company is entirely a business concern, and all the shareholders are in the family.

[Hopley, J.: It is not a case of cancelling capital which has been lost or represented by unavailable assets?]

Mr. Benjamin assented.

Rule nisi granted, returnable on the 16th July, calling upon all persons concerned to show cause why the resolution for the reduction of the capital should not be sanctioned in terms of prayers (1) and (2), one publication in the "Cape Times," "South African News," and "Government Gazette" forthwith.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

VAN ZYL V. ESTATE MULLER ( 1907.  
AND ANOTHER. ) June 26th.

Mr. McGregor, K.C., moved for judgment under Rule 329d as against the first defendant, who had not entered an appearance, judgment in terms of a consent paper as against the second defendant, and judgment against the third defendant under Rule 319.

Judgment entered in terms of the consent paper as against the second defendant, and in terms of the declaration as against the first and third defendants.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

UPTON V. CORDER. } 1907.  
June 26th.

This was an action in which William Henry Upton, of Cape Town, sought to recover from Wm. James Corder, of Kimberley, the sum of £1,000 as damages for slander.

The plaintiff's declaration stated that he was a travelling representative of certain British hardware manufacturers, and resided in Cape Town. In or about February, 1905, the defendant falsely and maliciously published to one G. H. Upward, the manager of the hardware department of Messrs. Harvey, Greenacre and Co., of Durban, the following defamatory words of and concerning the plaintiff, contained in a letter, dated January 18, 1905, written by the defendant to the plaintiff, the said publication having been made by defendant showing the said Upward a copy of the letter at Durban: "I am surprised that you should address me again after our interview at East London, when I expressed so emphatically to you my contempt at your mean and dishonourable conduct. . . In the interview we had at East London, in the presence of Mrs. Corder, who, fortunately, has a perfect recollection of what occurred, you and I mutually agreed that whatever was said by either party was to be preserved in strict confidence. You gave your sacred word of honour to so regard our conversation, before a word of business was spoken between us. Now, from the statement in your letter to me, you have, for your own purposes, broken your pledged word of honour, and repeated part, at least, no doubt, of what was said to your employer, Mr. Howe," meaning thereby that plaintiff was a person of dishonest and dishonourable character. In or about March, 1904, at Port Elizabeth, the defendant falsely and maliciously published to one Mr. Parker, of Messrs. Collins Bros., the following defamatory words concerning the plaintiff: "There is something queer about him, otherwise his wife and family would come out to him," meaning thereby that the plaintiff was a person of undesirable character, and unfit to associate with respectable people. By reason of the premises, the plaintiff had suffered in his fair name and reputation, and had been much injured in his business. Therefore he claimed a full and unconditional retraction and apology by the defendant in writing, in respect of the injurious statements, the sum of £1,000 damages, and costs of suit. The defendant's plea admitted that he wrote the letter to plaintiff, and showed it to Upward. The letter was

written in reply to a letter written by plaintiff to defendant, which was also shown to Upward. The matters set out, even if they constituted a claim in law, were well known to plaintiff for more than a year prior to action being brought, and that any action was barred by prescription. The defendant denied the rest of the allegations.

In his replication, the plaintiff admitted that he did not institute his action until a year had expired, but owing to the absence of defendant, was unable to do so, but on his return, plaintiff demanded a retraction of the libellous statements and compensation in damages, whereupon defendant tendered to plaintiff £50, but as it was not accompanied by any retraction, he did not accept it.

The defendant's rejoinder denied the tendering of £50 as compensation.

Mr. Burton, K.C. (with him Mr. Inchbold), appeared for plaintiff, and Mr. B. Upington (with him Mr. M. Bisset) appeared for defendant.

William Francis Wood, a merchant residing in Cape Town, stated he was well acquainted with the parties in this suit. Mr. Upton came to South Africa in 1903. The defendant prior to that asked witness if he could recommend him a man for his business, and as a result of the conversation which ensued, witness at the instance of defendant wrote to Upton, offering him an agreement for five years at £360 a year. Witness had known Upton for some years before that. He bore an excellent reputation, and witness knew him about 20 years. Upton accepted the offer, and subsequently came out. Prior to Upton's arrival, witness saw Corder, who, owing to the depression which was then setting in, seemed sorry he had engaged Upton. When plaintiff arrived, witness took him to defendant, who did not seem inclined to keep to his agreement, and offered Upton other terms. This offer was £10 a month salary and commission. A heated discussion ensued, and Upton declined to accept the new offer. Witness received from Upton a letter dated February 15, 1905, which he showed at Upton's instructions to Corder. Nothing came of that letter. Witness during a conversation with Corder got the impression that he was willing to pay £50 damages, and he told Upton. No definite order, however, was made.

In cross-examination by Mr. Upington, witness said that as Upton was a very old friend of his, he wrote to him regarding the trouble he had had with Corder. Upton was willing to go into Corder's employment in October, 1905; that was after the libels complained of were uttered. Witness knew nothing about Upton's refusal of a partnership with Corder's son. Witness was at home in July and August of 1905. Witness did not show the letter of October 12 to Corder. Before the arrangement for Upton's coming to South Africa was

made, witness received a letter from Upton stating he had made up his mind to come to South Africa.

William Henry Upton, the plaintiff, stated he came to South Africa in 1903, and prior to that lived in the Isle of Wight. He had been in the ironmongery trade about 34 years, and now represented many leading English firms. Witness on arrival went straight to Mr. Wood, and they went together to see Mr. Corder. Mr. Corder said to witness, "You know, an agreement between South Africa and England is not binding." Corder told witness that instead of paying him the salary he offered he wished to make him take an interest in the business, and would pay him a salary and commission. This witness refused to take, and went into partnership with a Mr. Scott as a commission agent. At Durban witness met a Mr. Upward. Witness subsequently approached Mr. Corder, because he did not feel at home travelling in "soits" when he was a "hards" man, and on November 20 received a communication from Corder in which he stated that witness, when he first landed in South Africa, weighed the offer made by Snow against his. That was not correct, because on board witness thought Snow was a missionary, and as a matter of fact he was not far wrong, because they held services at various towns visited.

Mr. Burton: It was not inconsistent with his being a soft goods man when you found he was a missionary.

Witness, continuing, said that in January, 1904, the negotiations with Corder fell to the ground, and witness took service with Mr. Howe. In November, 1904, at Corder's request, he had an interview with him at East London, when Corder invited him to leave Howe and join his son on equal shares—a partnership. Witness rejected the proposal, whereupon Corder called him a liar and a cad. A number of letters were put in, which Mr. Burton said brought one to the kernel of the case.

[Buchanan, J.: You have been a long time getting at it.]

Witness went on to say that when he left Howe after six months' notice he went to England in January, 1906, and returned in June, when active steps were taken to prosecute the present action. When served with notice of the intended action for slander, the defendant wrote denying it, and added that Mr. Upton had injured him. The statements made by defendant had affected him both in business and in social life. Being musical, he had entry to the houses of some of the wealthiest merchants in the country, but since these libels had been circulated, the invitations had dropped off. In business circles he had been informed that the chiefs of many businesses avoided him, and his connection consequently fell off. He gathered from conversations he had had



with Wood that the defendant would be willing to pay him £50.

Mr. Upington at this stage applied for permission to amend the plea so as to allow of prescription.

Mr. Burton contended that that plea should have been made when the case came on.

Mr. Upington quoted in support of his case that of *Harris v. Jordan*, reported in 13 Cape Times Law Reports, pages 216-219.

Buchanan, J., said that application was now made to amend the plea by inserting a plea of prescription. This was an action for slander, and it was alleged that the slander took place in March, 1904, and the plea was a denial of the utterance of the slander. He thought the defendant might have pleaded it in the first instance, and, looking at the words used, he thought Mr. Upington was too late in making his application.

In cross-examination, the plaintiff stated that he was bound to secrecy when interviewed by Corder at East London, but he was released from that. Witness was prepared to enter into partnership with Corder. He did not favour it very much, but his whole future rested on that. At the interview that took place, Mr. Corder told witness his thought of retiring, and asked witness to enter into partnership with his son. Witness saw through Corder's idea, which was that they would have some of Howe's agencies. Witness admitted having told Corder that Howe was very genial.

Witness went straight to see Howe, because he feared Corder would go and see Howe, as he threatened to do so. On December, 1904, witness tried to "collar" Corder's agencies, and felt himself justified in doing so, because of the libels.

Mr. Parker, of Port Elizabeth, stated that plaintiff used to visit him, but that in view of what he had heard from Corder he dropped his society.

In reply to Mr. Upington, witness said he had heard something else about Upton. He had had a little unpleasantness with Corder, and had not any business dealings with him since. Witness told Upton what Corder had said. Witness had not refused to purchase goods from Upton on account of what he had heard.

In re-examination, witness said the trouble with Corder had reference to the hire of a sample room.

George Henry Upward, until recently manager of Messrs. Harvey, Greenacre, and Co., Durban, stated he knew both parties to this suit. He first met plaintiff in 1903. Before that he was informed by Corder that he was getting somebody out from England. Corder called on witness, and asked him if he had seen Upton of late, and asked witness to endeavour to get Upton to write pri-

vately to him with regard to opening up of negotiations.

[Buchanan, J.: When was that?]

Witness: About 1905.

Mr. Burton: I think you are wrong, because the correspondence is dated 1903.

Witness: It is 1903, my lord.

Counsel, continuing, read a series of letters, which passed between witness, Corder and Upton regarding the position.

[Buchanan, J.: I really do not see that those letters are at all revelant to the case.]

Mr. Burton: It has been said that the witness favoured Upton, but I want to show that he acted on behalf of Corder.

Witness, continuing, said that Corder forwarded him a copy of the letter he had sent to Upton, and witness remarked that he thought it libellous. Witness and Corder often discussed Upton. The letter created a suspicion in witness's mind with regard to Upton for a time, until witness had heard from people residing in Upton's native place.

In cross-examination, witness said he had resigned his position with Harvey, Greenacre and Co. If a man broke his word of honour to witness he would lose faith in him.

Mr. Burton closed his case.

William James Corder, the defendant, stated his firm represented several Home firms. He admitted the evidence with regard to the arrangements for engaging plaintiff. He next saw Upton in Durban. It was Upward who suggested to witness that he should engage Upton. At East London, witness again met him, and before witness discussed anything with him, he bound him by his honour not to repeat a word of the discussion, and after some shuffling, he agreed to do so. Witness then suggested to him that he should go half shares in the business with his son. Other things cropped up, and plaintiff said that he could bring other agencies into his business, amongst which was that of Howe's. As a conclusion to the interview, he asked to be allowed to sleep over the offer, and next day came back and said he was not satisfied with half shares. After some further discussion, witness told him they could not agree, and reminded him of his promise to keep everything private. They had a third interview, and he told witness that he was going to take his agencies. Witness told him he was glad he knew the kind of man he was, and that he had not left the destinies of his son with him. Upward had acted as intermediary between plaintiff and defendant, and when witness was in Durban in June, he showed Upward the letter he had received from Upton, and also his reply. Witness denied that he had ever imputed anything against Upton's character.



The defendant, cross-examined by Mr. Burton, denied that the plaintiff came out to South Africa under engagement to him. Witness withdrew the offer definitely by letter before the plaintiff came out. At the interview at which Mr. Wood was present, and upon plaintiff's arrival, witness did not back out of the engagement. Mr. Wood was very deaf, and could not state with certainty what took place at the interview. Witness withdrew the offer before the plaintiff left England, and gave him to understand that the details could be arranged upon his arrival in South Africa. Mr. Upward suggested that the plaintiff should apply to witness, and correspondence took place, of which nothing came. The man was not necessarily a good man of business, although he was a pushing traveller. Up to March, 1904, there was no reason why he should not have a perfectly friendly feeling towards the plaintiff, although in the previous January he wrote to Upward, and in the course of the letter he said he did not know why a man so brilliantly endowed as the plaintiff should ever have come out here at all, leaving his wife to earn her own living in England. He thought there was nothing unfriendly in that remark. He denied that he said to Mr. Parker there must be something queer about the plaintiff, otherwise his wife and daughters would come out to South Africa. Witness and Mr. Parker had a little quarrel, and had not met for some time.

What position do you take up with regard to the words in the letter of the 18th January: "I am surprised you should address me again after my interview at East London, when I expressed so emphatically my contempt at your mean and dishonourable conduct?" Do you say you were entitled to use these words?—I used them.

I want to know your position because there is no plea to that effect. Do you say you were entitled to use these words?—I did use them.

We know you used them. Do you say he acted in a mean and dishonourable manner?—Certainly, he threatened he would do so.

What do you refer to?—That he would break his word of honour to me, and use the information, and apply for my agencies.

That he had broken his word in divulging what he heard?—Yes.

And threatened to apply for your agencies?—Yes.

You put him under a pledge of secrecy that he would not say a word to anyone?—Certainly, I did.

You yourself were not under such a pledge about this conversation?—Yes, the interview was understood to be in strict confidence on both sides.

When you parted with him from East

London, did he accept your offer?—No, I broke off all negotiations.

You kept cool at the interview?—I did, but the plaintiff got excited.

You buttoned up your coat?—Yes, I was prepared to receive cavalry.

He was going to apply for your agencies whether you liked it or not?—Yes.

He threatened he would get them with or without your leave?—Yes.

He wrote to you on the 10th January that he intended making application to the several firms you represent for their agencies, seeing that you told him you were about to retire. He said he had made up his mind to do so, and he asked you whether you would recommend him for those things?—I did not say I was going to retire. I made it quite clear I was not going to retire unless I arranged a suitable way of carrying on business with my son in partnership.

You wrote to him that there were other facts concerning him which threw a fresh light altogether on his character, concerning his private and domestic life past, present, and contemplated future, and if he was aware of what you knew he would dance with vexation. Why did you put that in the letter?—I wrote back to him what I knew. I put the history of our relations in a truthful way. I was angry at the time. My prime object in writing was to show that there was no truth in the rumour the plaintiff was trying to circulate that I was going to retire.

If you had had time to reflect you might not have put that into the letter?—I might not.

What made you after you had time for reflection show this statement to Mr. Upward?—Mr. Upward is a friend of both parties, and he was anxious in my interests that this man should work for me as a traveller. When I went to Durban in January, 1905, I called in to see him, and he told me that the plaintiff had been to him, and told him all about the interview at East London, and gave the usual wrong impressions about it. I said it was absolutely incorrect. I said I had recently received a letter from Upton in which he threatened to apply for my agencies. I then read a copy of my letter to Upward quietly in order to right myself in his estimation.

You read the whole of the letter?—I cannot remember if I read every word of it.

You said you would not leave a lady in the room with him?—I would not leave my wife with him. He had just said he would give me a — good hiding, and I certainly would not leave my wife with him.

Mrs. Corder, wife of the defendant, corroborated her husband as to what took place at the interviews. Her husband reminded the plaintiff of his promise to secrecy. Upon the third interview the plaintiff said he had decided

to take over her husband's agencies. When the plaintiff said so he was white and trembling. Her husband told him that his behaviour was mean and contemptible, and called the plaintiff a "cad." When the plaintiff said he would like to have a talk to her on the matter, her husband said, "I would not leave a lady in the room with you." The plaintiff then said, "You had better be careful what you say. I shall give you a — good hiding."

Frank Corder, son of the defendant, denied that his father made the remark to Mr. Parker, as to something being queer about the defendant, otherwise his wife and family would come out to him.

Mr. Upington closed his case.

Counsel having been heard in argument on the facts:

Buchanan, J.: This is an action brought by plaintiff for the vindication of his character. He alleges that about January, 1905, the defendant wrote the following false and defamatory words in a certain letter to the plaintiff, viz.: "I am surprised that you should address me again after our interview at East London, when I expressed so emphatically to you my contempt at your mean and dishonourable conduct." The declaration makes a further quotation from this letter to show what this dishonest and dishonourable conduct was alleged to consist of. In effect it is that there had been a private conversation between the parties, and at this private conversation the plaintiff gave his "sacred word of honour" to consider the conversation which was about to take place between them as strictly private, that he broke his word, in that he afterwards informed his principal, Howe, of what had taken place, or, at any rate, of part of the conversation. Had the matter remained there, there probably would not have been this action, but shortly after the letter was written the defendant was in Natal and saw one Upward, who is a friend of both parties, and a conversation about plaintiff took place between them. Some remark was made about plaintiff's conduct, whereupon the defendant took out a letter dated 10th January which he had received from the plaintiff, to which the letter complained of was a reply, and he read these two letters to Upward. This constituted a publication of the defamation which the plaintiff now complains of. The letter of the 10th January is, in the plea, averred to be the justification for the defendant writing the letter of the 18th January. It is admitted on both sides that the conversation between the parties took place under the pledge of secrecy, and that notwithstanding this pledge it had been revealed by plaintiff to Howe. The defendant said he was justifying his conduct to Upward by giving both letter and justification to him to read. Up-

ward had, therefore, the poison and the antidote, if there were poison at all, supplied at the same time. There is, however, no plea of justification or truth put upon record. But in an action of this nature where the plaintiff comes into Court complaining of injury done to his character one has to look at the actual facts as disclosed in evidence, to see in how far he has been damnified. Both parties are agreed that this conversation took place at East London, and the plaintiff was pledged to secrecy. There is no doubt that the plaintiff broke this pledge, and there is also no doubt that his so doing called forth the indignant remonstrances which the defendant has written. It is remarkable after the plaintiff's admission that all negotiations between the parties were broken off without any agreement being come to, that immediately afterwards we find plaintiff cabling to his principal, Howe, in England, "Agency has been already promised me by Corder." If this is the kind of interpretation which the plaintiff put on what took place, I am not surprised at his misunderstanding other conversations which took place afterwards. Apart from any question of justification I should not have felt myself justified in giving any damages, or, if any, only the most moderate amount possible under the circumstances disclosed by the evidence. But the plea has set up the defence of prescription. In my opinion this plea is a perfectly good defence. The letter upon which this part of the action is founded was shown to Upward in January, 1905, and in February this fact was brought to the plaintiff's notice. The defendant had been carrying on business in Cape Town for fourteen years, and had a place of business here, and could have been served with legal process there at any time. In March he temporarily left the Colony, returning again in November, but no action was instituted until the 16th of October of the following year. Absence from the country might interrupt prescription where it is an obstacle to the prosecution of the action, but in this case the temporary absence of the defendant was not any such obstacle. An analogy we can draw from our Cape Act of prescription, although it does not refer to the matter of defamation, as to the principles which govern prescription in regard to absence from the Colony is against the plaintiff. The 11th section of Act 6 of 1861 enacts, where persons are absent from the Colony, as follows: "If at the time when any such cause of action as is in this Act mentioned first accrued the person against whom such cause of action had arisen shall be absent from the Colony, then the person to whom such cause of action so accrued shall have the same time after the return of such other person to this colony within which to bring his action as he would have had had the

person been in the Colony when the cause of action first accrued."

Where a person is only temporarily absent from the Colony and has a place of business here where he can be served, and when he returns within the year, there is nothing in this section nor in any law as far as I am aware that makes the temporary absence for a portion of the year a ground for interrupting prescription from running. I think, therefore, that both upon the facts and upon the law of the case the plaintiff has no right to recover upon the first claim in the declaration.

The ground of plaintiff's second claim is, that in or about March, 1904, and at Port Elizabeth, the defendant said to a Mr. Parker, referring to the plaintiff: "There is something queer about him, otherwise his wife and family would come out to him," and the innuendo is that plaintiff was a person of undesirable character and unfit to associate with respectable people. It has been argued that these words do not in themselves form any slander and that the innuendo which has been drawn from them is not justified. The words are not necessarily actionable, and no special damage arising from their use has been proved. At any rate, Parker, to whom these words were alleged to have been used, when under cross-examination, said they were used in a casual manner during his conversation with defendant. No special damages have arisen from the uttering of these words, as they did not prevent Parker from giving plaintiff an order for goods. Parker goes on to say that he had only referred to this remark alleged to have been made by defendant in a conversation he had with plaintiff in November, 1904: Parker and plaintiff were then discussing the defendant. The remark, if uttered at all, was, as Parker says, made in a very casual way, *apropos* of nothing at all, and it did not stop business transactions between Parker and plaintiff. This casual observation was not repeated by Parker until nine months afterwards. It is quite possible under these circumstances, if anything was said in March, there may have been some misunderstanding or want of recollection of the words uttered so long before. The defendant denies having used the words, and if I was forced to say as a juror whether or not these words had been uttered I would give a verdict of non-proven. Then there is the fact that although these words were brought to the plaintiff's notice in November, 1904, in the letter which was written by the plaintiff in February, 1905, there is not the slightest reference made to them. All he complains of in that letter is the showing to Upward of the letters which passed between the parties. In that letter he says:

"If I learn of one more instance on your part prompt legal proceedings will

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be taken, no matter in what country or manner, verbally or otherwise, the offence is committed."

Now, although the plaintiff writes in this way, in the very next month of March he alleges he heard of something further said by plaintiff, and yet he took no prompt legal action. Although the claim for damages founded on what was alleged to have been said in March has been withdrawn, it has transpired during the hearing that the remark was alleged to have been made to one Chappell at Johannesburg, and that it contained a reflection on the plaintiff's moral character, which would be *prima facie* actionable. Yet it is a very curious thing that in all the correspondence that took place after consultations with attorneys and in several letters of demand, nowhere is this alleged defamation set forth by the plaintiff. The letters were all in general terms, and all through the answer to all these letters was a repudiation of the uttering of any slander. It was only after the matter had got into the hands of the present attorneys for the plaintiff, in August, 1906, that the details of the alleged slanders were given. Thereupon the defendant at once wrote to Chappell, and got a reply from him which the defendant at once communicated to the attorneys for the plaintiff. He wrote to them: "I immediately wrote to Chappell, and requested him to inform me whether it was true," and he adds, "Chappell expresses his surprise at Mr. Upton's statement, and absolutely repudiates that I made any such statement in reference to Mr. Upton to him, and he advises me to treat the matter with contempt." Mr. Chappell goes on to say that "Upton had been in to see me many times about the time you refer to, and had all sorts of accusations against you, was constantly interviewing lawyers, and constantly showing me the letters which he was writing. He always seemed to be agitating for some legal proceedings against you." Now, where a disavowal like this is made, and the attorneys are told before action that there is no evidence for the statement, that the person to whom it is alleged to have been made had been communicated with and had expressed his surprise and absolutely repudiated any such statement, it is really strange that the matter got into the declaration at all. It was this third charge which made the case look black against the defendant, but at the outset it was withdrawn, and is not any longer before the Court.

I have now examined all the charges contained in the declaration. As the case now stands the only thing for which I am asked to give £1,000 damages is the statement that the defendant had said to Parker that "there is something queer about Upton, otherwise his wife and family would have come out to him." If there had been a plea to that

effect, this cause of action would also have been prescribed, but only a denial has been pleaded. Now, an action for defamation is usually instituted by a person who feels aggrieved by an attack on his character and who is desirous of having his reputation cleared, and a delay of years before suing is a matter to be taken into consideration. Here we have a plaintiff fully cognisant of all these alleged slanders, who months after the charges had come to his notice writes to his friend, Mr. Wood, to whom he originally wrote before coming out to the Colony, asking him to meet the defendant on his return from England, and to try to get him to take the plaintiff as a partner, or otherwise to get plaintiff to hand over his business to him. This is the man who, when he has failed to accomplish a partnership, now comes into Court to vindicate his character. He tried to use these alleged slanders as a lever to secure a business advantage. He seems to have thought that the defendant was in mortal terror of an action, and would be anxious to appease the plaintiff. He therefore took steps, not to vindicate his character, but to get defendant to enter into a partnership. Mr. Wood, in a reply which he sent to the plaintiff, must have given him some good advice, for he then sent a formal letter to Wood, which he wanted submitted to the defendant on his arrival—the letter written from East London on the 15th November. The private letter written to Mr. Wood is altogether inconsistent with the formal letter which Wood was asked to submit to the defendant. In the private letter he urged Wood to use his best efforts to get the defendant to communicate with him. In the formal letter he indicates that he is quite open, if the defendant prefers to deal with him direct, "to negotiate calmly and dispassionately and with a real desire to bring about an understanding mutually agreeable." Taking everything into consideration, I can only say that I must give judgment for the defendant, with costs.

[Plaintiffs' Attorneys: Syfret, Godlonton and Low. Defendant's attorney: G. Trollip.]

STEYN V. STEPHANY. ( 1907.  
( June 26th

This was an application brought by Richard W. F. Steyn, of Cape Town, against Myer Stephany, trading as Stephany and Co., of Upington, Division of Gordonia, for judgment under Rule 319, in default of plea, for an order of ejectment and damages.

From the declaration, it appeared that plaintiff is the owner of certain landed property, and that he claimed an order of ejectment and £500 dam-

ages against defendant for illegally occupying the property.

Dr. Greer was for plaintiff; defendant did not appear. A man, who gave the name of Greenberg, appeared, and said that he owned the business, and that Stephany was his manager. Greenberg said that he only appeared to ask the Court to be lenient in the matter of the damages claimed.

Hopley, J., said that defendant had been barred, and, strictly speaking, he was not entitled to be heard in the matter.

Abm. C. Kruger, articled clerk in the office of Dempers and Van Rynveld, gave evidence as to having served notice of bar and set down on defendant's attorneys.

Richard W. F. Steyn, the plaintiff, said that prior to March, 1905, he was the owner of certain erf No. 139, at Upington, and in or about that month he bought from his sister, Mrs. Jay, erf No. 138. At that time the latter property was let to Varim Abraham and Co., under lease. Witness recognised Abraham and Co. as his tenants. The rent was £2 2s. a month. In June, 1905, a new arrangement was entered into, whereby the tenants gave up one half, and he reduced their rent to £1 ls. a month. About August, 1905, he was led to believe that negotiations were taking place between Abraham and Co. and Stephany for the transfer of Abraham's business. He pointed out to the parties that they had no right to sublet the property without his consent, and he said that he would not be prepared to consent unless the rent were raised to £5 a month. The war in German South-West Africa was then going on, and rents in Upington were very high. Hardly a room was to be got. The parties offered him £4 a month, but this he declined to accept. They then said that the business would be carried on under Abrahams and Co. Shortly afterwards, he found that goods had been consigned to Stephany, and the latter individual explained that they had been so consigned because they thought the transfer would go through. Witness found that a licence was taken out in the joint names of Stephany and Abraham. The rents were paid as they became due by Stephany, and receipts were given to Abraham and Co. In February last, witness was informed by Abraham that the defendant had received £190 from him in payment of any difference in the rent after he had given up his tenancy. Witness claimed delivery of the erf and buildings thereon, and £150 damages. The buildings consisted of an iron structure on a brick and stone foundation.

Varim Abraham, a Moslem, said he had carried on business as Varim Abraham and Co. He had had a shop at Upington. He had had an assistant to



look after the shop. Subsequently he sold the shop and effects to D. Greenberg. He went with Mr. Stephany to Upington, and they took stock. He had not known before then that he was prohibited from sub-letting under the lease. Witness agreed with Greenberg to let him have the goodwill, shop, effects, and stock for £2,570, and he also entered into a further agreement whereby he undertook to make an allowance to Greenberg equal to any difference in the rent, the rent not to exceed £5 a month. Witness deducted from the money owing by Greenberg the sum of £190, representing the amount of the difference for four years' rent. Witness had not given the defendant any authority to use his name after the conclusion of the sale.

Defendant said he desired to ask the witness whether he paid £200 for the goodwill, and £203 for the building.

Witness said that that was so.

Defendant said that the sum of £190 did not represent merely the rent, but also included bad debts. It was in the nature of a compromise.

Witness said that the figure represented the difference in the rent simply.

Plaintiff (recalled) said that there had been somewhat of a reaction in property values in Upington since the close of the war. Witness was not anxious to have the iron building which had been put on the erf; in fact, he would not mind if it were removed from the ground, because it was an eyesore to the place. He did not desire to continue the defendant as tenant even at an increased rental.

Dr. Greer submitted that plaintiff was entitled to damages up to the time when the ground was vacated.

Hopley, J.: In this case the defendant is in default, and has been barred, and is not entitled any longer to appear, and he has not requested that the default should be purged, and that he may be allowed to plead, and the result is that this is practically an undefended action. The evidence shows that the firm of Varim Abraham and Co. had hired certain premises, the property of the plaintiff, originally from his sister, and afterwards by arrangement with himself, when by purchase from his sister he became the owner. The terms of that lease seem to be that up to 1910 Varim Abraham had the right to remain upon the premises subdivided, as the plaintiff afterwards subdivided them, at £1 ls. per month, but there was a clause prohibiting any sub-letting without the written consent of the landlord, the plaintiff in this case. Afterwards Stephany and, also, apparently Greenberg, who has appeared here to-day, negotiated with Varim Abraham and Co., and Stephany went up there to take stock, and take over the business. Plaintiff heard of this, and he called the attention of the contracting parties

to the fact that there was no right to sub-let, and they thereupon left him under the impression that they were still going to carry on the business as Varim Abraham and Co. Thereupon apparently he got legal advice that as long as they did so the conditions of the lease would be fulfilled, and he could not insist upon any higher rental or claim that there was any breach of the agreement of the lease. It appears that about that period, owing to the existence of the war in Damara-land, Upington, which, I suppose, was a sort of distributing centre for stores, etc., was in a state of inflated prosperity just for the time being, so that rents were considerably higher than plaintiff was getting for this property. He, therefore, when it was proposed to transfer the business from Abraham and Co. to Stephany, refused his consent to an assignment of the lease, unless the new firm would agree to pay £5 a month instead of £1 ls. per month. He was put off and apparently left with the idea that Abraham and Co. were not actually going out of the business. That now appears to be not correct. When one looks at the agreement between Varim Abraham and Co. and defendant, it shows that there was an actual transfer of the whole of the business, building, etc., for £2,000 odd, and that there was an assignment of this lease, and, more than that, there was a supplementary agreement by which Abraham and Co. agreed to pay defendant the difference between £1 ls. a month and whatever rental Stephany and Co. might have to pay to the landlord, provided that such rental did not exceed £5 a month. There was actually a compromise come to, and Abraham allowed £190 to go off the purchase price on that account. This goes very near being a fraud on the landlord. Defendant sought by underhand means to rob the landlord of his right of getting the increased rental in the circumstances for his premises, which the circumstances of the time seemed to warrant him in demanding. Apparently also Abraham's name was made use of in taking out the licence, in conjunction with Stephany, to lend colour to the idea that Abraham was still in the business, and to afford a defence in case the landlord moved for ejectment against the new firm or a higher rental. By these means it was sought to blind him, and they did for a long time apparently blind his eyes, for he went on receiving £1 ls. a month, which was paid as if by Abraham and Co. Clearly, the landlord was being defrauded to a certain extent, and he is now right in coming to show that there has been a breach of the agreement of lease, and he can claim an ejectment of these parties who played this trick upon him, and also he is clearly entitled, to my mind, to some damages, because,



undoubtedly, the property was worth more than £1 ls. at the time. He did actually ask £5 a month, and the defendants, by their conduct, deprived him of the extra money which he thus would have got. I cannot say I can take into consideration any further amounts he might have had by the more favourable terms of a lease that he might have entered into with others. What I do feel, is that the measure of damages must be gauged by the fact that the defendants had for a certain time lived unwarrantably upon his property in a manner in which they were not entitled to do, on the proper interpretation of the contracts existing between the various parties interested in this piece of land. They seem to have been there some 20, or by the time they leave, some 22 months, and there is a difference of something like £4 a month between what they were paying and what they ought to have paid. It is not too much to put it at that, and for the time that the defendants had been there, they must pay damages. The order of the Court is that they do vacate the premises forthwith, and give up possession thereof to the plaintiff; they must remove the buildings that they put thereon, as the landlord says he does not want them, provided that they leave the land in the same state as it would have been if there had been no buildings erected there at all, and they must pay £88 as damages and costs of suit.

#### REHABILITATION.

Mr. Toms applied, under the 117th section of the Ordinance, for the rehabilitation of Minnie Annenberg.  
Granted.

#### GENERAL MOTIONS.

*Ex parte* RUBENSTEIN { 1907.  
June 26th.

Mr. Palmer moved for an order authorising transfer to petitioner of certain lots of property in the Oakdale Estate, Durban-road, which had been bought by one Alfred Alex. Crichton from Messrs. Bradford Poole and Co. Crichton had borrowed £25 from petitioner and had failed to repay the money, and petitioner claimed the lots under an acknowledgment of debt and agreement to cede. Crichton had never obtained transfer of the land.

[Hopley, J.: I may give you leave to sue Crichton by edictal citation. There will be two transfers to pay for.]

Mr. Palmer said that Crichton had disappeared, and his address was unknown. He cited *in re Cradock Building Society* (13 S.C., 99).

The matter was ordered to stand over until to-morrow, applicant to file an affidavit as to Crichton's whereabouts.

*Postea* (June 27th).

Counsel put in an affidavit, from which it appeared that Crichton's whereabouts were unknown.

Leave to sue by edict granted, citation to be returnable on the 14th August, one publication in the "Government Gazette" and "Cape Times," citation, interdict, and notice of trial to be published together.

#### HOFFMAN V. TOWN COUNCIL OF CAPE TOWN.

Mr. Lewis moved to make absolute a certain rule nisi admitting petitioner to sue the Cape Town Council *in forma pauperis* for £200 damages alleged to have been sustained owing to the acts of the respondents' servants.

Mr. McGregor, K.C., appeared for the respondents to show cause against the rule being made absolute.

The matter, it appeared, arose out of a fire in Harrington-street on premises of which petitioner occupied one room. He said that owing to the acts of the Council's servants a wall was knocked down and goods that he had stored in a room were buried in the debris so as to be rendered worthless. The applicant first sent in a claim to the Council for £400. This had been investigated by one of the committees, who had come to the conclusion that petitioner had no good ground of action against the Council.

Affidavits were now put in from which it appeared that the Council took up the position that the Fire Brigade had acted within the scope of their authority under Act 26, 1893, that the wall in question was knocked down because it was a danger to life and property, and that it was by no means clear that petitioner was a pauper.

Mr. McGregor examined applicant as to his means and addressed the Court briefly in argument.

Hopley, J.: I think in this case the rule should be made absolute and that leave should be given to sue *in forma pauperis*. It is impossible upon the state of the affidavits at the present moment to say that there is not a good case by the plaintiff against the defendants, and it is not shown clearly and cannot be shown without investigating the facts, that the law protects the servants of the Council in the acts which they have done. As far as one can see, considerable damage was caused to the plaintiff, as far as one can gauge he is at present a pauper, and if there is any damage to him for which the Council is responsible, he should have an opportunity of prosecuting his claim. After what has fallen from him in court, it is

quite possible that the Council, on going more deeply into the matter, may find it advantageous to avoid a prolonged suit, especially as, if they were not unsuccessful, they would not get much out of a man in the position of the plaintiff. They will see whether they can settle the matter without going further. The rule must be made absolute, Mr. Lewis to be counsel and Mr. Frank to be attorney to the petitioner, such costs as there are to be costs in the cause.

## SUPREME COURT

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

CALEDONIA LANDING, SHIP-  
PING, AND SALVAGE CO. } 1907.  
LTD., AND ANOTHER V. } June 27th.  
EAST LONDON HARBOUR  
BOARD.

Amendment of judgment — Interest.

*Some months after a judgment in favour of the plaintiff, which was silent as to interest, had been pronounced, the plaintiff applied for an amendment of the judgment by allowing interest to run thereon.*

*Held, that the Court had no power to amend its own decree.*

This was an application for an amendment of the order granted by the Court on the 6th September last, in an action brought by applicants against respondents for damages arising out of a freshet in the Buffalo River.

Mr. Benjamin, K.C., was for applicants; Mr. W. Porter Buchanan, K.C., was for respondents.

Mr. Benjamin said that the actions came before their lordships, and damages were given against defendants in the one case for £3,000, and in the other for £250. The order of the

Court was, however, silent as to interest, and now the applicants asked that interest should be added to the judgment. Counsel read an affidavit by Mr. G. B. van Zyl, plaintiffs' attorney, who said that on the 27th November defendants applied for leave to appeal from the judgment of the Court to the Privy Council, and at that time the present applicants applied for an amendment of the order granting interest *a tempore morae* on the amount of the respective judgments. The respondents, by their counsel, opposed the granting of interest *a tempore morae*, but did not oppose interest being granted from the date of the judgments. Deponent annexed correspondence which had passed between the attorneys on the respective sides, in which the respondents took up the position that they were not prepared to consent to interest beyond the 27th November, 1906.

Mr. Buchanan read a replying affidavit by Mr. Walker, respondents' attorney, in which he said the Board did not admit that such an understanding as was alleged by applicants existed or exists.

Mr. Benjamin said that the first-named applicants had not proceeded to execution, and that the whole amount of £3,000 was still outstanding. The Court granted leave to appeal in the larger case, but refused leave in the case in which the Colonial Fisheries Co. were plaintiffs. Counsel went on to say that no substantiative application was made for interest on the 27th November last. Interest was, however, claimed in the action, both on the summons and the declaration. He submitted that if application had been made when judgment was given, the Court would have allowed interest. The respondents had lulled the applicants into a sense of security, and they now took up this position in consequence of the decision of the Court that interest did not run from the time of judgment in the case of *Buffalo Supply and Cold Storage Co. v. Federal Supply and Cold Storage* (17 C.T.R., 345). Counsel submitted that applicants were entitled to interest on both the £3,000 and £250.

Without calling upon Mr. Buchanan, De Villiers, C.J.: The rule is that when once the Court has pronounced formal judgment it has no power to alter its own decree. It is unnecessary to consider whether, and to what extent the Court may amend, or even set aside a judgment obtained by fraudulent means, for no question of fraud arises in the present case. It often happens that before the Registrar draws the formal order the Court has to be consulted as to its precise terms, so as to ensure that the intention of the Court shall be carried out. But when once that order has been drawn and delivered to the parties

the only mode of amendment is by way of appeal to a higher Court. It is said that Mr. Schreiner had admitted that interest would run from the date of judgment, but there is nothing to show that that admission was incorporated in the judgment or was accepted by the Court as a sufficient ground for amending the judgment. On the contrary, it appears from the Registrar's note that the Court refused to amend the order, and my own note says nothing about any amendment at all. Well, there was a practical refusal on the part of the Court to make any amendment at all, and it is impossible, therefore, now, for the Court to make an amendment so as to give interest from the date of the judgment. It is no doubt a case of considerable hardship as regards one of the applicants, because the Privy Council, in giving the leave to appeal, has stayed execution, so, as to that, plaintiff is now debarred from obtaining execution, and he may have to wait a couple of years before obtaining his money if he should succeed on the appeal. As to the other claim, I do not see that there is very great hardship, because it is still open to issue execution and see that the money is paid before the appeal is heard. However much the Court sympathises with the applicants, it is impossible to grant the application. The application will be refused, with costs.

Hopley, J.: I concur. My note, which I sent for, is silent on the point of interest.

[Before the Hon. Mr. Justice HOPLEY.]

#### GENERAL MOTIONS.

*Ex parte* PETRUSVILLE { 1907.  
PROSPECTING SYNDI- { June 27th.  
CATE, LTD.

Mr. Wallach moved for a winding-up order in the case of this syndicate, and the appointment of an official liquidator. The petitioners stated that the company was registered under the Companies Act, 1892, on the 20th September, 1906, with a share capital of £14,560, divided into 728 £20 shares. The company was formed to carry on exploration and prospecting business, and acquire prospecting rights over several farms in the Colony. Since the registration of the company prospecting works had been going on, but the shareholders had decided to abandon all their rights over the farms and cease prospecting. At a general meeting of the shareholders held on the 14th June, 1907, the shareholders resolved that the company be liquidated, and authorised the directors

to apply to the Court for a winding-up order. Petitioners prayed that the company be placed under liquidation and that Jacobus Higge be appointed liquidator, with powers under section 149 of the Companies Act, 1892, and power to appoint a solicitor and agent.

Rule nisi granted placing the company under provisional liquidation and appointing Jacobus Higge as provisional liquidator, with powers under section 149 of the Companies Act, and power to engage the services of an attorney-at-law if necessary, rule returnable on the 1st August, publication in the "Cape Times," "S.A. News," and "Oms Land."

#### VAN HEERDEN V. JOOSTE.

This was an application brought by Hannah Elizabeth van Heerden (born Jooste), of Krugersdorp, Transvaal, upon notice to Frans D. Jooste (defendant in the action), for leave to take the evidence of certain witnesses on commission, viz., Willem S. van Heerden and Petrus Johannes van Heerden.

It appeared that applicant claimed a certain inheritance in an estate of which respondent is executor. The respondent had filed a claim in reconvention, and it was principally in reference to this that the action would be fought. The applicant desired a commission to sit at Krugersdorp to take the evidence of the two witnesses, both on the ground of expense and convenience. Respondent urged that it was of the utmost importance that the witnesses should give their evidence in the Court, as the question of their credibility was raised, and that if a commission were granted he would be greatly prejudiced in his defence.

Mr. McGregor, K.C., was for applicant; Mr. Benjamin, K.C., was for respondent.

Counsel having been heard in argument on the facts.

Hopley, J.: Looking at the present application, I cannot see that there is any pressing necessity for the granting of this application. It is not alleged by the applicant that she will lose, or that she cannot get the evidence of these witnesses, or that it is highly improbable that they will be able to come here to give their evidence. All that she says is that the expense of getting them to Cape Town is enormous. One is her husband, and one would suppose that it would be a good thing that he should travel down here to protect her and assist her, as far as need be, in the prosecution of this case. Whether they are married in community or not, they are both closely interested in the result of this action, and as he is assisting her, it is right *a priori* that he should come here with her and see her through the various stages of this action, which she

says she is compelled to bring to establish her rights. The other witness, as I understand, is a near relation of her husband, who is at present at the same place, Krugersdorp, where they are, and they are ready and willing to give their evidence there. The expense is one of the items put in the forefront of the reasons for granting this commission, but as far as I can see, the expenses of travelling and the keep of these witnesses would not exceed £32. When one looks upon it from that point of view, the expense of bringing these witnesses down to Cape Town cannot possibly be very much more, if indeed it is not less than the expense of a commission at Krugersdorp, where a commissioner would have to be paid, and special instructions have to be prepared for the local agents and attorneys, who would examine and cross-examine these people, so that I do not think there will be anything left of the £30 odd or thereabouts by the time the expenses have been met. There are other grounds alleged. These are said to be poor men who cannot very well leave their places, and it is said that they irrigate farms, and so on, but, after all, arrangements can always be made when they know they have to come down here, and the chances are that for a week or two nothing serious will happen if any irrigation which takes place is left to the servants or overseers. I do not think any of the reasons are substantial, and I do not think there is any good reason for granting this commission. The application will, therefore, be refused, but I do not feel inclined at this stage to make applicant pay the costs of this unsuccessful application. I think that if the defendant is liable, he has opposed the hearing of evidence which is necessary, he has made costs larger by this application, and it seems to me that the party who is in the wrong eventually should pay the costs, and the costs will be ordered to abide the result.

	1907.
BETTINGTON V. SCOTT AND	June 27th.
OTHERS.	.. 28th.
	July 1st.
	.. 2nd.
	.. 15th.

This was an action brought by Alfred George Bennington, of Kraaifontein, district of the Paarl, against Wm. Louis Scott and John Henry Widdicombe Scott, both of Cape Town, for an order against defendants to provide a road to certain property or, failing compliance, £1,000 damages.

Plaintiff, in his declaration, said that he was a farmer residing at Kraaifontein, and that the first defendant was a broker and commission agent, and the second defendant a tailor and estate

agent, both carrying on business in Cape Town. Defendants, at the time of the sale, set out in the declaration, were joint registered proprietors of certain land near Kraaifontein, and known as the Bonny Brae Estate. On the 21st December, 1903, plaintiff bought from defendants 20 acres of ground for £300. No conditions of sale were signed. Plaintiff had taken transfer by deed of transfer dated June 18, 1904. Prior to and at the time of the said sale the defendants guaranteed that a certain road, 80 feet in width, from the said land to the Kraaifontein Railway Station was a public road, and would be available for use by the plaintiff as proprietor of the land sold to him, and he was induced thereby to purchase and take transfer of the said land. The said road, which crossed the property of one Jacob Berman, was not at any time material to the suit a public road, and the said representation was fraudulently and falsely made, and defendants were unable and refused to render the same available for the use of the plaintiff as the said proprietor. By reason of the premises plaintiff said that he had sustained damages in the sum of £1,000. He prayed for an order compelling defendants forthwith to render available to him as registered proprietor of the land in question for use the said road guaranteed to be a public road, or failing compliance payment of £1,000 damages.

Defendants, in their plea, said that the plaintiff acted as agent for the Prudential Properties, Ltd. They said that the Bonny Brae Estate formed part of the farm Joostenberg Vlake, situate near Kraaifontein Station. They said further that the sale was concluded under the conditions set forth in a letter sent by them to defendant under date the 18th December, 1903. They denied the allegations in paragraph 4, and specially denied that they in any way guaranteed that a certain road 80 feet in width, alleged to lead from the said land to Kraaifontein Railway Station, was a public road, and would be available for use by the plaintiff. Defendants said that they sold, and plaintiff bought, the aforesaid lots under the conditions set forth in the letter of the 18th December, and per the deed of transfer, with diagram annexed, bearing date the 4th December, 1903, whereby the farm Joostenberg Vlake was transferred by one Theunissen to the defendants with the rights of access as shown in the said transfer and diagram, to which defendants craved leave to refer at the trial. As to paragraph 5, they denied that they represented the said road to be a public road. They denied that the plaintiff had suffered damages for which they were liable, and said that he had access to the station as per the aforesaid deed of transfer and diagram annexed, in accord-



ance with the conditions on which the sale took place. In the letter annexed John Scott said that W. L. Scott and himself had decided to accept plaintiff's offer of the previous evening for two lots of ground, approximately 20 acres, with the option to purchase another 20 acres at same price and terms. "This sale and option," they added, "are subject to existing deeds of transfer and diagrams, and your selection is to be made from the plan of sale prepared by Mr. Home, Government land surveyor. He is willing to reduce his survey fees to 20 guineas should you purchase four lots adjoining in one block."

Plaintiff, in his replication, denied the allegations of defendants in several respects, and specially denied that he received the letter of the 18th December, 1903.

Mr. P. S. T. Jones was for plaintiff; Dr. Greer was for respondent.

Kenneth N. Teubes, Government land surveyor, produced certain diagrams and gave evidence to show that plaintiff had no right of access to the station by the alleged 80 feet road, unless he obtained leave of Mr. Berman.

Alfred G. Bennington (the plaintiff) spoke to the negotiations that he had with John Scott in consequence of an advertisement that he saw in the paper. On December 19, 1903, he said he went out to see the land. He was accompanied by the defendants and three other persons, two of whom were now in England, and the other had since died. When they got to Kraaifontein, defendants asked him which way he would go to the land. He said he would go by the road. Witness was taken down the 80 feet road. He mentioned to the defendants about the roads to the land, and they assured him that the roads would be all right. He said, "Will you guarantee that these roads are all correct?" The defendant said they would.

[Hopley, J.: Which roads?]

Witness: The roads subdivided on the estate of Scotts. They told me that they were going to get a survey of the ground. I said, "Will these roads have a connection with the station?" They replied that they would. They told me that the whole of the other place belonging to Mr. Berman had been laid out as a township and that we had that road and all the roads there. He selected certain lots because they were the nearest to the station. No sale was concluded that day. He went to see the defendants again on the following Monday, and paid an instalment of the purchase price. He spoke to John Scott in W. L. Scott's office. He was referred then to Mr. Home, whom they went to see about the land. Mr. Home said, "You need not trouble your head at all about these roads." Witness made inquiries about the roads being connected with the station. He obtained transfer of

the land in June, 1904, but a week later he discovered that the roads were not correct, and he had not, therefore, taken possession of the deed of transfer.

Dr. Greer cross-examined the witness at some length, largely with a view of showing that there was access from the land to the station.

Vincent Alex. van der Byl, John Wm. Ward, Harris Horwitz, Louis Sanden, and J. P. van Breda, also gave evidence. It was stated that the defendants had mentioned the 80 feet road to others who had purchased land from them.

Fredk. D. Bailey, who purchased some of the ground near that of the plaintiff; in January, 1905, from Mr. Scott, stated that he wrote to the defendant when he knew the ground was for sale, and the defendant sent him a blue tracing. The plan show a road, which defendant gave witness to understand was the right of way from the station to the ground.

Cross-examined by Dr. Greer: Witness never went out to the ground with either of the defendants. The station-master, who showed him over the ground, told him that he had nothing to do with it as there was a dispute about the roads. Mr. Scott's explanation was so satisfactory that witness decided to purchase. Witness had never made any complaint to Scott that he could not get access to this property.

John Irvine, broker, of Cape Town, stated that in the evidence he was acting as agent for Mr. Berman, who really resided in Johannesburg. Both the Scotts waited on witness, and asked him to arrange an interview with Mr. Berman, with a view to opening up the 80 foot road and give Scott access to the ground. Nothing came of the interview, because Scotts would not accept the conditions laid down by Berman.

Cross-examined by Dr. Greer: Berman was the owner of the Kraaifontein Estate. It was not Berman who asked for this interview. It was not Theunissen's road that was in discussion.

The witness Berman stated he had always taken up the position that Theunissen's road was not a public road. He wrote to the C.G.R. claiming a road from his ground to the station at Kraaifontein. Whatever position he took up, in regard to the railway, he was claiming Theunissen's rights. He had an amended title to see if anyone would challenge him in regard to roads or any other question. He obtained the consent of Scott and the Railway Department for this title.

Mr. Jones closed his case.

John Henry Widdicombe Scott, merchant tailor, stated that he, in conjunction with Mr. W. L. Scott, acquired a portion of the farm in December, 1903. There was a portion of the estate laid out as the Bonnybrae Estate. Witness first saw the plaintiff the week before



Christmas in 1903. Witness showed the plaintiff the estate on the 17th and 19th December. On the first occasion the plaintiff and witness went to Kraaifontein. The plaintiff's view was not only to buy the lots as his intention was to make an exchange of some small property which he had at Rosebank with some of plaintiff's property at Woodstock. The plaintiff was anxious to go out to have his selection before any other purchases were made, as a number of people were going out on Saturday. The plaintiff decided to take twenty acres, and wanted an option on a further twenty acres. Upon their return on the 19th December, there was little time to catch the train, and it was necessary to take a short cut. Witness never guaranteed to the plaintiff or anyone else the use of the 80-foot road. Soon after the sale the rough plan was signed by the plaintiff, and not some three months afterwards. Had anything been signed three or four months afterwards, it would have been the new plan. In the transfers which witness gave plaintiff, the same conditions were inserted in regard to the means of access as in his own transfers. Witness had never taken up the position that he had any right to the 80-foot road. He had plans prepared showing the Theunissen-road open, and the 80-foot road closed. What he did guarantee was access to the station. He never guaranteed the right to use the road to Horwitz and Sanden. There was nothing in the conditions of sale about the roads. None of the other purchasers ever claimed the 80-foot road.

Cross-examined by Mr. Jones: When he sold he told the purchasers that there was a road from the station, he never guaranteed a road, he simply sold the property as he bought it, without any guarantee as to roads. He had sent a plan to Bailey, but it was not the plan produced by Horwitz. Carnitz had a plan dated October 9, 1905, with no road marked.

[Hopley, J.: Is that a note made at the time which you are consulting on your cuff?]

No, I made it this morning.

Andries Galloway, managing clerk to Mr. D. Tennant, solicitor, stated he had not heard of an 80 ft. road until he came to court. The plans which he had seen did not show any 80 ft. road. He advised the defendants to sell the property according to the existing plans and diagrams. Plaintiff did not take transfer because he wanted the defendants to pay half of the survey expenses.

J. J. Bisset, Government land surveyor, of Cape Town, said he had prepared a sub-divisional plan of Scottville. He knew nothing of an 80 ft. road.

Karl A. Carnitz, who had bought land from the defendants on two occasions, said Scott told him that there was a

road from the property to the station. The road referred to by Scott was the Theunissen-road. He went to Kraaifontein with Hamilton, Scotts' agent. He produced a plan showing the position of the property.

[Hopley, J.: I suppose you are quite satisfied with your roads?]-No, I am not. The road was twice blocked up by Berman, but Bettington was good enough to cut the wire.

Proceeding, witness said he crossed the veld to the station. Before he could be quite sure of his road, he might have to fight two lawsuits against the Prudential properties and Berman. He had seen the 80 ft. road, but he had never received any guarantee from Scott that he could use it. His plan was dated October, 1905, and that was after the dispute had arisen. The road was not shown on his plan.

Jacobus M. Theunissen stated he had known the estate at Kraaifontein since 1875. He knew the Theunissen-road. It had always been an open road, and the public used it without interference.

Hendrik N. H. Theunissen, former owner of the estate, said that the road never went direct to Kraaifontein Station; it went some hundred yards higher up. People had always used this road coming from Durbanville. Witness knew the plaintiff, who had not complained to him about the means of access to his property. According to an agreement with the syndicate, witness put up a fence in 1904.

Cross-examined by Mr. Jones: The fence was not erected until 1904. In a letter from Mr. John Scott, witness was asked to support him in a civil action which he brought against Berman, and witness replied: "If you want to fight Mr. Berman, you do it. If I want to fight him, I will be man enough to do it."

Alfred Charles George Oakes, an official of the Surveyor-General's Office, produced the original grant to one H. A. Theunissen and Mr. King, dated 1883.

Dr. Greer closed his case.

Mr. Jones was heard in argument on the facts.

Dr. Greer, in the course of his argument for the defendants, said that the plaintiff, having chosen to bring his action in the form in which he did, when the ordinary action was open to him, found himself faced with an onus of a very distinct kind. He must prove his case clearly to the satisfaction of the Court. Here were written documents by which he was bound, legal documents of the most solemn character. Unless he could clearly prove his right it would be impossible for him to obtain the assistance of the Court. Another reason was because there was an allegation of fraud against the defendant. There was a clear allegation of fraud made in the declaration. Both on account of the

form in which the action was brought, because it was really brought on a breach of contract, and also because there was an allegation of fraud it was incumbent on the plaintiff to prove his case in the most clear manner. Counsel cited the cases of *Hoffmeyr v. De Waul* (1 Juta, 424), *Richards v. Nash* (1 Juta, 312), *Ohlssons v. Whitehead* (9 Juta, 84), *Ahlhom v. Vickers* (9 Juta, 484), *Jansen v. Fincham* (9 Juta, 239).

Mr. Jones, in reply, attributed the failure to call W. L. Scott as a witness to the fact that his evidence would not coincide with that of John Scott.

[Hopley, J.: Haven't you founded your case on fraud?]

Mr. Jones: After all, the Court is very adverse if there is another way of finding for the plaintiff, to find fraud unless the evidence is absolutely such as shows a man to be a scoundrel.

[Hopley, J.: Supposing in good faith at the time, these lots had been surveyed into the township, and they would be available.]

Then we still have a cause of action. It would be misrepresentation.

[Hopley, J.: Do the pleadings include *bona-fide* misrepresentation?]

It would be the lesser, and it would be a ground for action.

[Hopley, J.: Can you read your declaration at the time of the sale that the defendant *bona-fide* misrepresented?]

Mr. Jones: I submit it is quite competent for the Court to find that there was not necessarily fraud on the part of Scott, but there was misrepresentation, by which misrepresentation plaintiff was deceived, and if that misrepresentation had not been made he would not have bought the property. Proceeding, counsel referred to the case of *Lindenberg v. Stellenbosch Municipality* (3 Searle, 345). In that case the purchaser was sued to carry out the purchase. He raised the defence of misrepresentation made to him as to the proximity of the ground to the railway station, and the Court, although finding as a matter of fact he was not deceived by the advertisement, said had he been deceived he would have had a good ground of action.

(*ur. Adr. Vult.*)

*Postea* (July 15th).

Hopley, J.: In 1903 the defendants bought from Theunissen a portion of the farm Joostenberg Vlakte, near Kraaifontein railway station, and received transfer thereof early in December of that year. Part of the land so purchased they proceeded to subdivide into lots of about ten acres, and this part they named "The Bonny Brac Estate," which they advertised for sale. In answer to their advertisement the plaintiff made inquiries, whereupon he was taken to the property in question by the defen-

dants, with the result that during the month of December he concluded a purchase of two of the ten-acre lots for the sum of £300. The plaintiff deposes that he was taken to the land for the first time on December 19, and that he concluded the sale on December 21, paying on that date the first instalment of the purchase price. He asserts in his declaration that prior to and at the time of the said sale the defendants represented and guaranteed to the plaintiff that a certain road 80 feet in width leading from the said land to the Kraaifontein railway station was a public road, and would be available for use by the plaintiff as registered proprietor of the land in question, and that the plaintiff was induced thereby to purchase the land. He further sets forth in the declaration that he has taken transfer of the said land and that the said road, which is upon the property of one Berman, is not a public road or available to him as a means of access to the station, and that he has thereby sustained damages in the sum of £1,000. He says that the defendants well knew that the said road was not a public one and that their representation to that effect was fraudulently and falsely made, and that they are unable, and refuse, to render the said road available to him as owner of the lots purchased by him. The defendants plead that the sale was concluded in terms set forth in a letter dated December 18, 1903, which they attach to the plea, and they deny that they made any guarantee or representation about the road as alleged. The points to be determined are whether, when the contract of sale was entered into, there was a collateral agreement, or *pactum adjectum*, whereby the defendants guaranteed that the said road would be available for the plaintiff as a means of access from the land purchased by him to Kraaifontein station, whether, in case the Court should find that they did so guarantee and contract as alleged, the defendants have failed to carry out the terms of the said contract, and in such case, what damages have been sustained by the plaintiff by reason of their breach of contract. It appears that in July, 1901, Mr. Van der Byl, acting for himself, Van der Horst, and Berman, purchased from Theunissen a certain portion of the farm adjoining or adjacent to the Kraaifontein railway station, and obtained an option for one year to purchase a further portion to the north of the main line of railway, which option they subsequently exercised. This ground they, by agreement between themselves, divided, the parts to the south of the main line of railway and between the main line and the Malmesbury branch line falling respectively to Van der Byl and Van der Horst, and the part to the north of the main line going to Berman. Upon their ground these three proceeded to lay out

the Kraaifontein township, with public squares, parks, show-grounds, and recreation grounds, and with streets regularly laid out throughout its whole area. One of the streets running from south to north was an eighty-foot road, leading to the main line of railway at the station, both from the southern and northern portions of the town. This road was well defined, and on the northern side of the town, which was the property of Berman; it was laid out as a road, with trees on either side. As between the three gentlemen mentioned and Theunissen it was a part of the agreement that if the part north of the railway were purchased by them, it should be fenced off from the rest of the farm, and this was done after the exercise by them of their option, the exact date of such fencing being, however, somewhat obscure, and in dispute in the present case. In 1903 the defendants purchased from Theunissen the portion of the farm to the north of Berman's property, and took transfer thereof in December of that year. They seem to have advertised it for sale in lots, and on 14th December plaintiff wrote to them for particulars. They replied by letter of 15th December, 1903, making various representations, amongst which was one that the property advertised was well within a mile from the station. A few days thereafter the plaintiff was taken out to view the ground, and at this stage the first serious conflict of evidence is met with. The plaintiff swears that he first went upon the ground on Saturday, 19th December, and that he was accompanied by both defendants and by three other people, intending purchasers, of whom one is now deceased, and the other two are in England. He swears that the defendants took him to their property by the eighty-foot road, and that in answer to his inquiries they told him that that was the road by which he would have access to the station from any lots that he might purchase. He says that they further stated that all the streets running through Berman's portion of the town towards the north would be available, as they were providing a road which would serve all their lots along their southern boundary, but that they particularly mentioned the eighty-foot road as leading directly to the station. The plaintiff states that across that road there was then a fence, which had been cut, and that the defendants told him that this fence was of no consequence, and that he would have access by that road. The defendant, John Scott, admits that on 19th December the party, as above stated, went out, and that on that occasion they went to the Bonny Brae lots by the eighty-foot road, but he denies that there was then any fence across the road, or that he made any representations that the road would

be available to purchasers of the lots. It is noteworthy that, though the defendant W. L. Scott was available as a witness, he was not called for the defence to corroborate John Scott as to what took place on that occasion, or to contradict the plaintiff's evidence that such representations were in fact made. A justification for this abstention is claimed on the ground that the sale to the plaintiff had been actually concluded on 18th December, when the letter attached to the plea is said to have been written closing the bargain, or at all events on the morning of 19th December, before the party set forth, at which time John Scott swears that he personally handed the letter to the plaintiff, and it becomes material to examine minutely the terms of the letter, and the circumstances in which it came to be written and delivered, since the plaintiff swears that he received no such letter, and that he learnt for the first time that such a letter was alleged to have been written when he saw it as portion of the plea in this case. The letter is in the following terms:

11, Church-street, Cape Town,  
December 18, 1903.

Dear Sir.—Mr. W. L. Scott and myself have decided to accept your offer made to me last night, viz., one hundred pounds cash, and balance—£200—on bond, 6 per cent., for two lots of ground (approximately) twenty acres, and grant you option one year to purchase another 20 acres at same price and terms. This sale and option is subject to existing deeds of transfer and diagram, and your selection is to be from plan of sale framed by Mr. Home, G.L.S. He is willing to reduce his survey fees to twenty guineas should you purchase four lots adjoining in one block.—Yours faithfully,

JOHN SCOTT, JUN.

A. G. Bettington, Bettington-square,  
Woodstock.

To make such a letter possible as a genuine document it is necessary to believe that the plaintiff had been upon the ground between 15th December and 19th December, and John Scott swears that he and the plaintiff made an expedition to the place on Thursday, 17th December, going out by an early train starting shortly after 8 a.m., and returning by a train leaving Kraaifontein after 4 p.m., those being the only trains which could be utilised for such a purpose on an ordinary week day during the year 1903. If this be true, plaintiff and John Scott spent nearly seven hours upon the ground, and Scott swears that on that occasion, he pointed out a road (called in this case "the Theunissen-road"), and the main road to Stellenbosch; and he states that he guaranteed access to the plots

for sale by the "Theunissen-road"—though the record of the evidence does not make it clear whether he means that he made the guarantee on the 17th or 19th of December. The expedition of the 17th December is entirely denied by plaintiff, and it is necessary to find whether it ever took place. Now it is clear from the evidence in the case that in December, 1903, the defendant, John Scott, was a very busy man, and it appears at the outset extremely improbable that he would devote the whole of a working week day to an expedition of this sort, when the natural course would have been to fix the Saturday, only two days later, for the trip—a day upon which there was a train leaving Cape Town between 1 and 2 p.m., which would enable the parties to spend an hour on the place and get back at about 5.30 to town. I should think, too, that, if such a long time was spent away from his business on that Thursday, and if so many hours were passed at or near Kraaifontein, some kind of corroborative evidence would have been available to establish the fact. He and Bettington must surely have had luncheon together somewhere, and somebody might have been called who had caught sight of them in their long investigation of the merits of the Bonny Brae plots. But the expedition rests on the bare word of John Scott, emphatically contradicted by the plaintiff. If, however, no living witness could be found is there any corroboration or contradiction of such a visit to be gathered from any document? If John Scott's evidence be true, and if the letter attached to his plea be a genuine one written on 18th December, he must have consulted both his partner, W. L. Scott, and Mr. Home, the land surveyor, during the course of Friday, 18th December, since the letter begins by a statement that he and W. L. Scott had decided to accept the offer made by plaintiff on the Thursday evening; and it ends by saying that Mr. Home was willing to reduce his survey fees to twenty guineas in case plaintiff should purchase four lots in one block. Neither Mr. W. L. Scott nor Mr. Home was, however, called to speak upon this point, and one is forced to conclude that neither of them could give any corroboration to John Scott's evidence thereon. It is true that there is a press copy of the alleged letter in John Scott's letter-book; but it does not occupy a folio to itself. It is pressed upon a page containing a part of another letter of 18th December, and, though it is possible that an office boy of frugal mind might at some inconvenience and with a nice adjustment have utilised the space left available, it is obvious that such a document might have been written to fit the space, to serve a purpose in pending or threatened litigation, at any time before its produc-

tion, as an annexure to the plea in this case. Besides the place in which the letter appears, there is the circumstance that while all the letters of that date pressed in the book are distinct, and had been written in dark ink, the ink in this case is so pale that it is only barely legible. This is explained by the writer by the assertion that being anxious to close the matter with Bettington, he wrote that particular letter at his home in the suburbs, a course he sometimes took when pressed for time. It is not, however, a course one would expect to be taken in the circumstances. John Scott knew that he would see plaintiff next day. He knew that they were to go to Kraaifontein together, and rather than inconvenience himself by writing a somewhat unnecessary letter at home, he would have waited until he met plaintiff to close the bargain verbally. Furthermore, this alleged letter is, in point of time and position, the first in the book to Bettington, yet in indexing the book the clerk has taken no notice of such a letter, but has placed the first letter to Bettington 401 pages further on. An attempt was made at a later date by John Scott himself to remedy or rectify this, and, on a line at the top of the page usually left blank by the clerk, he in his own writing wrote the plaintiff's name and the number of the folio on which this letter appears, followed by something which has been erased, and by other numbers which had been indexed opposite the word "Bettington" lower down in the same page of the index. While it would be going too far to say that the state of the index is conclusive on the point under consideration, it is certainly in a most unsatisfactory condition, and goes far to shake belief in the genuineness of the disputed letter. But there are other circumstances by which we may test this letter, which is now so strongly relied upon as showing that plaintiff bought according to existing diagrams and transfers, and therefore without any guarantee, as claimed by him. Plaintiff having picked his two lots adjoining each other upon a plan, went with Mr. Home, the land surveyor, in March, 1904, to the ground, and in May of that year he went to reside there, and shortly thereafter Berman informed him that he had no right to use the 80 foot or any other road over his property to the station. On July 10 plaintiff wrote complaining that defendant had not carried out certain guarantees. "First," he wrote, "you guaranteed to give us roads to the ground from the station. I am since informed by the owner of the ground that you have no right-of-way through these whatever . . . ." and he concludes: "Trusting you will make good all defects before there is any more trouble, as at present the ground is quite valueless without any road to it."



... " The letter also dealt with a guarantee as to surveyor's charges and the swampy nature of the ground. This letter remained unanswered until 24th August, when a letter was written by John Scott acknowledging receipt of plaintiff's letter, and dealing with the matter of the surveyor's charges, but not referring in any way to the matter of the roads. "As regards the survey fees," the letter states, "same is most reasonable. What was mentioned was that, by purchasing two allotments adjoining together, you would save the expense of two transfers—whereas in your case you would take one transfer." This is inconsistent with the terms of the disputed document, and if the letter of December 18, 1903, had been in existence in August, 1904, surely the answer about the survey fees would have been different, viz., that the surveyor had agreed to a reduction of fees only in case plaintiff should purchase four adjoining blocks. But, moreover, surely the defendant, on the matter of the roads, would have referred the plaintiff to the letter of December 18, as recording the conditions attached to the sale of the land to him. The plaintiff, however, did not rest satisfied with the reply he had received, but on August 31 again wrote reiterating that John Scott had guaranteed that the expenses would not come to more than £20, and the letter goes on: "You will remember being asked about that, also the guarantee you gave as about the roads, in your letter you never mentioned what you intended to do about the road to the station—that is the most particular item I want put straight. I am in occupation of this ground at present, but it is useless to remain here without a road here from the station. . . ." Now, if the disputed letter had been in existence at that date, it seems well-nigh incredible that John Scott would not have referred plaintiff to its terms; but he never did so, and the plaintiff swears that he first became aware of the allegation that such a letter existed when he saw it attached to the plea which was filed in April of this year. There is one other test which can be applied. If the letter of December 18 means anything, it means that a contract of sale was thereby concluded. It is the acceptance of an offer, and closes a bargain; and, in fact, John Scott says that he wrote the letter at home on the night of December 18, for the purpose of closing the matter. According to John Scott, then, the sale took place on December 18, or possibly at latest, on the morning of the 19th, when, as he says, he delivered this letter to the plaintiff. It was so marked a transaction that he cannot have forgotten it, nor could he have forgotten that he had a copy of the letter in his book giving the exact date. As the plaintiff, though strongly pressed in cross-examination, persisted in

stating that he had never been on the ground until the 19th December, and that the sale was concluded on December 21, it occurred to me that possibly the declarations of purchase and sale might throw some light upon the matter. By consent of parties certified copies of these have been admitted as evidence since the closing of the arguments of counsel, and I find from them that plaintiff made his declaration as purchaser on February 11, 1903?—1904, and that he therein stated the date as December 21, 1903. The defendants made their declaration on May 6, 1904, and they likewise declared as sellers that the sale took place on December 21, 1903. If December 21, 1903, was really the date of the sale, then the force and effect of the annexure to the plea dated December 18, 1903, falls to the ground; and though the date in the declarations may have been a mistake in the earlier, followed in the later without strict inquiry, still they do contradict the defendants and do corroborate the plaintiff. At the close of the evidence, and of the arguments of counsel, my feeling was that no reliance could be placed upon the alleged letter of December 18, 1903, and a close and anxious examination of the record and documents only strengthens and confirms this conclusion. I am of opinion that no such letter was written in December, 1903, and that it was manufactured at a much later date, when, negotiations with Berman having failed, and intervention of the Paarl Divisional Council to have the Theunissin-road vindicated as a public road, having been sought in vain, it became plain that there would be litigation with the plaintiff. The letter attempted to deal with two points of grievance asserted by the plaintiff, viz., the road and the survey fees. As to the former it was designed to nullify any oral evidence which the plaintiff might bring as to guarantees and collateral agreements made on December 19, by proving that the sale had been concluded before such representations and agreements were made; while as to the latter it would also put the plaintiff out of Court since the only concession as to the fees was upon a condition which he had never fulfilled. I do not believe that the plaintiff was upon the ground on December 17, with John Scott, and I believe that, when he and others went with the two defendants on December 19, it was the first occasion on which he had been there. I believe that on that occasion the two Messrs. Scott did say that the eighty-foot road was the means of access to the station: and I think that they, if they said so, were possibly under the impression that it was so: but in such case the assertion was made by them so negligently and rashly and without proper inquiry, that their conduct in so making such representations for the purpose of enticing purchasers was of a nature so closely approximating to in-



tentional fraud that it must be looked upon as fraud. It is possible, I say, that both L. W. Scott and John Scott at that date thought that as Berman had advertised his town lots for sale, and as his diagrams issued to the public in the form of advertisements showed his roads apparently up to his boundary, and showed the large 80 foot road, which he had laid out, and bordered with trees, the consequence was that he had dedicated the road to the public, and that it would be open as an approach to his erven from the north. There is indeed some evidence that for some time John Scott held this view. It is distinctly sworn that both he and Mr. L. W. Scott did tell plaintiff and others both on December 19, and on later occasions, that the 80-foot road was available as their means of access to the Bonny Brae lots—a diagram made by one Hamilton, an engineer, who acted for them, and seems to have been a hanger-on of John Scott's—clearly showing the 80-foot road as leading to the lots, was produced, and it was sworn that it was exhibited to people who purchased some of the lots. I believe that it was, and the probability is, therefore, strengthened that similar verbal representations were made. Mr. L. W. Scott was not called to deny that such representations were made, and I am convinced that they were, in fact, made, and that they were made with the intention and with the effect of inducing purchasers to invest their money in these plots. Before I leave this portion of the case, I may say that some discredit of plaintiff's evidence was attempted by bringing about a contradiction between him and Mr. Theunissen on the point whether or no the 80-foot road had a wire fence across it on December 19, 1903. I can only say that I am not satisfied that Mr. Theunissen is right in his recollection. He is in all probability conscientious in what he says; but the fact that he had to consult a coloured servant before he was certain, shows, to my mind, that he had no clear recollection in himself of the exact date. The matter is a small one, and whether plaintiff or Mr. Theunissen is correct, I do not think it decisive of the main question in any way. At a later date, when John Scott, who seems to have then acquired his partner's interest in the Bonny Brae lots, discovered that Berman was able to close the road, he turned his attention to the Theunissen-road, which is more or less parallel to the 80-foot road, and a few hundred yards to the west of it, only to find that Berman also disputes the right of way over it. It is obviously impossible for me to decide in this action the rights of the public, and of the owners of the Bonny Brae lots to the use of the Theunissen-road. John Scott says that he guaranteed only this road to his purchasers, and that Berman has no right

to stop their user of it. Berman asserts that they have no rights over it; and there the matter must for the present rest. No road has been provided by the defendants for the plaintiff as promised between his lots and the station, and it is obvious that the plaintiff has by such breach of contract suffered considerable damage both in inconvenience and in deterioration of the value of his ground. In assessing the amount of damages, however, it is clear that according as matters may be adjusted hereafter, they may be increased or considerably reduced. The best and most direct route to the station for the plaintiff is undoubtedly the eighty-foot road, which is also the only road which can truthfully be described as being well under a mile long, and should the defendants either by a successful suit or by arrangement with Berman succeed in making that road available, as promised by them to the plaintiff, then I am of opinion that the damages would not reach a very large figure, and, in fact, no damages are claimed in the declaration if that road be opened. If, however, that road cannot in any case be obtained, then there remains the Theunissen-road, which John Scott admits that he guaranteed to the plaintiff. If that should be made available by the defendants, then a route to the station, not so short or direct as the road promised, but still reasonably convenient, would be provided, and the damages might be assessed at a moderate sum. But if no road be provided over Berman's property, then the owners of the Bonny Brae lots may be forced to use a most inconvenient and circuitous route to reach the railway, and their land will be very largely reduced in value. I think that as matters now stand they have no assured right of way of a convenient nature such as they were promised, and as far as the matter affects the present case, I am of opinion that if matters remain in their present condition the plaintiff's damages should be assessed at £250. I think, however, that an opportunity should be provided to the defendants to reduce this amount by providing the plaintiff with access to the station. The order of the Court, therefore, will be that the defendants do pay to the plaintiff as and for damages the sum of £250, but that if the defendants do within six months provide a right-of-way for him by the Theunissen-road the amount of damages be reduced to £100, or if they within the same period provide a right-of-way for him by the eighty-foot road, as guaranteed, there be no order as to damages. The defendants must pay the costs of the action. It is further ordered that the amount of £250 be paid in forthwith to the Registrar of the Court, to be dealt with hereafter in accordance with the terms of the judgment.

Prior to giving judgment, Mr. Justice Hopley observed that, as he had stated the other day, a lady called upon him and represented that further evidence had been discovered. He, however, declined to hear any further evidence. He told her that he would not listen to her. He did not know on what side she was acting, but apparently counsel had not been instructed to make any representations to the Court.

[Attorneys for Plaintiff: Dold and Van Breda; Attorney for Defendant: L. Alexander.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

LAWLOR V. LAWLOR.

1907.  
June 28th.  
" 29th.  
July 1st.  
" 2nd.

This was an action in which Henry George Lawlor, an hotel-keeper, of N'Cova, St. Mark's, Tembuland, sued his wife, Irena Maude Lawlor, for a decree of divorce, and John Archibald George Hearn, a scab inspector, of Cofimvaba, for £5,000 damages, by reason of the defendant's adultery.

The declaration set out that the parties were married in September, 1901, and there were two minor daughters of the marriage, aged four and two years respectively. The defendants, it was alleged, committed adultery in plaintiff's hotel during December, 1906, and January, 1907, and more particularly on the 24th and 26th January. Plaintiff sustained £3,000 damages by reason of the second defendant's wrongful action, and he claimed against the first defendant a decree of divorce, forfeiture of the benefits under the community, custody of the minor children, and costs jointly and severally against the defendants.

The pleas of the defendants were practically alike, in regard to the claim in convention. Both denied the adultery, and the second defendant denied the damages. For a claim in reconvention the first defendant stated that since Jan-

uary, 1906, serious differences had occurred between plaintiff and defendant at various times in December, 1906, and January, 1907, the plaintiff assaulted and cruelly ill-treated her and endangered her life. In December, 1906, the plaintiff threatened to sjambok her, locked her up, and severely assaulted her. She claimed a decree of judicial separation, division of the property, and custody of the children, and maintenance for each child at the rate of £1 a month, with costs.

The plea to the claim in reconvention denied any serious difference until January this year, which were caused through the conduct of the defendants. He admitted that on the 25th January he struck his wife on the face with his open hand as she ran away. He fired his gun under extreme provocation, upon discovering the defendants in a room, the door of which was locked and the blinds drawn down.

Mr. Close (with him Mr. Roux) was for the plaintiff, and Mr. Burton, K.C., (with him Mr. Sutton), was for the defendants.

Harry George Lawlor, plaintiff, stated he was married in September, 1901, and he had lived at N'Cova with his wife since then. Prior to December, 1906, witness and his wife got on very well. About August, 1906, Mr. Hearn came to his hotel as a boarder. Up to December, 1906, there were no questions about supporting and maintaining the defendant, who had as much to say in the working of the store as witness had. There was no truth in the allegation that there had been disturbances between the parties owing to witness's relationship with a Miss Rae, who was a great friend of his wife. On the 1st January there was a dance at the hotel. The dance commenced at 8 o'clock, and an hour later witness went into the ball-room, and he noticed Hearn and his wife were dancing together. They had several dances. Sometime later he was standing at the ball-room door, when a gentleman said he heard a remark passed, and he spoke to his wife about it. The remark which Mr. Palin passed was: "Is she engaged to Hearn?" and witness put this to his wife.

[De Villiers, C.J.: Didn't Palin know your wife?]

No. After that Mr. Palin asked me to give him an introduction to my wife. When he spoke to her she said: "The best thing you can do is to get a separation." She got into a rage, and was very white. The next morning he gave Hearn a month's notice to leave the hotel. At that time he had no idea there was anything wrong between the defendants. On the 18th January there was another dance at Tsomo, and Hearn and his wife were present. Before the dance witness spoke to his wife, and asked her on the year dance, and his wife asked Hearn. She made

no reply, but did dance with Hearn's several times. It was a leap year dance, and his wife asked Hearn's for a dance. After the dance there was more unpleasantness, and again there was talk of a separation. Witness's brother and his wife asked the first defendant to remain at their house until Hearn's went away, but this she refused to do. On the morning of the 25th January he got up early, and two of the boys at the hotel told him about something which took place the previous couple of days. In consequence of what took place he asked the boys to take a note of what was going on. At breakfast he stated that he was going to Luyt's, but returned unexpectedly three-quarters of an hour later, and came through the garden. One of the boys made a statement to him, and he jumped off his horse and walked down by the other side of the house. He went in by the hall door, and one of the boys stood at the entrance. When he got to the dining-room he tried to open it, on account of what one of the boys told him, but the door was locked. He struggled with it, and finally forced the lock open. When he entered Mrs. Lawlor passed him. He said, "What is the meaning of this?" but she made no reply. She was very white.

Did you strike her?—No, she passed me without speaking, and went out by the hall door. I entered the sitting-room, where I found Hearn's sitting down on a chair. The green blind was drawn.

What took place then?—I went up to him, and asked him what was the meaning of this. He said, "Please, Mr. Lawlor, I will go at once. Allow me to go at once." I had a stick in my hand, and I struck him over the head. I was in a passion, and chased him round the room; but Hearn's got out of the room. The last I saw of him was when he entered the dining-room door. After that I searched for my gun.

What were you going to do?—I was going to shoot them.

Were you in a rage?—Yes.

Did you find your gun?—I could not find it in its usual place in the bedroom, but I found it under the couch in the dining-room.

Did you take cartridges?—Yes. I went round the place to see if I could see Hearn's, but I could not find him.

[De Villiers, C.J.: What shot did you have?—Number 6, my lord.

Mr. Close: Was there considerable excitement at the time?—Yes, all the servants rushed about.

When you got to the gate, did you fire?—Yes, I fired in the direction in which Mrs. Lawlor had gone.

How far off was she?—Between 200 and 300 yards.

You had not gone out of the gate?—No, I fired over the hedge.

Did you smack her that morning also?—Yes.

When was that?—After her return.

What became of the gun?—The boys took it away.

Did the boys go after Mrs. Lawlor?—Yes.

What took place?—I met her half-way, as the boys were bringing her to the house. I accused her of what she had done, and she asked me to forgive her.

What did you accuse her of?—Committing adultery with Hearn's.

Was she crying?—Yes.

Was there any mention again of forgiveness?—Yes, she asked me to allow her to live in the hotel as a servant and to forgive her.

You decided then to take her back to her mother?—Yes, I said I will take you back to your mother and explain the whole thing to your mother.

What did the furniture in the sitting-room consist of?—A couch, chairs, and a table.

You smashed the stick, I think, on Hearn's?—Yes, it was only a small walking-stick.

You took her to her mother and told her what you had heard and seen?—Yes.

A couple of days afterwards Hearn's wrote to you?—Yes, on the same day.

He asked for his things?—Yes.

You wrote a letter—a very enraged letter, Mr. Lawlor, in which you threatened to shoot him if you came across him?—Yes.

Proceeding, the plaintiff said he subsequently took up an attitude that he would forgive her if she made a confession. She said she would not confess to her brother, but she would confess to her sister, and she did confess to witness and her sister Emily. At a meeting at Mrs. Snodgrass's (defendant's mother) place, his wife made a confession of her guilt. Her mother would not allow her to return unless witness put a public apology in the paper.

At one stage were you willing to do something of that kind?—Yes.

What was the attitude you took up at first?—I promised my brother and my wife's sister that I would take my wife back provided she made this confession. I agreed to put an apology in the paper, in order to whitewash my wife in the eyes of the people, so that she could live with me again.

You wrote a letter to your wife on the 30th January?—Yes.

And another on the 30th May?—Yes.

Proceeding, the plaintiff said his property was worth between £7,000 and £8,000.

Cross-examined by Mr. Burton: You were married to your wife by special licence?—Yes.

I think you and she eloped?—Yes.

She was a young girl then, about 19?—I do not quite remember her age.

As a matter of fact there was considerable unpleasantness about this Miss Rae between you and your wife?—Not that I know of.

She did not complain about your attentions to Miss Rae?—No.

You never heard of a single objection on her part?—No.

I do not say there was anything wrong, but you paid undue attentions to this girl?—No, I did not.

She never complained to you?—Not previous to the 1st January.

She sent a note to Miss Rae?—Yes.

And she subsequently sent a note of apology to Miss Rae?—Yes.

When did you find out about these notes?—Just a day or two before Miss Rae left.

Counsel then read a letter of apology, in which the defendant asked Miss Rae for forgiveness for the tone of a previous note, and suggesting that Harry (plaintiff) should drive her to her destination, Cala.

She says on one occasion she found you sitting with this lady, with your arm round her waist?—No.

There was considerable unpleasantness between you, and you threatened to sjambok her if she did not write this apology to Miss Rae?—That is absolutely false.

I am not making any reflections upon Miss Rae at all. Your wife says there was considerable unhappiness on account of your attentions to this lady?—I deny that.

Will you swear Mr. Palin made this remark to you?—He did not make it to me. I overheard him making it.

Continuing, the witness stated the unpleasantness started after the dance on the 18th January, because his wife would not go home with him. She refused to walk home with him from the ball-room to the hotel.

You put a watch on her?—Yes.

Were they to signal to you?—Yes.

Where?—Below the garden.

Hearns was seedy about this time?—He said he was.

Had she a hat on when you saw her?—Yes, when she came out of the sitting-room.

Has she ever admitted this offence to anyone else?—She has admitted it to my brother Eddie. It was only when her mother said, "I have plenty of money. I will see this thing through in court," that Mrs. Lawlor denied the offence.

Hearns brought a charge of assault against you, and did you not ask your wife to admit her guilt to several people in order to show that you had great provocation in assaulting Hearns. What was the idea of admitting this guilt and your apology?—That was in order that she should be whitewashed in the eyes of the world.

[De Villiers, C.J.: What became of Hearns's case?]

Mr. Burton: That has been postponed at the plaintiff's request, pending the decision of this case.

Sam, one of the boys who kept watch at the request of the plaintiff, stated he saw the scab inspector on one occasion kiss Mrs. Lawlor. He could not understand why Mrs. Lawlor and Mr. Hearns shut themselves in the room. On the occasion in question he saw Mrs. Lawlor draw the blinds down. He told a Mr. Warner what had taken place, and then he went back to watch. When Mr. Lawlor had gone away, he saw the scab inspector go into the dining-room, and he saw him, before the blind was drawn, just by the window, with Mrs. Lawlor. The other boy went to see if Mr. Lawlor was coming back. When the plaintiff arrived he saw the scab inspector run very fast into the garden. Then he saw Mr. Lawlor on the other side of the fence. Mr. Lawlor came out with his gun, and asked witness the whereabouts of the scab inspector. Witness said he had run into the garden. When Mr. Lawlor fired the gun after Mrs. Lawlor, witness and the other boy took away the gun.

Another native stated that sometime after Christmas last year he saw the defendants go into a room after Mr. Lawlor and Mr. Manley went away to fish. The door was shut, and the blind drawn down, and witness drew Sam's attention to this.

Shortly afterwards Mr. Lawlor's horse came back, and Mr. Manley tried to catch it. Mrs. Lawlor came out of the room, and subsequently returned. The second time she came out of the room she was followed by the scab inspector.

Another boy gave evidence of a similar nature.

Harry P. Manley, member of the firm of Sutton and Manley, stated that at the beginning of the year he was doing some boring for the plaintiff on his farm. On and off he was at plaintiff's place from June, 1906, to January this year. Mr. and Mrs. Lawlor appeared to be getting on all right. On the 24th January he went out on horseback with the plaintiff on a fishing expedition. Mr. Lawlor's horse broke loose, and witness went in pursuit of it. The animal was caught at the hotel. He saw Mrs. Lawlor when he came back. Mrs. Lawlor was partially flushed, and she asked where the rider was. Witness said that the horse ran away.

[De Villiers, C.J.: Had you been staying as a boarder in the house?—Yes.

At the same time as Mr. Hearns?—Yes.

Have you noticed any familiarity between him and Mrs. Lawlor?—Not out of the way.

Out of the way. I do not know what you consider out of the way or in the



way?—I do not know what would be termed familiarity. Nothing disgraceful.

You have never seen familiarity such as kissing?—No.

Nothing to attract your attention in the relations between the two?—Nothing.

Walter J. Warner, who looked after the store business for the plaintiff, stated that on the 24th January Sam asked him to come and see something.

Did you act on what he said?—No.

Why not?—In the first place I did not consider it my business to interfere with Mr. Lawlor's domestic affairs.

He remembered on the 25th January hearing the gunshot. Mrs. Lawlor was about 300 yards off. When the plaintiff fired the gun he looked very excited. Upon her return to the verandah Mrs. Lawlor was crying, and he heard her say: "Forgive me, Harry; I will never do it again." The plaintiff said: "You can take your things; the cart is in-spanned; and I will take you home." When Mr. Lawlor was present the defendant and the co-defendant seemed to avoid each other; but when he was absent they were often together. On two occasions he saw Mrs. Lawlor writing notes in the shop, and when Mr. Lawlor came in she hurriedly concealed them. He noticed that Mrs. Lawlor took an interest in Mr. Hearn's correspondence. Witness's office was a sub-post-office, and he had to do the sorting. When the first defendant came she looked over Mr. Hearn's correspondence before she even picked out her own.

Wm. George Bennett, who was at present working for the plaintiff, stated that while he was working in the smoke-room on the 24th January he noticed Mrs. Lawlor come from Hearn's room. Shortly afterwards Hearn emerged from the same room. Witness remembered the morning of the 25th January, when the disturbance took place. He saw some girls rush from the kitchen round the house. Witness asked Mr. Lawlor what was the matter, when he used an oath and said he had found the defendants together in the room. The plaintiff was in a passion. He heard Mrs. Lawlor, who was crying when she was brought back, say, "Forgive me, Harry; it shall never happen again."

George Pitt gave corroborative evidence as to the defendants entering the same bedroom.

Edward Lawlor, trader, Cofimvaba, spoke to a family gathering in February last, at which efforts were made to effect a reconciliation. Witness asked Mrs. Lawlor if she were guilty. He had not the slightest doubt that she said she was. Mrs. Snodgrass, on hearing of the admission, subsequently said that defendant was a little fool for making such an admission.

By the Court: Mrs. Snodgrass used her influence with the plaintiff's wife, and prevailed on her not to return to her husband.

What was it she admitted, being found in the room with a man?—I took it she admitted the general accusation against her.

That is of adultery?—Yes.

Agnes Lawlor, wife of Percy Lawlor, brother of the plaintiff, stated Mrs. Lawlor had often written notes to Hearn, and her explanation for doing so was that her husband objected to her being with Hearn. She saw a note from Hearn which began, "My dear, darling girl." Mrs. Lawlor told witness after the dance she was getting to dislike her husband more and more every day.

Cross-examined by Mr. Burton: Mrs. Lawlor made no secret of the notes, although it struck witness it was a very improper state of affairs. She must have been subpoenaed on suspicion, as she never breathed a word to a soul about what she had seen.

Did Mrs. Lawlor confide in you about Miss Rae?—Yes, she thought her husband was carrying on with Miss Rae.

Did she say there was unpleasantness between them about it?—Yes.

Mr. Close closed his case.

The defendant, a young woman of prepossessing appearance, stated that she and her husband eloped to get married. Owing to various circumstances, they were only happy for a few months. There was a governess named Miss Rae, and her husband used to ask her out. Her husband became very friendly with this lady. Witness objected to Miss Rae coming to the place, and the plaintiff said it was his house, and he would invite whom he liked. On one occasion she saw her husband sitting with his arm round Miss Rae's waist and his hand on her knee. The plaintiff followed witness into the kitchen, and begged of her not to be angry. Witness said: "I do not wish to speak to you." Witness was very angry about the plaintiff taking Miss Rae to Cala, and she wrote to that lady stating if she made arrangements to go with her husband, to select a meeting-place other than the hotel. The letter of apology which witness subsequently wrote was drafted by her husband, who threatened to sjambok her if she did not copy it. She had more dances with Mr. Manley than with the second defendant on New Year's Night, and when she challenged Mr. Palin about the remark he passed, he absolutely denied having made it. Upon the second occasion she danced with Hearn at her husband's suggestion. She denied having kissed Hearn. On the 24th January Mr. Manley and her husband went out. Witness remained in her room.



On January 24 her husband and Manley left on a fishing expedition. She asked to be allowed to accompany them. Her husband, however, withheld his consent. She then went to her bedroom, and was lying down reading when the horses returned to the yard. The evidence given by the natives as to her having been in the stoep-room was quite untrue. On the 25th January, when she was passing the sitting-room, Hearn said: "Just a minute, Mrs. Lawlor." Witness went into the room, and sat on a chair close to the door, with her hand on the handle. Mr. Hearn spoke about his shirts and clothing. The door was ajar. She was not in the room above five minutes. It was not true that she pulled down the blind. While she was in the sitting-room her husband passed the door, and could not have helped seeing witness.

[De Villiers, C.J.: What was the object in holding the handle?]

Witness: I had no particular object.

[De Villiers, C.J.: A curious thing for you to do.]

Witness (continuing) said that soon afterwards she went out into the hall, and her husband asked her what she was doing. She replied, "Nothing." She went to the child, who was crying, and while she was standing at the sideboard in the dining-room, her husband came in with his gun in his hand. She did not remember whether she spoke to him, but he gave her a slap, and she fell against the sideboard and he kicked her. She was dazed, and when she came to her senses she went out, because she was frightened. She went along past the tennis-court fence. She heard someone call out, "Not that way; the front way." As she turned round, her husband fired at her. He then sent two native servants after her. They tried to catch hold of her, but she would not let them touch her. She went back to the house, and her husband then accused her of having been locked up in the room with Hearn. She emphatically denied the allegation, but he repeated it, and said that he would take her back to her mother's, where he had got her from. He again slapped her and pushed her, refused to let her have the children, and finally drove her to her brother's. She denied that she said "Forgive me, forgive me." She next saw plaintiff at the family council at Cofimvaba on the 5th February, when he said that he would make a public apology to her if she admitted her guilt. She refused to accept such terms, and at no time had she made an admission of guilt. She denied that she had made a confidante of Mrs. Percy Lawlor, or had told her that she wrote notes to Hearn. She had never written notes to Hearn.

Cross-examined by Mr. Close: Witness did not invite Miss Ray to visit them. Miss Ray came at the invitation of her husband. The trouble ori-

ginated about the incident of the room when she found her husband with his arm round Miss Ray's waist. She wrote the letter of apology to Miss Ray under compulsion by her husband, but she had not since written to Miss Ray repudiating that letter. She had been friendly with Hearn, but nothing more. On the 25th January she saw no commotion between her husband and Hearn, and she heard no noise. She started to run away from the house when her husband fired at her.

By the Court: She copied part of the letter of apology sent to Miss Ray from a draft by her husband, and the rest she wrote at his dictation. Words were underscored at his request. It was through fear that he would sjambok her that she wrote the letter.

John Archibald George Hearn (the second defendant) was then called. He said he was a sheep inspector in the district of St. Mark's, Tembuland. He was insolvent, his estate having been sequestrated about 18 months ago. He had never been on intimate terms with Mrs. Lawlor. He had not carried on a clandestine correspondence with her. After the dance at Tsomo plaintiff gave him notice to leave the hotel at the end of January. On the 23rd and the following days he suffered from dysentery. On the 25th he was in the sitting room when Mrs. Lawlor passed, and he called her in, and asked her about his washing. Mrs. Lawlor went out, and a moment later Lawlor came in and said, "What the d— are you doing here with my wife?" Before he could reply Lawlor struck him over the head with a stick. Witness dropped on his knees, but pulled himself together, and was about to rush at plaintiff, when the latter turned round and ran to his bedroom, saying that he would get his gun. Witness was covered with blood. As he was going through the garden he heard a shot fired. He concluded that this was meant for him, and he therefore ran away. He subsequently sent for his horse, but received a threatening letter from plaintiff. Witness lodged a complaint with the Chief Constable at Cofimvaba in reference to the assault. That case was standing over pending decision of the present action. Witness was engaged to be married, and had received a letter from his fiancee since he had arrived in Cape Town.

Cross-examined: Witness had been dismissed from his appointment as scab inspector on account of being absent from his district without leave. He had informed the department that he could not give a full and complete explanation until the action was heard. On the 25th January, witness spoke to Mrs. Lawlor about his washing, as he was leaving at the end of the month. When Lawlor came into the sitting-room he did not chase witness round the sitting-room table. Witness

did not run out of the room. Plaintiff went out of the room, saying that he was going for his gun.

Arnold K. Paling said that he was present at the New Year's dance at N'ccra. He denied having asked whether Mrs. Lawlor was engaged to Hearn.

Horace D. Lloyd, Assistant Magistrate of Cofimvaba, said that on the 27th January he saw plaintiff chasing Hearn with a stick. Witness spoke to plaintiff, who then began crying, and said that Hearn had ruined his wife. The incident took place in the street at Cofimvaba. Lawlor was drunk.

Mary Snodgrass (mother of the first defendant) gave evidence as to the return of her daughter with plaintiff on the 25th January, and the family council on the 5th February. At the family council, plaintiff wanted his wife to own up. Witness told her daughter that she was not to own to anything unless it were the truth. Plaintiff said that he wanted her to own up because he was frightened of Hearn. Witness did not hear her daughter make any admission.

William John Snodgrass (brother of Mrs. Lawlor) corroborated the previous witness. He said that his sister emphatically and persistently denied having committed herself with Hearn.

John Watterus, a trader (Mrs. Snodgrass's brother) said that he had never heard or understood from anyone that Mrs. Lawlor had admitted her guilt. He was present at the family gathering at Cofimvaba, and was with Eddie Lawlor most of the time, but he never heard an admission made by Mrs. Lawlor.

Thomas Wm. Watterus (who also attended the family gathering) said that Mrs. Lawlor always denied her guilt.

Martha, a native servant, and Hester, a native nursemaid, said that while in plaintiff's service, they had not seen any familiarity between Mrs. Lawlor and Hearn.

This concluded defendants' case.

Agnes J. Ray (called by Mr. Close) said that in December last, she was asked by Mrs. Lawlor to extend her visit to the hotel. She denied that she had been on intimate terms with plaintiff. Witness was engaged to be married, and was engaged about Christmas last.

This was all the evidence.

*Postea* (July 1st).

Mr. Close said that he did not at the present stage intend to touch upon the first defendant's claim for a judicial separation, but to deal solely with the question of adultery. The evidence was not direct, but the Court, all the same, had very considerable evidence in support of the charges laid by plaintiff, and of as near and direct a nature as one could possibly expect in such cases, and corroborated in material points

when it came to a question of conflict of testimony between the witnesses for plaintiff and defendants. All the independent corroboration, he submitted, was on the side of plaintiff. There was, he contended, every reason to believe the story told by plaintiff as to the defendants being locked in the sitting-room of the hotel together on the 25th January. The admission stated by Mr. Edward Lawlor to have been made by the first defendant at the family council on the 5th February was entitled to credence. The plaintiff had absolutely proved his case, and he was entitled to a divorce and custody of the children. As regarded the matter of damages, Hearn had admitted that he was an insolvent, and he (Mr. Close) did not propose to go into the question of his means, but he asked the Court to award such a sum as to mark its sense of the co-defendant's conduct.

Mr. Burton laid stress on the fact that Mrs. Lawlor seemed to have been very jealous of her husband, on account of his relationships with Miss Rae. The incident of her husband proposing to drive Miss Rae to Cala, a distance of 30 miles, caused her a good deal of trouble.

Mr. Close (interposing) said that it was plaintiff's brother who was asked to drive Miss Rae to Cala.

Mr. Burton (continuing) said that, whether justifiably or perhaps unjustifiably, on the actual facts, there was no doubt the defendant was troubled about it, and the matter was one of real unhappiness. Counsel went on to call attention to the abject letter of apology alleged to have been written by Mrs. Lawlor under compulsion by her husband, and the similarity in style between that letter and one sent by plaintiff to his wife. Plaintiff denied that he had anything to do with this letter. Was his evidence credible on that point? Mrs. Lawlor had spoken the truth with regard to this matter, and one could not help concluding that plaintiff had misled the Court. Counsel said that he found it difficult to believe the story told by Mrs. Percy Lawlor as to Mrs. Harry Lawlor having told her that she was carrying on a clandestine correspondence with Hearn. The story was one which, he submitted, the Court could not place reliance upon. Coming to the incidents alleged to have taken place in the latter part of January, he commented on the need of accepting the testimony of native witnesses with great caution, unless it were properly corroborated. Their evidence as to what took place on January 24 was uncorroborated. The allegations as to January 25 depended mainly on the evidence of plaintiff himself. The whole story given by the native witnesses was most improbable. Mr. Burton claimed that plaintiff's account of what he found on January 25 was not to be believed. In regard to

the family council, he urged that plaintiff had recognised that he had not a good case, and so he wanted an admission from his wife to bolster up his case. The story told by Edward Lawlor was contradicted by several witnesses, who said that they never heard the first defendant admit her guilt, and that throughout she maintained her innocence. Counsel also briefly addressed the Court in support of the counter-claim for a separation.

De Villiers, C.J.: This is an exceedingly painful case, painful certainly for the parties concerned, and for their friends, and painful even for the judge who has to decide in the midst of the conflicting evidence which has been given. A great deal in the present case must depend upon the credibility of the parties immediately concerned—of the plaintiff and of the two defendants—and if it is found that either party has upon very important points given evidence which to my mind is wholly incredible, then their evidence cannot be accepted upon other points which are even more material to the decision of this case. I must express my regret that Miss Rae's name has been dragged into the case. I consider that the first defendant had no justification whatever for any of the charges which she has made against Miss Rae. One of the statements which she has made is that on one occasion she had seen the plaintiff sitting in the room with Miss Rae, with one arm round her waist and his hand on her knee. Miss Rae has been called to give this statement an emphatic denial, and I am bound to say that I accept Miss Rae's statement as the perfect truth in the case. Then it appears that the first defendant had taken offence at the fact that her husband had offered to take Miss Rae to Cala station, and that she must have written some very insulting letter to Miss Rae on the subject. After the letter had been written she appears to have regretted its very insulting terms, and she sent a letter again to Miss Rae humbly apologising for the terms in which she had written. Now, the fact that she had written this letter would, of course, have weighed against her, and accordingly she, in giving her evidence before this Court, stated that it was written because her husband threatened to sjambok her if it were not written, and that her husband had dictated the terms of the letter, and that she was simply an instrument in his hands in writing that letter. I am bound to say that I wholly disbelieve this statement; it is wholly incredible. It is not a letter which he could have or would have written, it is not a letter which a man could write or would write, it is a woman's letter from beginning to end in its underlinings as well as in every form of expression. It has been said that another letter has been writ-

ten by plaintiff which is in very much the same terms, but they differ *in toto* from each other in the forms of expression, and certainly I do not see any of the underlinings in the plaintiff's letter written by him; it is shorter in terms and very much to the point. She said that the latter part of the letter was dictated by her husband. I do not quite understand why, if the latter part were dictated, she should end with the latter part instead of beginning with the dictated part. Now, the part which she said was dictated was the latter part, which reads: "The devil, Miss Rae, got the better of me on Tuesday, and I could not tell you to save my life what it was about. Do please forgive me. I am really sincerely sorry for the step I took, and I do sincerely wish you to let Harry drive you to Cala. Oh, please, don't say no. You don't know how ashamed I am of myself. Do write and relieve me of my misery. It has, I can assure you, been painful misery. I have hardly closed my eyes for the last two nights. My face will show you the misery I have been in. Good-bye, Miss Rae; I hope you will do as I wish.—Yours in misery, M. Lawlor." Now, to my mind, it is wholly incredible that her husband had forced her to write this, especially the phrase about her face would show, by having a sjambok there ready to give her a thrashing. He had never had the sjambok down before. I consider that she would have had quite sufficient spirit to tell her husband when he asked her to write this letter that she refused to write it, and that he could sjambok her as much as he liked, but she would not write it. I believe that this letter was written from her heart, because she was thoroughly ashamed of herself for having written the previous letter to Miss Rae. Coming to the points more immediately in the case, what led to this suit was that the plaintiff found his wife in her room with the second defendant. Now, that in itself, I do not think, would prove adultery. If the door were locked it would not necessarily prove adultery. It was not in a bedroom. The lady had her hat on and her husband does not allege that her condition showed that anything improper had occurred. I do not think myself that that in itself would be clear proof of adultery. But if the defendant denies the statement that she was closeted with the second defendant, that, if untrue, would go far to throw discredit upon her denials as to the other case in which circumstances were more conclusive as to adultery than the circumstances of being found in the sitting-room with the second defendant. Now, what led the plaintiff to go back and find her there? Something must have been told him. Undoubtedly something was told him that morning. He says that Sam and Fungama had told that something had taken

place previously, and it was in consequence of what they told him that he determined to pretend to go to Light's, and to come back, thinking he might find defendants in a compromising position. It has been urged by counsel for the defence that a trap was laid for defendants. I do not see that any trap was laid. Neither was enticed into a position in which the plaintiff wanted to assure himself that what the natives had told him was the truth, and that there was some intriguing going on between his wife and Hearn. He came back almost immediately after he had been out of sight, his wife saw that he was out of sight, and then, on a signal from Fungama, he goes into the house, and, according to his own evidence, he finds the sitting-room door locked, and with considerable effort he opened the door and found his wife and the second defendant in the room together. The statement that he attempted to go in and had to use considerable force is supported by Fungama, who says that he saw the master try three times at the door before he could get in. Undoubtedly the plaintiff was in a state of frenzy. Nobody can excuse his conduct. He was out of his mind with fury. He admits that he struck his wife, and that he afterwards fired at her. It is not suggested that he was drunk. If ever he would have been sober it would have been that morning when he was going to find out the truth about his wife. It is incredible that the man would have been in that state of frenzy if the wife's statement is true that she was sitting at the door, with the door open and her hand on the handle, with her hat on, and the man sitting near the window. It is utterly incredible that the man would have been in that condition if her statement be true and the statement of the second defendant be true. I should have thought, on the contrary, the plaintiff would have been relieved rather at finding that his suspicions were unfounded, but so far from his suspicions being relieved, they were fully confirmed when he found, as I find the fact to be, that the door was locked at the time, closed so that he could not enter, and the two defendants were in together. As I said before, that is not conclusive. The circumstances are such that it is quite consistent with her innocence. The mere fact that the door was locked is not necessarily proof of misconduct, but then, as I said before, something had taken place the day before, which led to suspicion. That is undoubted. Now, what is it? There we have the evidence of two natives. I quite agree that the evidence of these people should be looked upon with care, and that it should not be accepted, unless there be corroboration in some important point. Well, already there is corroboration in the fact that when they had told their master what had taken place, and the master had

tested the matter, he had found the two together. But there is further corroboration in what followed on the day on which the plaintiff had gone fishing with Manley, and he has stated what he saw, and, in my opinion, such evidence does to a great extent corroborate the evidence of the man Sam. At first it would appear that Sam had wished to convey the idea that he was all the time at the store. If that were so, then it would have been impossible for him to see the first defendant speaking to Manley, but it would appear from the evidence that he was not all the time at the store, that he at one time had gone to the back, and would have been able to see the first defendant speaking to Manley there. Manley says that he saw Mrs. Lawlor coming from the corner room towards the hall door. She denies that altogether, but I say that that is a corroboration of the evidence given by the two natives. The defendant knew that Manley had been there, and that the horse of the plaintiff had run away. She said, "Where's the rider?" He said the horse had run away. She went back to the room, knowing there was time to be there without being interrupted. Now, if these parties had admitted that they were in the room for an innocent purpose, then the Court might still have considered whether it cannot be possible that they were there for an innocent purpose, but they say they never were together; she says that she was in her own room that afternoon, and he says he was in his own room. So that the very fact, if the Court find it true that they were together, that they totally deny their presence there, would go far to show that, if they were there actually, they were there not for innocent purposes. In these cases of adultery the Court must be guided by circumstantial evidence. It is not a thing that is done in public, but as secretly as people can do it, and therefore the Court must judge by what it knows of human nature, and by the evidence in cases of this kind must judge from the circumstances as to whether there was guilty conduct, and I am bound to say that the only conclusion I can arrive at is that there was misconduct on that afternoon. There had been undoubtedly strained relations between the husband and his wife previously. I believe what Mrs. Percy Lawlor says generally, that she (the defendant) was losing her affection for her husband, and I do not see any reason to disbelieve the statement made by her that she had seen a letter addressed to the first defendant in somewhat endearing terms, and considering the manner in which these natives gave their evidence on other points, I do not see any ground for disbelieving their statement that on the occasion on which the plaintiff and defendant returned from Cofimvaba



there was familiarity between the two defendants, and that they kissed each other when the plaintiff had gone to the bar. That in itself, as I say, would not be conclusive proof, but I say that these circumstances, taken together, seem to me to prove that the two defendants were on affectionate terms with each other, and that the terms were such that it is extremely unlikely that their being together in the bedroom on the afternoon of the 24th January would have been for any other than illicit purposes. Then in regard to the admission alleged to have been made by the first defendant as to her guilt, the first admission was heard by Warner and, I think, Bennett, when she had been called back after the firing. She and her husband were walking together under the verandah on the stoep, and they both heard her speak under great excitement, and they heard her ask her husband to forgive her. Now, here again the forgiveness she asked for might have been only for being found in the room with the second defendant, but then here again she denies having asked for forgiveness at all, and I can only conclude that the forgiveness she asked for was for misconduct which she had been guilty of with the second defendant. Then again we have the evidence of Mr. Eddie Lawlor as to what took place at the meeting of friends on the 5th February. I am not prepared to say that the other witnesses came here to perjure themselves as to what they heard. They may possibly not have heard everything, but I am quite satisfied that Eddie Lawlor understood the confession was made, that the confession was at once repressed by the interference of her mother, and when the mother had interfered the daughter did not repeat the confession; but up to a certain point I am satisfied that the daughter was prepared to make a confession. In regard to Eddie Lawlor's conduct in the matter, I am bound to say that throughout he has shown a sincere desire to bring these parties together and to get them to settle this matter amicably. I do not see any trace in his letters of animus against Mrs. Harry Lawlor, or of partiality for his brother. Notwithstanding his belief that the woman was guilty, he tried for family reasons and more especially for the sake of the unfortunate children to bring them together and get them to settle matters, but there was a hitch, and I believe that the hitch was mainly caused by the interference of the mother of the first defendant. But for that interference probably these parties would have come together, and they might have settled the matter and perhaps lived together again happily afterwards. But unfortunately the case has now reached a stage at which this seems to be impossible. Plaintiff has decided to go on

with the action, and the Court must now with the evidence before it, and according to its best lights, decide between the two, and I am bound now to say that, as a juror, I come to the conclusion that plaintiff has proved his case and that there has been adultery on the part of the first defendant with the second defendant. In saying this I do not in any way excuse the conduct of the plaintiff towards his wife after he discovered what their relations were, but I do not think there is any evidence to show that before he discovered these relations he was in any way an unkind husband or treated her at all improperly. After he had discovered it, undoubtedly he lost his temper completely, and in a state of frenzy he did things which I am sure he must have afterwards regretted. I do not think I am justified in punishing him for what he did afterwards by withholding costs in this case, but I do not think this is a case in which any good purpose could be served by giving damages against the co-defendant. I think it would be sufficient for the purpose of this case if in giving judgment for the plaintiff as prayed I ordered that costs of this action be paid by the second defendant. Judgment will be given as prayed, the first defendant to have access to the children of the marriage at all reasonable times and places, the second defendant to pay the costs. Plaintiff will be declared a necessary witness.

*Postea* (July 2nd).

De Villiers, C.J., said that judgment was entered for plaintiff as prayed. Of course, that did not include the £5,000 damages claimed against the second defendant, but it included forfeiture of the benefits of the marriage by the first defendant. The only point was that there might still be a question hereafter of whether the forfeiture should not take effect from the date of judgment.

Mr. Roux said that his client was prepared to consent to that. He added that he understood an inheritance was coming to defendant.

[De Villiers, C.J.: It affects the question of the costs of the first defendant in defending the action, whether those costs should not come out of her share of the estate, seeing that the forfeiture takes effect from the date of judgment.]

Mr. Roux pointed out that in evidence it transpired that Mrs. Lawlor did not bring any property into the marriage.

[De Villiers, C.J.: They were married in community and until the forfeiture was actually decreed half the estate belonged to her.]

Mr. Roux said the Court ordered the costs to be paid by the second defendant.

[De Villiers, C.J.: Yes, but supposing the second defendant is insolvent? The Court only ordered the plaintiff's



costs to be paid by the second defendant, not the first defendant's costs.]

Mr. Roux: We did pay over a sum of £50 to enable her to defend the action.

De Villiers, C.J., said that he wanted to make it perfectly clear as to what was to happen hereafter. Until the forfeiture actually took place, she was the owner of half the estate. Supposing her costs were in excess of £50 should they not first be paid out of her estate?

Mr. Sutton (in the course of further argument) said that the sum of £50 was as nothing compared to the amount of costs incurred by Mrs. Lawlor. She had been quite justified in defending the action. As to the inheritance, it would be a matter of law whether it came into the community at all.

De Villiers, C.J.: The judgment had better stand. The Court will grant a decree of divorce, plaintiff will be declared entitled to custody of the children of the marriage, with leave to the first defendant to have access to such children at all reasonable times and places, ordered that plaintiff's costs be paid by the second defendant, including plaintiff's costs as a witness, declared that the first defendant has forfeited any benefits accruing to her by virtue of the marriage in community. That, of course, is the result of giving judgment in terms of the prayer of the declaration. As to the ultimate result of this, I do not think it is necessary for me to express any opinion now, but I should think that the effect of the forfeiture would be to debar the first defendant from claiming payment except for such expenses as she has incurred by authority of her husband. Still, the point is not raised in the pleadings, it does not arise for decision, and all I can do now is to give a decree of forfeiture as prayed.

[Plaintiff's Attorneys: Zietsman and Bosman; 1st Defendant's Attorney; G. Trollip; 2nd Defendant's Attorneys, Walker and Jacobsohn.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### REVIEW

REX V. TITIES. ( 1907.  
( June 28th.

Acts 23 of 1879, Sec. 4 and 23 of 1906, Sec. 1—Evidence as to character.

Buchanan, J.: A case has come in review which raises rather a nice point. One Tities was prosecuted under the

Vagrancy Act, for trespass upon an enclosed camp. Now, the 4th section of the Vagrancy Act, under which he is charged, makes a person a vagrant, who is found wandering and loitering on a farm. The 1st section of Act 23, 1906, which amends the 4th section, makes trespass liable to the same penalties, when any person is trespassing upon or found within enclosed premises. In this case the accused was not found upon the farm. Certain spoors were found, and a charge was brought against the accused for killing an ostrich, which had been found dead in the camp, and he was convicted, and sentenced for that offence. Then this second charge was brought up against him. He was not found within the camp at all, and every witness when he began his evidence spoke of the previous conviction of the accused. Even if a strict reading of the Act might allow, the prisoner to be made a vagrant though he was not found on the place, still the proceedings are so irregular that I think they ought not to be confirmed. There is a distinct prejudice to the prisoner in the statements made by every witness. It is a well-known principle that evidence as to the character of the accused should not be brought before the Court prior to conviction unless evidence as to good character is led on the other side. The papers had been submitted to the Attorney-General, and he is not prepared to support the conviction. The conviction will be quashed.

### ADMISSION.

Mr. Marais moved for the admission of Cornelis Hermanus Weesels as an advocate.

Application granted and oath administered.

### PROVISIONAL ROLL.

#### STEELE V. DREYER.

Mr. Wallach moved, in terms of consent, for a decree of civil imprisonment, with costs, execution to be stayed pending payment of £3 per month for two months, and £5 per month thereafter, with leave to plaintiff to apply for increased payments.

Decree granted, execution to be stayed on the conditions stated in the consent paper.

### ILLIQUID ROLL.

#### HORNE V. DE MARILLAC.

Mr. De Waal moved for judgment under Rule 319 for £87 10s., amount of

brokerage due by virtue of a broker's note, dated October 27, 1904, and signed by defendant, in reference to certain property, Tantaloon, Rondebosch, sold by defendant to Mr. E. R. Bradfield for £3,500, through the agency of plaintiff, who acted as broker in the matter.

Defendant appeared and asked for a stay of execution, as he was expecting funds to arrive in a few weeks.

Judgment as prayed, execution stayed for three weeks.

#### ZEEKDERBERG AND LUNCAN V. LEVIN.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £57 1s. 5d., for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

#### REHABILITATION.

Mr. J. E. R. de Villiers moved, under the 117th section of the Ordinance, for the discharge from insolvency of Sors Klaas.

Granted.

#### GENERAL MOTIONS.

*Ex parte* ESTATE VAN ZYL. { 1907.  
June 28th.

Mr. Marais moved for leave to the executor to sell certain estate property in the division of Clanwilliam, in which a minor is interested.

Order granted as prayed.

#### *In re* THE SOUTH AFRICAN WIDOWS' FUND (IN LIQUIDATION)

Dr. Rainsford presented the first report of the liquidators and the liquidation and distribution account, and applied for the usual order.

Usual order granted, one publication in the "Cape Times" and "Ons Land."

#### IRWINE V. GOLDSMITH.

#### LEVINE V. GOLDSMITH.

Mr. Toms was for applicants, Reuben Levine and Alto Irwine; Mr. Van Zyl was for respondent, Abraham Goldsmith.

These matters arose out of certain spoliation proceedings. Applicants had been adjudged to pay the costs, and subsequently they were again brought into Court on an application for a decree of civil imprisonment. The Court granted a decree, but suspended execution on payment by Levine of 15s. a month, and by Irwine of 5s. a month.

Applicants had fallen into arrear with their payments, and had been lodged in gaol.

Having heard affidavits and counsel on the facts:

Buchanan, J.: These are two applications against the same respondent. The first one is by Reuben Levine. Reuben Levine has had a previous judgment of the Court against him, and on failure to satisfy that judgment a decree of civil imprisonment was granted against him, but execution was suspended on condition of his paying 15s. a month to the respondent. Levine, as I understand, has paid one 15s., but omitted to pay a second 15s., though after his arrest his attorneys, to whom Levine had paid 15s., intended, I presume, for the respondent, tendered the amount to the respondent. In Levine's case, on payment of this 15s., he will be released from gaol, but the previous order will still remain against him. As regards Irwine, there seems absolutely no reason whatever given why a man in his position, earning the money he does, should not pay the 15s. a month which was the condition upon which in his case execution was stayed. On Irwine's application there will be no order. In Levine's case, an order will be made that he be released from imprisonment on paying the 15s. which was tendered, but the decree will remain otherwise as before. The costs will be added to the debt.

#### MARAIS V. LANGERMAN.

Mr. Upington moved, on behalf of plaintiff, in the action for a commission *de bene esse* to take the evidence of Mr. Anders Ohlsson, who was shortly leaving Cape Town. Respondents consented to the application.

Order granted, appointing Mr. Giddy, K.C., as commissioner to take the evidence of Mr. Ohlsson.

#### PIENAAR V. GODDESS.

Mr. Lewis moved, on behalf of the applicant, for a postponement of this case, brought by respondent against applicant, which had been set down for trial on the 3rd July.

Mr. Roux appeared for respondent.

The ground of the application was that defendant had been called away to Upington on the business of a company of which he is managing director, and that his evidence was essential to the defence. Respondent was prepared to consent to a postponement, so long as the case was heard this term and defendant paid wasted costs.

Buchanan, J.: This case arises out of a contract which was entered into last year for the building of certain buck wagons. Certain of these wagons seem to have been completed early this year.

Upon the completion of the work the purchase price was payable. Two of the wagons were not approved of, and, therefore, no payment was made. On the 10th May summons was issued and declaration filed. The defendant entered appearance, but did not plead, and he was barred. When he applied to the Court in June for leave to purge default, he had been in hospital, and assuming there was good reason for his delay, it was intimated that the bar would be removed on condition that the parties went to trial this term. That was really the impression left by the Court. The case must go to trial this term. The defendant was in town when the bar was removed, and he ought to have prepared for the trial taking place as intimated. He is now at Kenhardt, and the case has been set down for the 3rd July. A postponement will be granted, but I do not think it can go beyond the date originally contemplated. The case will be set down for the 12th July. Costs may be mentioned at the trial.

*Ex parte O'CONNOR.*

Mr. Toms moved on behalf of petitioner, as proprietor of the "South African Trade Journal and Shipping Gazette," for an order for the attachment of certain goods belonging to C. J. R. Dolling, lately trading in Cape Town as the "Horne Water Paint Co.," and for leave to sue the respondent by edictal citation. Petitioner stated that respondent was indebted to him in a sum of £45 12s., for advertising and copies of the paper supplied, that Dolling had left for England some time ago, and that there was reason to believe that he had no intention of returning to the Cape, as instructions had been given to close down the business here. Petitioner asked leave to attach about four tons of material belonging to respondent, in order to found jurisdiction.

Leave granted to attach the goods *ad fundandam jurisdictionem*, and to sue by edictal citation, citation returnable on the 31st August, personal service, failing which, service at respondent's last known place of business in London.

## APPENDIX.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Vilander Concessions Syndicate v. The Government of the Colony of the Cape of Good Hope, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 7th February, 1907.

Present at the Hearing:

LORD MACNAGHTEN.  
LORD DAVEY.  
LORD ROBERTSON.  
LORD ATKINSON.

[Delivered by Lord Robertson.]

The question in this Appeal is of the present effect, in relation to the Government of the Cape Colony, of a certain concession of minerals obtained by one Adolph Heinrich Carstensen from a native chief in Bechuanaland in 1889 and 1890. The Appellants are admittedly vested in all the rights of Carstensen.

At the time of those concessions there was only a Protectorate of the territory in question, Her late Majesty's sovereignty not having been proclaimed until 1891. Accordingly it is assumed that, in those days, David Vilander, the chief who granted the concession, was competent to deal with those minerals. The immediate question is rather of the effect of the decision on the concession of a Court styled "The British Bechuanaland Concession Court," which was constituted in 1893, and authorised to inquire into and decide upon the validity and scope of all such concessions from native chiefs made prior to 1891. Postponing, in the meantime, any examination of the terms of the Proclamation of 1st February, 1893, establishing this Court, it is convenient now to say that the Appellants submitted their claim under Carstensen's concession to this Court, and the Court inquired into and decided upon it, their Judgment being entered under the head "A' claims allowed," "A. H. Carstensen, mineral rights over the whole of Vilander's country."

"The entire claim as proved granted, subject to all laws and regulations of British Bechuanaland relating to mines and minerals, and otherwise in force in the said territory."

The whole controversy in the present Appeal turns on the qualification or condition introduced into this decision by the word "subject," and neither party has pointed to any other law or regulation as bearing on the question than a Proclamation dated 25th April, 1889. The contention of the respondent is that, in so far as the precious minerals by Vilander with the rights al-

erals are concerned, the privileges conferred by Vilander on Carstensen have, by this decision, been restricted to the rights allowed to subjects by the Proclamation of 1889. It is not necessary, in detail, to compare or contrast the rights purported to be conferred on Carstensen by the Proclamation. It is still less necessary to contrast the latter with the claim of exclusive right which is, for the first time, advanced in express terms in the appellants' case. Suffice it to say that the difference, in either view, is so great that, if the Proclamation be the true measure of the appellants' rights in the precious minerals, they rightly failed in the Courts of the Colony.

In the Colony the litigation between the parties was commenced by summons dated 1st June, 1904, by which the appellants claimed a declaration; but it was agreed that the question should be tried on a Special Case, and the contention of the parties, the appellants (as plaintiffs) and the respondent (as defendant), were stated in the following (very general) terms:

"The plaintiffs contend that the concession and further concession are and have been of full force and effect and binding upon the Government, and that they are entitled to have their rights in, arising out of, and under the said concession and further concession, declared accordingly by this Honourable Court, and to obtain an order declaring that as to all grants already issued with such reservations the Colonial Government is bound to recognise the said reservations as made for and on behalf of the plaintiffs, and directing the Government as to any further grants of land in the said territory to include a condition subjecting such grants to the rights of the plaintiffs and their successors or assignees under the aforesaid concessions."

The defendant contended:

"That the plaintiffs are not entitled in the premises to the relief claimed."

The Chief Justice, on 7th March, 1905, granted judgment in favour of the defendant's contention, "this Judgment to have effect only of absolution from the instance." On appeal, this Judgment was affirmed by the Supreme Court, sitting as a Court of Appeal, on 19th June, 1905. The present appeal was then brought.

Reverting now to the concession of Vilander, it is to be observed (1) that it does not purport to make the right conferred an "exclusive right to search for and win minerals in the territory in question"; and (2) that it is not confined to the precious minerals, but applies to all minerals. It gives to the grantee a mining concession to search for and win precious stones, gold, silver, platinum, and other minerals over and in one or more area or areas not to exceed in the aggregate 20 miles square

or 400 square miles, to be chosen by the grantee. Then, as soon as the grantee has selected the area, he is, in consideration of a stipulated rent and royalty, to "be entitled to convert to his own use all precious stones and all minerals whatsoever found within the limits of this concession or demise." The concession was to last so long as the stipulated rent and royalty were punctually paid.

Now it should seem the just result of these provisions that assuming the grantee, once he has selected and marked off his area, to have an exclusive right to the minerals found in that area, his antecedent right to prospect within the territory of Vilander was not exclusive and could effectively be exercised although not exclusive.

Considering, however, apart altogether from this question of exclusiveness, the effect of the qualification or condition imposed by the Concession Court in 1893 on the appellants' claim on Carstensen's concession, it is to be observed that that qualification operated solely on the right to precious minerals, and did not touch the right to other minerals, which, as has been seen, was conferred on Carstensen. Accordingly it is not the case, as was maintained by the appellants, that the judgment of the Concession Court, on the theory of the respondent, extinguishes, while it purports only to qualify, the rights conferred by the concession. If the concessionaire had an exclusive right to prospect for the baser minerals, that right is untouched by the qualification in the judgment and he has it still. If, on the other hand, the right to prospect for the baser minerals be not exclusive, again, it exists *tantum et tale* as in the concession. What the qualification does modify is the right to the precious minerals. And their Lordships have not heard any argument which gives any effect at all to the words of the qualifying part of the Judgment and at the same time supports the appellants' claim. Such argument as has been advanced does not offer a competing construction of the qualification (and indeed none is possible), but goes to establish a repugnancy between that part of the Judgment which sustains the claim and that part which subjects it to the rules and regulations. The appellants have indeed assumed that, if there be a repugnancy, they are entitled to solve the difficulty by ignoring the condition imposed by the Court to which they submitted their claim. But it was unquestionably competent for that Court to hold the concession to have been honestly obtained, and at the same time to "modify the terms, conditions, and scope" of the concession, or to "impose equitable limitations, restrictions, or conditions upon" its exercise. (Section 23 of the Proclamation of 1st February, 1893.) And it is wholly intelligible that, in the present instance, the Court should allow the concession

full scope as regards the baser metals, in which region the rights conferred were not in excess of existing rules, while, as to the precious metals, the concessionaires were made subject to the ordinary rules.

This is the view which their Lordships take, and they will therefore humbly advise His Majesty that the Appeal ought to be dismissed. The appellants will pay the costs of the appeal.

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Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of The Standard Bank of South Africa, Limited, v. Heydenrych, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 20th June, 1907.

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Present at the Hearing:

THE LORD CHANCELLOR.  
LORD ROBERTSON.  
LORD COLLINS.  
SIR FORD NORTH.  
SIR ARTHUR WILSON.

[Delivered by Lord Collins.]

The question on this appeal is one of preference between creditors in the insolvency of Messrs. Mackie, Young and Co., a firm carrying on business in Cape Town. On 23rd April, 1901, a general notarial bond was passed by the above firm in favour of Cresswell, Sons and Co., who were about to act as their agents in London. By the said instrument the obligors acknowledged themselves bound to Cresswell, Sons and Co., thereafter styled the mortgagee, in the sum of £5,000, and, after reciting that they, desiring to extend their business operations, had applied to the mortgagee to be granted an open credit and certain other facilities which the mortgagee had agreed to grant on certain terms, they declared the condition of the bond to be that, if they should pay at due dates to the mortgagee all sum and sums of money which then or at any time thereafter should be or become due by them to him, whether arising from promissory notes, drafts, acceptances, goods sold and delivered, interest, charges, moneys paid or from what cause soever, and should perform all the conditions agreed upon between them and the mortgagee, then those presents should be null and void, but otherwise of full force and effect.

This bond was registered at the Deeds Office in Cape Town, on the 25th of April, 1901.

On the 12th December, 1902, it was ceded by the mortgagee to the Standard Bank (the now appellants), and the cession was registered on the 5th of Decem-

ber, 1903. In determining the rights to preference in the liquidation on the insolvency of Mackie, Young and Co., the Master held that the Standard Bank were entitled to preference as against the now respondent, and that decision was upheld by Buchanan, Acting C.J., on appeal. But the point now raised before their Lordships did not come up for discussion. Nor when the case came on appeal before the Supreme Court was the point raised by the parties. It was, however, taken by the Court itself, who accordingly directed a re-argument, and, though agreeing with the opinion of the Court below on the argument as there presented, reversed their decision and gave Judgment awarding a preference to the now respondent, and it is against that Judgment that the present appeal is brought. The Court, on looking closely into the facts, ascertained that, at the date of the incurring by the insolvents of the debts in respect of which the now respondent claimed preference, no sum had yet been lent by Messrs. Cresswell or the Standard Bank to the insolvents under their security; that thus, though the bond under which the Bank claimed was prior to that set up by the respondent, still preference was to be determined by the date of the debts and not of the securities, and that a security earlier in point of date but under which no advance had been made must therefore give place to one that was later, but given for an actual advance. The learned counsel for the appellants could not dispute that the law as laid down by Sir H. de Villiers, C.J., based as it was on a passage from Gaius, confirmed by modern authorities, was correct; but he sought to raise a distinction upon the special terms of the bond relied on by the appellants. His contention was that the bond itself evidenced a present debt, and that therefore the security was effective from its date. But it is quite clear that no present debt was in fact created by the bond. In certain events which might or might not happen a debt might arise which might be described as *solvendum in futuro*, but until those conditions were fulfilled nothing became *debitum* at all either in the present or the future. This disposes of the main argument for the appellants. A faint suggestion was, however, made that the appellants, notwithstanding the fact that the respondent's security was on the register and an advance was made under it before the appellants had found any money for the mortgagor, must be assumed to have had no notice of the registration of a security subsequent in date to their own, and therefore were entitled to preference for their advance notwithstanding the intervening security and advance under it of the respondent. But even if, consistently with the Cape law as above ascertained, the absence of notice of the existence of a security sub-



sequent to their own could be material, where on the facts later security had been followed by an advance before anything had been advanced by the appellants, the onus was clearly upon the appellants to establish the absence of notice, actual or constructive, having regard to what is laid down both by Buchanan, J., and by the Supreme Court as to the effect of the law and practice with regard to the registration of such deeds in the Colony. But no

authority was cited, or principle invoked, which in any way threw doubt on the position thus taken by the learned Judges in both Courts below, and it seems therefore unnecessary to pursue the point further.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed.

The appellant will pay the costs of the appeal.





# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

#### SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

CARROLL V. QUINE AND OTHERS. { 1907.  
July 1st.

This was an application to make absolute certain rule nisi temporarily interdicting respondents from proceeding with certain works upon a wreck in Table Bay, alleged to have been located by applicant. Mr. Pohl was for applicant; Mr. Upington was for respondents.

Mr. Upington applied for a postponement for a week. He said that respondents claimed to be acting under a permission obtained from the Assistant Treasurer on the 26th June.

The matter was postponed until Friday next, interdict in the meantime to continue, and applicant not to part with any wreckage which he may find in the meantime.

### SUPREME COURT

#### SECOND DIVISION.

[Before the Hon Sir JOHN BUCHANAN.]

INSOLVENT ESTATE WEIN- { 1907.  
BERG V. S. AND J. WEIN- { July 2nd.  
BERG.

[As this action cannot be heard until a criminal charge against the Insolvent has been disposed of, the report of the case is held over.]

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### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

#### PROVISIONAL ROLL.

HAWSE, REYNOLDS AND CO. { 1907.  
V. TILBROOK. { July 2nd.

Mr. Watermeyer moved for provisional sentence on a promissory note for £400, payable at the Standard Bank, Prieska, with interest from the 31st May, 1907.

Order granted.

EATON, ROBINS AND CO. V. EXECUTOR ESTATE ANDERSON.

Mr. Sutton moved for provisional sentence on eight promissory notes for £20 each, with interest from the due dates.

Order granted, subject to the defendant's letters of appointment being filed.

#### HOSKING V. HOSKING.

This was an action brought by Lily Eliza J. T. Hosking against her husband, Harry Daniel Hosking, for a decree of restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits of the marriage, on the ground of defendant's alleged malicious desertion.

Mr. Rowson was for plaintiff; defendant did not appear.

W. T. Birch, clerk in charge of the marriage register, Colonial Secretary's Office, gave evidence as to registration of the marriage.

Plaintiff said that she lived very unhappily with the defendant after marriage on account of his giving way to

drink. He was at that time market master in Cape Town. They lived together for seven years, at the end of which time he lost his appointment. They had to give up their occupation of the house which went with the post. Her husband left the house and had to go to a farm for the benefit of his health. She understood that defendant was now in Cape Town, but she had not seen him.

By the Court: They were married in community. Witness, however, had no property. It was five years and seven months since she had seen or heard anything of defendant. She had heard that he was at the Docks.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 15th July, failing which to show cause on the 1st August why a decree of divorce should not be granted, with costs, and defendant declared to have forfeited any benefits accruing from the marriage in community.

#### REHABILITATIONS.

Mr. Roux applied under the 117th section of the Ordinance for the discharge from insolvency of John Nicholes. Granted.

Mr. Howes applied under the 106th section of the Ordinance for the discharge from insolvency of Arnoldus Christian Vlok van Wyk. Granted.

#### GENERAL MOTIONS.

*Ex parte* TAYLOR. } 1907.  
July 2nd

Mr. Palmer moved to make absolute a certain rule nisi, admitting the petitioner to sue *in forma pauperis*.

Rule absolute, Mr. Palmer to be counsel and Messrs. Ginsberg, Perl, and Kramer to be attorneys to the petitioner.

*Ex parte* ESTATE LOMBARD.

Mr. M. Bisset moved on the petition of the surviving spouse and executrix testamentary for leave to sell to her eldest son portion of certain landed property in the division of Cradock for the sum of £200. The heirs, all majors, consented to the application. It appeared that a sum of £1,000 had been raised on mortgage on security of the property during 1905 by leave of the Court.

Order granted, subject to consent of mortgagees, proceeds of the sale to be paid to petitioner for her own use and benefit.

*Ex parte* KUHN.

Mr. Howes moved on the petition of P. G. Kuhn, as *curator bonis*, of Cornelia Kuhn, for an order authorising the transfer of certain farms in the division of Victoria West, in which Miss Kuhn has a half share. It was proposed to sell the farms for £4,000, and the purchaser was prepared to deposit a sum of £2,000 for investment for the benefit of Cornelia Kuhn. The interest from the money invested on mortgage would be greater than the share that she would get by way of rent.

Order granted as prayed.

*Ex parte* INSOLVENT ESTATE STEYN.

Mr. Douglas Buchanan moved, on the petition of F. F. Werdmuller, of Malmesbury, as sole trustee in the insolvent estates of Albertus J. Steyn and Elbert Lucas Steyn, for the appointment of the R.M. of Malmesbury, or Assistant R.M., to take the evidence of the insolvents, and certain other witnesses, in reference to certain transactions of the insolvents.

Order granted as prayed.

*Ex parte* KRIEL.

Articled clerk — Completion of service of Articles within a foreign jurisdiction.

*The Court refused to allow cession of a clerk's articles to an attorney of the High Court of the O.R.C. practising in that Colony; although the attorney was also an attorney of the Supreme Court.*

*Law Society v. McLeod (14, C.T.R., 836) distinguished.*

Mr. Roux moved on the petition of Richard Craig Kriel for leave to complete his articles of clerkship in the Orange River Colony.

Mr. Close appeared for the Incorporated Law Society to oppose.

Applicant, it appeared, entered into articles with an attorney at Dordrecht on the 10th December, 1904, to serve for three years, and was still in the service of this attorney. He desired, however, owing to his monetary circumstances, to have his articles ceded to an attorney at Koffyfontein, Orange River Colony, who was an attorney not only of the High Court at Bloemfontein, but also of the Supreme Court at Cape Town. The latter had offered him a small salary, which would enable petitioner to support himself during the rest of his service. The Law Society

opposed on the ground that such service would be outside the control of this Court and the society.

Mr. Roux said that the matter was entirely in the discretion of the Court, and, under the special circumstances, he urged that the indulgence asked for should be granted. He cited *ex parte McLeod* (21, S.C., 545), and *Law Society v. McLeod* (14, C.T.R., 836).

Mr. Close was not called upon.

De Villiers, C.J.: There is no doubt that the 149th Rule contemplates that a clerk will serve within this colony for the full period. In the case of *McLeod*, a Divisional Court admitted the applicant, who had served part of his articles in Rhodesia, and stress was laid upon the fact that the Supreme Court is the Court of Appeal for Rhodesia, and that circumstance undoubtedly had an effect upon the decision of the Court in the first instance, as well as the Supreme Court sitting as a Court of Appeal. The sole reason why the Supreme Court in appeal refused to interfere was because of this one circumstance I have mentioned, and also because the learned Judge, sitting as the Supreme Court had granted a certain indulgence, and the Court was not prepared to say that it was illegal under the special circumstances of that case to grant the indulgence, but that certainly seems to be no reason for further extending the indulgence to a case like the present. Here, at all events, we have not the case of an attorney practising in an area over which the Supreme Court has jurisdiction as a Court of Appeal. It is now the case of an attorney in the Orange River Colony, and however desirable it may be to extend the comity in the manner proposed. I am not prepared to grant the application. Application refused; no order as to costs.

MASTER, SUPREME COURT V. TRUSTEE  
INSOLVENT ESTATE OF DICKER AND  
MEIRING.

This was an application under the 115th section of the Insolvent Ordinance, upon notice to John Orlando Walter, as trustee of the insolvent estate of Dicker and Meiring, of Laingsburg, for an order directing him to show to the Master of the Supreme Court, by vouchers or other sufficient proof, that the dividends payable under the first and final liquidation and distribution account filed by him in the estate had been fully paid, the said account having been duly confirmed by the Court on the 30th August, 1906, and to pay the costs of this application *de bonis propriis*.

Mr. Howel Jones, K.C., was for applicant; respondent did not appear.

Mr. Jones read an affidavit in support of the application.

Order granted as prayed, compliance to be made within one month.

*In re* THE CAPE CANNING CO., LTD.  
(IN LIQUIDATION).

Mr. Benjamin, K.C., moved for confirmation of the final report of the liquidator. Counsel said that the liquidator asked for special orders dissolving the company, in terms of the 169th section of the Companies' Act, and authorising him to destroy the books, vouchers, and documents of the company now in his custody.

Order in terms of the report.

KNOX V. KNOX. { 1907.  
July 2nd.  
" 3rd.  
" 8th.

Divorce — Domicile — Practice —  
Edictal citation — Suit *in forma pauperis* — *Prima facie* evidence of domicile.

*The petitioner alleged that she and her husband had been married in community of property, and thereafter lived together in this Colony for over two years, after which the husband went away, leaving her here. The petition did not state whether the husband was born in this Colony; but there was, in the opinion of the Court, prima facie evidence that the parties intended to make this Colony their permanent home and that the husband had not changed his domicile:*

*Held, that the petitioner was entitled to obtain leave to sue her husband by edictal citation for restitution of conjugal rights and, failing obedience, for divorce on the ground of malicious desertion; leaving it to him to rebut the presumption that the parties were still domiciled here.*

*The petitioner had obtained a rule calling upon the defendant to shew cause why she shall not be allowed to sue in forma pauperis.*

*Held, that the existence of such rule was no bar to her obtaining leave to sue her husband by edictal citation, provided that the fees of office in connection with such citation were paid if issued before leave*



to sue in forma pauperis was granted.

The headnote in Walker v. Walker (6, C.T.R., 388) disapproved of. Case of Le Mensurier v. Le Mensurier in Privy Council (L. Rep., Ch. 1895, p. 517) commented on.

Mr. Douglas Buchanan mentioned this matter, which had been before Mr. Justice Buchanan recently, on an application for leave to sue in forma pauperis and by edictal citation. Mr. Justice Buchanan had granted a rule on the former part of the application, but declined to grant the latter part of the application at the present stage. Counsel said that the decisions of the Court seemed to be conflicting in this matter of granting leave to sue in forma pauperis and by edictal citation at the same time. He cited the note at 6 Juta, 61, and the cases of Standen (15 C.T.R., 34), Brink (16 C.T.R., 439), Hamp (16 C.T.R., 1,150), and Brownell (17 C.T.R., 446).

De Villiers, C.J., observed that it did not appear that there had been any decision to the effect that the two processes could not be taken together. All that appeared was that there had been one case in which the Court thought it was not advisable that the processes should be served simultaneously.

Mr. Buchanan said that as far as he could see, the point was not decided in that particular case.

De Villiers, C.J.: It depends very much on the nature of the case whether the Court would adopt the one course or the other. As far as I can see, there is no decision that it would not be competent for the Court to authorise the issue of the edictal citation until after the leave has been granted to sue. Of course, there is a certain amount of difficulty in doing it all in one, especially in pauper cases. Professedly, the pauper has no means, and if there is to be double service, the expense would be very great, and it is to save that expense, I suppose, that the practice has crept in. At the same time, there is an inconsistency, no doubt, that the edict should be issued before there is leave to sue. The practice has existed, and I do not see that there is any decision to the contrary that it cannot be done. However, I think it would be well for the judges to meet and consider the matter. There should be uniformity of practice, if possible.

Mr. Buchanan said that he believed it was the practice at the High Court of Griqualand to allow the processes to take place together.

De Villiers, C.J.: And the probability is that the practice would be con-

tinued, more especially as there is no decision that it cannot be done. However, I would like to consult the other judges before finally deciding this matter.

Mr. Buchanan applied for an extension of the return day of the rule until the 1st November.

Return day extended accordingly.

Postea (July 3).

De Villiers, C.J.: The matter was mentioned to me yesterday of the petition of Mrs. Knox, who has obtained a rule nisi calling upon the respondent, her husband, to show cause on the 14th August, why the applicant shall not be admitted to sue in forma pauperis. I understand that application is now made for leave to issue edictal citation and intendit before the return day of the rule. That has been allowed frequently, and I am not aware of any decision of the Court in which it has been held that it cannot be done. But, of course, until leave is given to sue in forma pauperis, it cannot be treated as a pauper case, and the fees must be paid. The stamps for the edictal citation and the intendit must, of course, be affixed, and that would be a loss to the applicant even if the rule should ultimately be made absolute. So there is no difficulty in the matter, the Court will grant leave, as it has done in many other cases, to issue citation and intendit, and serve the same together with the rule, but it is clearly understood that any costs incurred until the rule is actually made absolute must be paid by the plaintiff, and if once the stamps are affixed, then the money cannot be recovered back. I see that counsel in the case of Knox is not at present in Court, and the matter may be mentioned again as to the mode of service of the citation.

Postea (July 8).

De Villiers, C.J.: This case has stood over to enable me to consult my brethren as to the practice which should in future be observed in cases where leave is sought by one spouse to sue the other in forma pauperis by edictal citation for divorce or for restitution of conjugal rights. It is said that there has recently been a departure from the practice referred to in 6 Juta, 61, under which the rule nisi and leave to sue by edictal citation were obtained at the same time, but there has been no decision to the effect that the practice is erroneous. Under special circumstances, the Court may have refused to grant leave to sue by edictal citation before the rule calling upon the defendant to show cause why the plaintiff shall not sue in forma pauperis has been made returnable, but the judges are agreed that, unless such special circumstances exist, the practice referred to shall be continued. Of course, until the rule is made absolute the plaintiff

cannot obtain his citation or file his intendit without payment of the fees of office, but if he or she is willing and able to bear the expense there is no valid reason why the Court should not allow the citation and intendit to issue before leave to sue as a pauper is granted.

Another important question raised in this case is whether the Court should continue its practice of requiring no more than *prima facie* proof that the spouses are domiciled in this colony before allowing either of them to sue the other for divorce by edictal citation. In the case of *Hawkes v. Hawkes* (2, Juta, 109) it appeared that the husband had taken lodgings and afterwards a furnished house with the intention of settling here, and that he afterwards suddenly left for England, leaving his wife and children behind, there being nothing to show that he did not intend to return, and it was held that his wife was entitled to a decree of divorce on the ground of his adultery. In the course of the judgment it was said that the Court was not bound to inquire minutely whether he was domiciled here or not, but it is obvious that what the Court intended to convey was that, where the defendant does not appear to object to the jurisdiction, *prima facie* proof of domicile is sufficient to entitle the plaintiff to relief. There is no doubt that the plaintiff, under such circumstances, always incurs the risk that the decree might thereafter be called in question in the Courts of other countries on proof that the domicile was not in this country. but such a risk he or she would incur, although in a lesser degree, even on full proof to the satisfaction of the Court granting the decree, that the domicile was within the jurisdiction of such Court. The practice of requiring no more than *prima facie* proof of domicile in cases of divorce has been uniformly followed in this court in numerous cases, and for many years, and I am not aware of any trouble or inconvenience having ever resulted therefrom. Certainly no case has ever been brought to the notice of this Court in which the Court of any other country has directly or indirectly questioned the validity of any of the decrees of divorce so granted by this Court. Of course, where there is no *prima facie* evidence of domicile in this colony, the Court would not grant leave to sue the defendant by edictal citation for divorce. Thus in the case of *Walker v. Walker* (13 S.C.C., p. 363), the parties had been married in this colony, but the husband, at the time of marriage, was an itinerant lecturer. In the same year they left for Australia, where they lived together for 12 years, after which the wife returned to the Colony, the husband promising to follow her. He failed to keep his promise, and the wife

asked for leave to sue the husband by edictal citation, but leave was refused on the ground of insufficiency of proof of domicile. The head-note, however, of the report would lead to the inference that the Court would have granted leave if jurisdiction had first been founded by virtue of an arrest of the defendant or an attachment of his property. The concluding paragraph of my judgment was certainly somewhat unfortunately worded, and I cannot conceive that I was accurately reported. The suggestion that the arrest of the defendant might have supplied the defect of want of domicile would have been so contrary to the daily and established practice of the Court, that I cannot help thinking that my words were misunderstood. But even as the passage stands, it would not quite justify the terms of the head-note. I had previously referred to *Protecteur Company v. Erwin* (4 Juta, 91), which was not a matrimonial cause at all, and I added, "Where it appears on the face of a petition to sue by edict that the defendant is not only absent from this colony, but is not domiciled here, leave is not granted unless jurisdiction has first been founded by virtue of an arrest of the defendant or an attachment of his property." That remark, however, had no application to the particular case, which was then under consideration. What was intended to be conveyed by the concluding passage was that besides the defect of jurisdiction, which undoubtedly existed in that case by reason of want of domicile, there had not even been such arrest or attachment as would, in ordinary suits, have been necessary to confirm the jurisdiction of the Court. This remark was unnecessary for the decision of that case, and if the passage is capable of the construction placed on it in the head-note, I must take this opportunity of withdrawing it.

It still remains to be considered whether, in view of the practice said to prevail in other South African courts, and in view of the decision of the Privy Council in *Le Mesurier v. Le Mesurier* (L.R.A.C., 1895, p. 517), this Court should reconsider the doctrine as to domicile upon which it has hitherto acted. In the case of *Weatherby v. Weatherby* (Transvaal H.C. Cases, for 1878, p. 66), it was held that the High Court of the Transvaal Province had jurisdiction, on the ground of adultery committed in the Transvaal, to dissolve a marriage contracted in England between parties whose domicile was English, but who were *bona fide* resident in the Transvaal, but the case does not appear to have been followed by the judges of the present Supreme Court of the Transvaal. In the case, for instance, of *Ex parte Kaiser* (T.H.C., for 1902, p. 165), Innes, C.J., held that permanent domicile is necessary within the territory to give its Courts jurisdiction.

to divorce, and in *Murphy v. Murphy* (T.S.C., for 1902, 179), Solomon, J., with the concurrence of his two colleagues, practically overruled the decision in *Weatherby v. Weatherby*. In the case of *Burnett v. Burnett* (12 C.L.J., 14), the High Court of the Orange Free State held that as the wife, who was the plaintiff, was domiciled within the jurisdiction, the Court had the right to decide upon her status, and a decree of restitution of conjugal rights was granted. If this decree was granted with a view of granting a decree of divorce on failure of the husband to return to or receive the plaintiff, it would be impossible to reconcile the decision with that of the Privy Council in *Le Mesurier v. Le Mesurier*. There it was held that, although residence without domicile may be sufficient to sustain a suit for restitution of conjugal rights, for separation, or for alimony, it is not sufficient to give jurisdiction to dissolve the marriage. Nowhere in the judgment is a precise definition given of the nature and length of residence which would be sufficient to establish domicile as distinct from residence. The nearest approach to such a definition is the following: "*Bona fide* residence is an intelligible expression if, as their lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile." In that case the parties had been married in England, the plaintiff was an Englishman by birth, and at the time when the action was instituted, although officially resident in Ceylon, he admittedly retained and continued to retain his English domicile of origin. The Privy Council held that the Courts of Ceylon, where the Roman-Dutch law prevails, had no jurisdiction to dissolve the marriage, although the wife's adultery had been proved. I am not aware of any case in this Court in which a different principle has been allowed to prevail. *Bona fide* residence in this colony, with the object of making it the permanent home of the spouses, has always been considered necessary, and where it appeared that the residence has been resorted to for the mere purpose of getting a divorce, the Court has refused to grant relief. The only question in each case has been whether there is sufficient proof of *bona fide* residence. If *prima facie* evidence is given of such residence, the burthen of proving that a domicile has not been acquired within the territory is thrown on the defendant, and if he does not appear to object to the jurisdiction, the Court exercises the power to dissolve the marriage on sufficient grounds shown. This practice, as I have remarked, has never led to injustice or inconvenience, and will be continued in future.

The only remaining question is whether the petitioner has made out a *prima facie* case of domicile. As I understand the petition, both spouses were *bona fide* resident in this colony at the time when the marriage took place. They were married at Simon's Town in 1900 with community of property. After their marriage they lived together at Simon's Town for two years and three months, after which the husband left for England, where he now resides. There is nothing to show that he left the Colony with a view of changing his domicile, and the presumption is that he retains his Cape domicile, more especially seeing that he left his wife here. It is quite possible that at the trial the husband may be able to prove that he never had a Cape domicile, or that, having acquired it, he subsequently relinquished it, but with the proof now before the Court, there is sufficient reason for believing that such domicile has existed and still exists. The Court will therefore grant leave to the petitioner to sue the defendant by edictal citation, and to serve the intendit with the citation. The citation will be returnable on the 1st of November next, to which day the rule nisi already granted calling on the defendant to show cause why the petitioner should not be allowed to sue in *forma pauperis* will be extended, it being understood that all fees of office for citation and intendit will be payable until the rule is made absolute. Personal service to be effected.

## SUPREME COURT

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

SOMERSET STRAND MUNICI- { 1907.  
PALITY V. DEYDIER. } July 3rd.

Mr. Toms moved for a writ of civil imprisonment against defendant, upon an unsatisfied judgment of the Periodical Court at Somerset West for two sums of £11 17s. 6d. and £11 respectively, being Municipal rates for 1905 and 1906, and interest *a tempore morae*, and costs, amounting to £3 18s. 11d.

Mr. Roux read an affidavit by defendant, who said that he was sued for rates and charges on immovable property at Somerset West Strand, which he had owned there at one time. He had tried to sell the property during last year, and had eventually disposed of it for the amount of the bond (£600) to the bondholder. The property had cost him £1,200. Deponent went on to state that he was absolutely without means or income, and that his wife carried on a small mineral-water factory and a small dairy, from which they derived barely sufficient to maintain the family. He annexed certified copies of certain judgments given against him. Counsel also read an affidavit by C. J. Krige, M.L.A., attorney, Caledon, who said that he knew the defendant had no means.

Mr. Toms read an answering affidavit by F. A. Guthrie, of Guthrie and Theron, attorneys, who said that defendant was a Councillor and Mayor of the Municipality of Caledon, and that he carried on business as a mineral-water manufacturer in his own name.

Mr. Roux said that Mr. Krige was in court, and was prepared to give evidence as to the defendant's want of means. Defendant had been advised to surrender his estate, but he was without assets. It appeared that he had lost all his money through land speculation at the Strand.

Mr. Toms submitted that the defendant, occupying the position he did, and carrying on a business in his own name, must be presumed to have some means.

De Villiers, C.J.: It is quite clear to me that the man is hopelessly insolvent, and that the only reason why he does not surrender his estate is that he has nothing to surrender. At the same time, it is possible at some future time the plaintiff may satisfy the Court that the defendant has means. Therefore, the Court will now make no order, but will reserve leave to the plaintiff to apply again on motion, without issue of fresh summons, on proof that the defendant has means to meet the amount of the judgment in whole or in part.

#### LUNTZ BROS. V. HOVELMEIER.

This was an application for the final adjudication of the defendant's estate as insolvent. There had, however, been short service of summons, six days only having been allowed, instead of eight. In order to save expense, Counsel suggested that the present summons should be allowed to stand, and that the case should be postponed for three weeks, notice of the postponement to be given to defendant, who resided at Kwelegha, district of East London.

Mr. Watermeyer moved,  
Case postponed until the 23rd July, notice of postponement to be given to defendant by registered letter.

#### GOLDFOOT V. SIMSON.

Mr. Lewis (for plaintiff) applied for a postponement to enable his client to file replying affidavits.

Mr. Roux (for defendant) said that he consented subject to a long postponement being granted. The maker of the promissory notes in suit, was, he said, in New Zealand, and the defendant proposed to obtain an affidavit from him. There were other defences to the action, but his learned friend had not the notes at present, and could not put them in, so that he (Mr. Roux) could not argue the matter at the present stage.

[De Villiers, C.J.: It may be quite possible to decide the case without calling upon the maker of the notes.]

The matter was postponed until the 12th July.

Mr. Roux then said that the plaintiff was not domiciled within the jurisdiction, and he proposed to raise the question of security for costs.

[De Villiers, C.J.: You may now claim security for costs, as he asks for a postponement.]

Mr. Roux said that, if in order, he would apply for security now.

De Villiers, C.J.: The Court will make it a condition of the postponement that security for costs be given to the satisfaction of the Registrar of the Court.

#### Ex parte ESTATE DORFLING.

Mr. Toms moved, on the petition of Gesina Sophia Snyman, as mother and natural guardian of her minor daughter, Gesina Sophia Dorfling, by her previous marriage, for authority to give and receive transfer of certain property in the division of Jansenville. The minor owns a share in Riet River, and also in Dwaas, and petitioner considered that it would be to her advantage to acquire a larger portion of Dwaas in exchange for her share in Riet River. Petitioner proposed to accept the offer of Mr. P. W. F. Weyer to transfer a thirty-seventh portion of Dwaas in exchange for the minor's sixth share of Riet River. Affidavits were also read showing that the proposed exchange was fair and reasonable. The Master, while pointing out that a tutor should have been appointed to the minor, reported that the exchange appeared to be fair and equitable.

Order granted as prayed.



# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP  
and a Jury.]

BRADY V. PALMER.

1907.  
July 4th.  
" 5th.

Libel—Newspaper.

This was an action brought by Christopher Brady, attorney, Cape Town, against (1) Alfred Palmer, proprietor and editor of the "South African Review," (2) the Argus Printing Co., Ltd., and (3) the Central News Agency, Ltd., to recover £5,000 damages for alleged defamatory libel published in the "Review."

Plaintiff's declaration was as follows:

1. Plaintiff is Christopher Brady, an attorney of this Honourable Court, practising at Cape Town, who from time to time has been appointed to act, and has acted, in the capacity of trustee in various insolvent estates.

2. The first defendant is Alfred Palmer, a journalist, carrying on business at St. George's-street, Cape Town; second defendant is the Argus Printing and Publishing Co., Ltd., a company with limited liability incorporated under the Companies' Act (25 of 1892) and carrying on business at Cape Town and elsewhere as printers and publishers; the third defendant is the Central News Agency, Ltd., a company incorporated under the Companies' Act (25 of 1892) and carrying on business at Cape Town and elsewhere as publishing agents.

3. The first defendant is the proprietor and editor, and second defendant is the printer, and third defendant is the publisher, of a certain weekly publication issued in Cape Town under the style and title of the "South African Review," and circulated in Cape Town and elsewhere in South Africa.

4. In or about the month of January, 1907, plaintiff received instructions from one Alfred Field, a dentist, practising in Cape Town, to recover by process of law a certain sum of one guinea due by one Harry St. Clair Tewson to the said Field for professional services rendered; thereupon plaintiff, on or about the 11th day of January, 1907, caused a letter to be sent to the said Tewson demanding payment of the said amount, but no reply was received thereto.

5. On or about the 19th day of January, 1907, the said Field surrendered his estate as insolvent, and on or about the 1st day of February, 1907, plaintiff was appointed sole trustee in the insolvent estate of the said Field.

6. On or about the 11th day of February, 1907, plaintiff caused a second letter

to be written to the said Tewson demanding payment of the said amount of one guinea due to the insolvent estate of Field, and warning the said Tewson that, in case of his failing to pay, legal proceedings would be taken for the recovery of the said amount. No reply was received to the said letter.

7. Thereafter, on or about the 15th day of February, 1907, plaintiff issued summons in the Resident Magistrate's Court against the said Tewson for the said amount, and subsequently, on or about the 19th day of February, 1907, the said Tewson or his agent paid to plaintiff the said amount of one guinea, and thereafter, on or about the 22nd day of February, 1907, the said Tewson paid to plaintiff the amount of plaintiff's bill of costs incurred in and about the recovery of the said amount. The said bill of costs amounted to £1 5s. 1d. sterling, and contained only the usual and customary charges in such matters, and has been submitted to the clerk of the Resident Magistrate's Court at Cape Town, who has certified the charges contained therein to be the correct and customary charges.

8. In the number of the said "South African Review," issued on or about the 15th day of March, 1907, the first defendant wrote and caused to be published, the second defendant printed and caused to be published, and the third defendant published of and concerning the plaintiff in the way of his profession certain false, slanderous, malicious, and libellous statements contained in an article and in a letter signed by one "J. Lujt," together with the heading or headings prefixed to the said article and letter, which article and letter, plaintiff says, are and by the defendants were intended to be read together. The said article and letter were printed, issued, and published by the defendants in the said "South African Review" under a common title or heading with sub-titles or sub-headings, viz.: "Small Debts Collecting," "Illegal Charges by Attorneys, etc.," "The Trustee-Attorney," "An Interesting Case," and contained the following false, scandalous, malicious, and libellous statement, viz.: "(a) I am aware of the fact that the Supreme Court judges have for long enough set their faces against solicitors acting as trustees in bankruptcy, but that does not altogether stop the practice, and the particulars of the under-mentioned case . . . forcibly illustrate the hardship entailed upon small debtors. (b) The debtor had been well known to the dentist for some years, and the latter had not even rendered his account for the service when he unfortunately had to place his affairs in the hands of a Cape Town attorney, who, at a subsequent date, was appointed sole trustee in the estate. This attorney cum trustee I will call Mr. X. (c) Mr. X. (meaning thereby the plaintiff) is



appointed trustee, and in that capacity does not take the slightest trouble in order to collect this debt, nor, one may naturally suppose, any of the others. No, Mr. X., the trustee, having become possessed of the names and addresses of the debtors in the estate, adopted the truly Gilbertian course of gravely instructing himself, as attorney, to write letters of demand to the recalcitrant ones—at 3s. 1d. a time. (d) If Mr. X. incurs legal charges without making any effort at collection as trustee, then many pounds must be lost to the estate in a quite unnecessary way over debtors, whom any ordinary trustee would know perfectly well, it would be waste of time to proceed against. (e) Regarding lawyers who are trustees in insolvent estates, charging 3s. 1d. or 5s. 1d. for demands (a question raised in your issue of the 1st inst.) this is illegal, and any lawyer receiving such a fee (?) would lay himself open to a criminal charge of theft of money by means of false pretences. Similarly no attorney is entitled to demand 3s. 1d. when demanding a debt. Debtors should not be bluffed. (f) Attorneys here, however, go one better; besides demanding 5s. 1d. for the demand, they also claim 10 per cent. of the debt from the debtor, who is generally a simpleton and pays up. The attorney then draws another 10 per cent. from his client, the creditor. So on a debt of £10 he will demand from the debtor £11 5s. 1d., which he will probably get, and then he will pay over to his client £9, so on this £10 account the attorney has made £2 5s. 1d. This is simply nothing less than obtaining money under false pretences. (g) No wonder these sharks grow rich. But what can the public expect as long as they allow such a thing as the Incorporated Law Society to exist, which is only run for the benefit of a few attorneys in Cape Town."

Plaintiff craves leave to refer to the whole of the said article and letter which are annexed hereto, marked "A."

9. Plaintiff says that the said statements were intended by the defendants to apply to him (the plaintiff) and that they did so apply and were generally understood so to apply, and that by the said statements defendants meant to imply and did imply, that plaintiff had been guilty of unprofessional conduct and of making extortionate charges, that he had acted illegally, that he had been negligent and careless in the discharge of his duties as trustee, that he had laid himself open to criminal charge, and that his conduct as an attorney was such that the Incorporated Law Society ought to take cognisance thereof and make application for the removal of plaintiff's name from the roll of attorneys.

10. By reason of the said false, scandalous, malicious, and libellous statements, plaintiff has suffered loss and

damages to his professional character and reputation in the sum of £5,000 *etg.*, for which the defendants are jointly and severally liable, but defendants refuse or neglect to pay the said sum or any part thereof.

Wherefore plaintiff claims from the defendants jointly and severally, or from one or other of them: (a) The sum of £5,000 *etg.*; (b) alternative relief; (c) costs of suit.

Defendants' plea was as follows:

1. The defendants admit paragraph 1 down to the words "Cape Town," save that the first defendant admits that plaintiff was appointed sole trustee in the estate of one Alfred Field, the defendants have no knowledge of the allegations in the remainder of the said paragraph.

2. Paragraph 2 is admitted.

3. The first defendant admits paragraphs 3, 4, 5, 6, and 7. The second and third defendants have no knowledge of the allegations therein contained.

It is admitted that the issue of the "South African Review" dated the 15th day of March, 1907, the first defendant wrote and caused to be published, the second defendant printed, and the third defendant published an article and a letter containing, *inter alia*, the words set out in (a) to (g) of the said paragraph inclusive! The defendants crave leave to refer to the whole of the said article and of the said letter when produced at the trial. Save as above the defendants deny the allegations in paragraph 8.

5. The defendants say that the whole of the said article in so far as it consists of allegations of fact is true in substance, and in fact, and in so far as it consists of comment is fair and *bona fide* comment upon a matter of public importance, and that the said article was written, printed, and published without malice, and in the public interest.

6. As to the said letter, the defendants say that the said letter was written and published as a reply by the said Lujt to the following inquiry, which was published in the issue of the "South African Review," dated March 1, 1907, to wit:

"Whilst on this subject, I would like to ask if a law agent or an attorney, who is also a trustee, is entitled to demand legal fees for collecting accounts in the latter capacity, which would not be charged by ordinary trustees; and did not and was not meant to apply to the plaintiff. The said letter was printed and published without malice, and in the public interest, and was fair and *bona fide* comment upon a matter of public importance."

7. The defendants deny the allegations in paragraphs 9 and 10 as specifically as is herein set out.

Wherefore the defendants pray that the plaintiff's claim may be dismissed, with costs.

Mr. Burton, K.C. (with him Dr. Greer), for plaintiff. Mr. Upington (with him Mr. Pohl) for defendant.

Alfred Field, dentist, of Cape Town, stated he had known the plaintiff, who had acted as his attorney for some time past. In January last, witness's affairs were in a troublesome way, and among the debts he gave the plaintiff to collect was one for a guinea, which was due by one Tewson. Witness sent out his accounts every month, and Tewson would receive his. On the 19th January, witness surrendered his estate. Witness saw the article in the "South African Review" on March 15, referring to "attorney cum trustee, Mr. X." As he was the only insolvent dentist in Cape Town he had no hesitation in saying that it referred to his case. He took the letter and the article to be one and the same thing.

Cross-examined by Mr. Upington: He had known Tewson for several years, and witness believed he sent him an account for the amount in question. Witness was worried at the time on the account of the state of his affairs. The account was sent to Tewson somewhere at Green Point.

You recognised at once that Mr. X. was Mr. Brady?—Yes.

And, of course, you knew all the circumstances of the case?—Yes.

John Gabriel, dentist, of Cape Town, stated the plaintiff had acted as his attorney in various matters for many years. Witness had no difficulty in recognising that the article referred to Mr. Brady, as he knew of no other dentist insolvent in Cape Town. Witness naturally connected the letter with the article. After reading the article he expressed his surprise to plaintiff at what he thought was an exorbitant charge. The plaintiff assured him he would take steps to alter witness's opinion.

Cross-examined by Mr. Upington: He took the article to refer to the plaintiff, and the letter of Lujt to be connected with it.

Abraham Berlyn, another dentist, who knew both the plaintiff and Field for some time, stated he had read the article in the "S.A. Review," and he knew it must refer to the plaintiff. He took it the letter had been placed in its position deliberately to substantiate the article. Witness had a small claim in the estate, and did not prove, as he thought the plaintiff would get the pickings by piling up bills of costs.

Cross-examined by Mr. Upington: The first thing that struck him after reading the article was that Mr. Brady was making charges that he was not entitled to, and the heading "Illegal Charges" contributed to that belief.

Cross-examined by Mr. Upington: The letter appeared to him to corroborate what had been written in the previous article. He did not prove his claim on

the advice of the plaintiff, which proved to be correct, that no dividend would be paid to concurrent creditors.

[Maasdorp, J.: What did you think of the charge £1 5s. 1d. for collecting a guinea?—Well, I thought if it was not absolutely legal it was unfair.

John Aloysius Carroll, messenger of the Resident Magistrate's Court, said he received his correct fee of nine shillings for the service of the summons at Tewson's place.

Jacob P. Brink, a clerk in the Insolvent Branch of the Master's Office, produced the record in the insolvent estate of A. Field.

Alfred N. Foot stated that the plaintiff suggested to witness that he should take the trusteeship of the estate, but he declined. It was well known among business men that the plaintiff was the trustee in the estate. He knew of no other dentist in Cape Town being insolvent. His attention was drawn to the article in question, and he thought it referred to the plaintiff.

Cross-examined by Mr. Upington: The invariable practice was for the trustee himself to endeavour to collect the debts, but failing that, he generally employed the attorney who was connected with the estate. Attorneys locally did not usually seek trusteeships.

Christopher Brady, plaintiff, stated that for some time prior to the beginning of this year he had been acting as Field's attorney. Among the claims handed to witness to collect, was one for a guinea from Tewson. On the 11th January, witness sent a letter of demand to Tewson, but received no reply. If the guinea had been paid there would have been to charge to the debtor, he would have got his commission upon collection. When summons had been issued, he brought up a charge of 3s. 1d. for the letter. Witness wrote another letter to Tewson in his capacity as trustee in the estate of Field. It was all nonsense that he proceeded as trustee to send out letters of demand at the rate of 3s. 1d. a time. No one had been charged in respect of these letters. It was absolutely false that he, as trustee, took no trouble to collect the debts. Mr. Field's assets amounted to £84. They consisted of his office furniture, which he assessed at £70, and upon which witness realised £60, and there were a list of debts of about £14, of which witness collected £9 9s., including Tewson's guinea. There was £2 disputed, and abandoned, as witness was satisfied it had been paid. There was another pound which was looked upon as a bad debt, and a couple of pounds more were abandoned. The money was put into the estate, and witness got his commission paid. On the 15th February, Tewson was summoned, and on the 19th he sent a messenger with the guinea. Witness accepted the guinea, and wrote back that he would

have to pay the costs, or application would be made to the Court. On the morning of the 22nd February, the morning of the trial, Tewson paid the bill of costs, which amounted to £1 5s. 1d. Witness explained that Tewson could have the bill taxed. The charges were all according to the Magistrate's Court tariff. In a letter witness inadvertently used the word "where" instead of "were," and the same mistake appeared in the "Review." Several of his friends called his attention to the article.

Palmer admitted to plaintiff it was Tewson who wrote the article, and if he (Palmer) did not accept it, the "Owl" would. Palmer said: "I haven't mentioned your name." I said: "Everybody knows Mr. X. is Mr. Brady." Palmer then said he would see what could be done in the matter. Witness said he would want full reparation. As nothing was done, witness issued a summons. Witness had acted as trustee in other estates. He did not covet the position.

Cross-examined by Mr. Upington: He would swear positively that the letter of demand for which he charged in his bill of costs was the letter written on the 11th January as attorney for Field. He said nothing whatever of legal proceedings in his letter of demand on 11th January. He thought he put it in a polite way, but, in a subsequent letter, he threatened legal proceedings, as the trustee. On the 11th February he sent out a similar letter to every debtor in the estate.

Four days afterwards you sent a summons to Mr. Tewson?—Yes.

To every other debtor in the estate?—No.

Continuing, witness read several paragraphs in the publication, which he characterised as deliberately false. The costs of recovering nothing from Cato cost 14s.

If you wrote a letter to Cato in similar terms to that which you wrote to Tewson before your appointment as trustee, and that was a letter of demand, why did you not charge it in Cato's bill of costs?—If it is not there it should have been. If it has not been allowed, I cannot help that.

Proceeding, witness said it was a mistake that the 3s. 1d. had not been charged in the bill of costs submitted to the Master, although it appeared in witness's draft bill. The whole of the letter from beginning to end was a libel on witness. Until a summons was issued, an attorney could not charge the 3s. 1d. After summons, it became part of the bill of costs.

"But what can the public expect as long as they allow such a thing as the Incorporated Law Society to exist, which is only run for the benefit of a few attorneys in Cape Town?" That doesn't apply to you, Mr. Brady?—No.

Why should Mr. Palmer libel you when you were on friendly terms?—I think it was put in to enhance the sale of his paper. He had done the same in other matters, and witness had forced him to apologise.

You are referring to the case of the racehorse with that extraordinary name Ceyx?—Yes.

As a matter of fact, what the "Review" published was taken over from another paper in Johannesburg, the "Critic," about the horse being pulled?—Yes, but the "Review" added their own observations to it.

Yes, and they apologised?—Yes.

Without going into the merits of that case, the notice of suspension appeared in the Official Calendar?—I do not know that.

Have you found out how many summonses you issued?—Yes, three.

Who was the other to?—Mr. French.

You recovered the capital and the costs?—Yes.

And there you charged 3s. 1d.?—Yes.

That amount would not be in the Master's eye?—It was not necessary.

It was a letter of demand before insolvency?—Yes.

You met Mr. Palmer in the street, and he went to your office with you?—Yes.

You complained about this article to him?—Yes, as soon as I met him.

When?—A few days after it appeared, which was some considerable time before he put the explanation in the "Review."

He told you then he had no intention of libelling you at all?—He said he had no intention of referring to me in particular.

What did you want? £5,000?—I did not tell him so.

What did you mean him to do?—I think at the least he should have given me an ample apology. He never offered it.

Anything else?—I think he ought to have compensated me.

Also a little money as well as an apology?—Exactly; I think he was making a profit by doing that sort of thing, and I think he ought to be penalised for it.

Mr. Palmer said he was quite prepared to put in an explanatory paragraph?—Yes.

Nothing but an apology and a little money?—I did not even say so.

And then you told Mr. Palmer that an explanatory paragraph would not do, but that you were determined to issue a summons?—I do not think so.

Now, you know what took place?—I do not remember saying I should issue a summons.

Will you deny you said that?—I deny I said I would issue summons there and then.

What did you say?—That I would take action unless I was satisfied.

You are not satisfied with that explanatory article?—No.

What more do you want than that article and explanation?—I wanted a proper apology.

I, Alfred Palmer, do hereby apologise to Christopher Brady, attorney-at-law, and so on?—Not in such a dramatic fashion, Mr. Upington.

W. E. Moore, attorney, of Cape Town, who has been in practice for fifty-four years, stated that he had known the plaintiff in business. Witness read the article in the "Review," and he read the letter, which he took to be in support of the former publication.

If that conduct imputed in the article were true, would you say as president of the Law Society that it would form conduct for which they would take steps against him?—I take it the Council would call upon Mr. Brady for an explanation, and then, if not satisfied, they would move the Court to have the attorney struck off the roll, or such other order as the Court might see fit to grant.

Continuing, witness said that generally speaking, he looked upon the tone of the article as a reflection upon the conduct of the attorney.

Can you, as a witness, point out any particular part of the statement you have in mind?—I can only take it as a whole, because it charges him in the dual capacity of trustee and attorney with making charges he was not entitled to.

John Robert Lancaster, president of the Law Agents' Association, who read the article casually, stated that he took it to be an attack upon somebody. The first man witness met in the street told him who it was. Witness treated the article as a serious imputation upon the plaintiff that he was extracting charges he could not extract.

Wm. W. Brady, son of the plaintiff, also gave evidence.

Mr. Burton closed his case.

Harry Sinclair Tewson said he wrote the article in question, which was sub-edited by Mr. Palmer. Witness had put in Mr. Brady's name in the article, but the letter "X" was substituted. In January last year he received a letter from Brady with regard to Field's account, but he did not regard it as a letter of demand, and told his wife when she was in town to settle with Field himself. Witness received a further letter from the plaintiff when he was trustee in the estate, and when he got the summons he sent a guinea to the plaintiff. The guinea was paid, and witness subsequently sent a small boy with five shillings to pay for the summons. The boy returned with a bill for £1 5s. 1d., and said that Mr. Brady said that the tender was ridiculous. Witness paid the full amount to save any further bother. A week or so afterwards he contributed his experi-

ence in this matter to the "Review," and what appeared there was to the best of his knowledge and belief true. There was only one letter of demand, and that was the one signed by the plaintiff as trustee. The original heading to the article was "A Warning To Small Debtors." Apart from this matter of the guinea debt, he had very little to do with the plaintiff. He was not actuated by any ill-will towards the plaintiff.

What was the object in writing this article?—I wanted something to do on Sunday afternoon, and there was some amusement, and profit in it.

What was the profit in it?—A guinea, as a rule.

What is the moral of this article, if I may put it to you as author?—Pay up.

Continuing, witness said in writing the article he had no doubt Mr. Brady was charging 3s. 1d. for the letter of February 11, and so witness wrote in the article that the plaintiff did nothing as trustee.

Cross-examined by Mr. Burton: He objected in the first place to the bill because he was under the opinion that the trustee could not charge for sending the letter of demand.

Is that the only thing?—I objected to pay the messenger's fee for service when the fee was not known.

Did you object to pay this amount of nine shillings?—I wanted to settle the whole thing up.

Do you still object to the 3s. 1d.?—I do now.

Why now?—Because he now says he charged it as trustee.

That is just what he does not say?—He said he wrote the letter as trustee.

Proceeding, witness said he received no account from Field. Witness did not suggest that the plaintiff made any illegal charges, and he did not put a heading on the article to that effect.

Alfred Palmer, proprietor and editor, of the "South African Review," stated he took a considerable interest in the Small Debts Recovery Act, which was recently passed. He had written, or caused to be inserted in his paper, certain articles dealing with the recovery of small debts. He had known Mr. Tewson for some time, and had known him to be a reliable man as a contributor to the "Review." The letter headed "A Solicitor's Testimony," came to hand the day after he received Mr. Tewson's article. His object in publishing the article was to call attention primarily to the undesirability of attorneys acting as trustees, and, secondly, to call attention to the same old subject of heavy legal charges on small debts. The plaintiff's name appeared in the manuscript, and witness excised it, and substituted "X." He had no animosity against the plaintiff, who was good enough for a few weeks before to supply witness with information about the Im-



migration Department. Witness satisfied himself that the article in question was not libellous. He put the headings on the article.

What is the heading "Illegal Charges by Attorneys" intended to refer to?—It refers to the letter of Mr. Lujt.

Continuing, witness said when he met the plaintiff, the latter appeared to be annoyed about the article.

Cross-examined by Mr. Burton: The circumstances set forth in the article and those in the letter were entirely different. He thought it was time somebody should be put in gaol for attempting to extort this infamous 3s. 1d.

Do you still maintain the truth of this statement in this paper of yours?—I certainly do.

"That he was appointed a trustee, and in that capacity he did not take the slightest trouble in order to collect this debt, nor, one may naturally suppose, any of the others.—No, Mr. X., the trustee, having become possessor of the names and addresses of the debtors in the estate, adopted the truly Gilbertian course of gravely instructing himself as attorney, to write letters of demand to the recalcitrant ones—at 3s. 1d. a time." Is that the truth?—It is a fair corollary.

You did not mean to injure Mr. Brady?—No.

You do not expect this would injure this man in his business amongst people who knew the circumstances?—I think the whole tale is one to point out the undesirability of this dual capacity. It is not intended in any way to make an invidious distinction. I wished to point out the anomalous results that follow the dual capacity. I do not think the article called for any reparation at all, but as the plaintiff had done me a favour, I published the subsequent article.

I suppose you give the usual indemnity to your publishers and printers in case of loss by libel?—I believe there is no invidious distinction in the case of the "Review."

Do you give an indemnity to the printers and publishers in case of loss by libel actions?—Yes.

Re-examined by Mr. Upington: His printers and publishers had never had to come in under the indemnity.

Richard John Barry, chief clerk in the Insolvency Branch of the Master's Office, stated it was customary to see what endeavours the trustee had made to recover outstandings before collection was handed over to an attorney. The rule was followed that a trustee should not make any profit out of an estate beyond his ordinary commission.

Mr. Upington closed his case.

Mr. Burton, in his address to the jury, said he supposed they would have little difficulty in saying that the article as it stood was libellous, unless defendants succeeded in establishing their defence that what they said was true and justifi-

able, and that they were entitled to say this in the public interest. If what the defendant said was true, that his conduct was of this description, then he (Mr. Burton) did not intend to contend that it would not be in the public interest such a matter should be brought to light. Attorneys, like other men, were bound to practise their profession honourably. He did not intend to magnify the damages. The point they had to decide was whether this article was likely to injure a professional man. Law costs, until they had a more Utopian style of things, would continue to be heavy. Whereas prior to 1884 an attorney was not regarded as being a person who was entitled to be a trustee, the Legislature specially passed an Act by which it was made lawful and proper for an attorney to be a trustee. He did not suppose that anyone would be anxious to take this estate for the sake of what could be made out of it, and the jury must remember that the plaintiff collected an unusually large proportion of the outstandings for the benefit of the creditors. The accounts had all been confirmed by the Master, and the matters were all in perfect order. The plaintiff had collected practically everything without a single penny of expense to the estate, with the exception of a small item of 14s., which the Master had passed as correct. In Teweon's case, whether the plaintiff issued the summons himself or employed another attorney to do so, made no difference to the estate. The first defendant in his evidence adhered to the truth of the statement that the plaintiff did not take the slightest trouble to collect these debts, but proceeded to instruct himself to write letters of demand to each of the debtors at 3s. 1d. a time. Was the defendant justified in saying that this statement was true in substance and in fact? Where was the evidence to that effect? It was very far from being a true statement, and the untruth of it was of the greatest possible gravity to Mr. Brady. On the question of costs, counsel referred to Van Zyl in his *Judicial Practice* (p. 781). *Bland v. Trustees, Insolvent Estate Ekstein* (Ford's Reports, p. 103). and *Bennet and Webster v. Kotze's Trustee* (6, Juta, 317). Bills of costs were presented every day, in which items were struck out by the Master, although they were presented in all good faith. It was the law, even if a newspaper published a bona-fide and correct report of proceedings, if the headline of the report was not justified by what was contained in the report, there could be an action for libel. Counsel cited the case of *Clements v. Lewis* (Odgers, p. 26), where a correct report of the proceedings was headed: "Shameful conduct of an Attorney," and that was held to be libellous, and there was another case headed: "How Lawyer 'B'



Treats His Clients." There one true case was established in the article, but, as only one case was proved, damages were awarded. The heading "Illegal Charges by Attorneys," in this case, counsel contended was intended to refer to the statement made in the article, and the letter was placed in its position as a sort of confirmation of what preceded it. In conclusion, counsel urged that the publication was an unjustifiable libel, and for it the defendants were liable for damages.

Mr. Upington said his learned friend had told the jury that Mr. Brady came there to clear his character, but counsel did not think that was the object. It was clear on the evidence of the plaintiff himself that he came to Court to get damages. The motive of the plaintiff was a mercenary and sordid one, and it could be summed up in the word "damages." The point the jury would have to consider here was the right of a journalist to expose what he considered to be public abuses in the public interest, the right of a journalist to comment freely and fearlessly upon facts brought to his notice, so long as that criticism did not degenerate into unfounded abuse. The press was regarded as the very foundation of civil liberty, and it was right that that should be so. Counsel referred to Odgers on Libel (p. 42), and said what the jury would have to decide was whether the relationship between Brady and Tewson as set out in this article was substantially correct. He contended that not one single fact set out there could be seriously disputed. An attempt had been made for the first time, and apparently to the great surprise of the plaintiff's counsel, to establish that the letter for 3s. 1d. was charged as a letter of demand, which was written by Brady as attorney for Field before there ever was a question of Brady being appointed trustee at all. In the plainest possible language Brady told Tewson the letter he wrote on February 11, although not signed as trustee, was written in his capacity as attorney. Had any of the jury ever heard of a lawyer's letter of demand which did not threaten legal proceedings? It was an impossible position for the plaintiff to take up that the first letter he wrote was the letter of demand. He contended that the plaintiff, as trustee, had not stirred a finger to collect the debts before he commenced to send out letters, for which he was going to make legal charges. "Gentlemen," said Mr. Upington, "can you imagine the scene in Mr. Brady's office, as the trustee meets the attorney, and Mr. Brady, the trustee, says: 'Mr. Brady, I have the greatest confidence in you as an attorney. Your knowledge of the law is extensive. Your knowledge of human nature is extensive, and I have the greatest confidence and respect for you. Kindly draw out a

power of attorney for me to sue,' and Mr. Brady, the attorney, says to Mr. Brady, the trustee, 'I am very much obliged to you for your complimentary remarks. I will draw out a power of attorney,' which he does, and he thereupon hands to Mr. Brady, the trustee, to which Mr. Brady, the trustee, then affixes his signature, and gravely hands it back to Mr. Brady, the attorney. Gentlemen, is there anything in Gilbert and Sullivan's operas to beat that?" Is there anything more laughable than that? Is that a justifiable comment that Mr. Brady, the attorney, has charged 1s. for drawing the power of attorney to sue." Proceeding, counsel said the hardship entailed upon the small debtor was a matter to which public attention should be directed, in the interest of the small debtor. The plaintiff had only the right to recover on behalf of the estate by way of costs from Tewson, the costs to which the estate was lawfully put, and if it was a fact that Brady had no right to charge more than his actual out-of-pocket expenses, then all that Mr. Tewson was liable to pay was this amount. The subject was one of great public interest, and this particular case was an illustration of the general principle. If a journalist could not render such a public service without being mulcted in damages, then to talk about the liberty of the press was to talk about a thing which was non-existent. The plaintiff had no wounded soul to soothe or assuage, and the only balm that could assuage Mr. Brady's wounds was golden balm, and he hoped the jury would make a striking illustration to the plaintiff of the case of going out to gather wool and coming back shorn.

Maasdorp, J.: After the very exhaustive arguments which we have had from counsel, I think the issues of the case have become pretty clear to you. You know pretty well now all the points which are to be decided, and I think you will also find that a little application of common sense will enable you very readily to dispose of the points one way or another. The whole of this case depends upon the contents of this article, which appeared in the journal of the defendant Palmer. This article is partly serious and partly humorous. As far as its fun is concerned, it may be considered to be a little too prolix and long drawn out, but the result is that you have a long article which forms a very big text to make discourses upon, and the result has been that you have had discourses in due proportion; not undue proportion. But the effect upon your mind in consequence of all this, I am rather afraid, may be this: that you have come to think that you are here to-day with a case of very vast and intricate issues; that there are important matters which

will require the exercise of large intellectual powers to decide. Now I think, gentlemen, it is nothing of the kind. The case is in a small compass in so far as the facts are concerned, and so far as its consideration is concerned it is a matter of pure common sense, as I have said before.

The plaintiff complains that an article has been written about him, for which the defendants are responsible, which implies that he has been guilty of unprofessional conduct, and making extortionate charges, that he has acted illegally, and been negligent and careless in the discharge of his duties as trustee. He says that it is implied that there is illegality in his charges, that his charges are too large, and if to some extent legal, nevertheless extortionate. Then, further, it is imputed that he has been negligent in his duties as trustee. He says that these imputations are false, consequently that a libel has been perpetrated, for which he is entitled to claim £5,000 damages. That is the complaint, and you are to decide if the complaint is a just one.

In the first place you have to consider whether it has been proved that this article refers to Mr. Brady. Mr. Tewson wrote about Mr. Brady by name when he sent this article to Mr. Palmer. The article contained Brady's name, so that Mr. Palmer knew to whom it referred. When he adopted the article he substituted the letter "X" instead of the name. In his mind that letter "X" referred to Mr. Brady. Well, when this letter was published it was seen by parties acquainted with the circumstances of the case, and they immediately applied it to Mr. Brady. Now, I leave it to you to say whether it was intended to apply to Mr. Brady, and did it, in the minds of the people acquainted with the circumstances, apply to him? That is a point which you have to dispose of.

Now the question arises as to whether it is a libel upon Mr. Brady. One thing you must guard yourselves against. You will observe how the article affected the minds of some of the witnesses. Here is an article referring, say, to Mr. Brady in his conduct as an attorney, and immediately the conclusion is come to by those who read the article: "Here is an attack upon Mr. Brady." Mr. Moore, amongst others, said to you that he considered it an attack upon Mr. Brady. He was asked to point out what exactly this attack was, which particular part was a reflection upon the character of Mr. Brady. Well, he could not point out any particular sentence as being such a reflection. He regarded it as a reflection, an imputation, and an attack upon Mr. Brady. You see how naturally that arises in a person's mind. Supposing any writer to a public print takes up a case, a special case,

one which he has a right to take up, say a case which has appeared in Court, and makes comments upon that case as reflecting upon a certain individual. The first thing that would strike any one reading those comments would seem to be that there is an attack upon the individual. It need not necessarily be so. It is for you to decide whether this is an attack, a libellous attack, upon Mr. Brady. A writer in a public print would be perfectly justified in making use of a case which has been tried in Court, or of matters in which a public character is interested, and he may make fair comments upon that case. Even if those fair comments were damaging, still, he would be justified in making those comments.

Now, Mr. Brady, in this particular case, is an attorney of this Court, and acted in the capacity of trustee, consequently he acted in a capacity in which the public have a right to see that the duties are properly performed. But also guard yourselves against this: A man may make fair comments in a reasonable way about a case in the interest of the public, and in so far would be justified; but if you could detect behind that something more, that is to say, malice, and intention of bringing forward that case merely to injure the individual, the justification would be gone.

The simple function which you, as a jury, have to perform, is to say whether there is fair comment in this article upon the circumstances, which, in the wording of it, conveys to your minds the idea that the writer was attempting to expose an abuse, or whether, under the cloak of privilege, he was trying to injure maliciously his fellow-citizen.

The defendant Palmer admits that he published this article, but he says it is a fair comment upon the facts which actually took place. Now, are the facts proved? I leave it in your hands. It has been so largely commented upon that I may safely leave you to consider whether the facts are proved. The facts are then these: That Brady, as trustee, had the administration of an estate in which it was necessary to collect certain debts; that for the purpose of collecting those debts he acted as attorney to institute proceedings against the debtors; and his bill of costs was produced and is put before you. The whole facts of the case hinge upon the joint capacity of trustee and attorney, and the bill of costs resulting. It is alleged to be a large bill of costs, the necessity for which might have been obviated if Mr. Brady had acted as trustee and not as attorney. The comment is that the costs are too high, considering the smallness of the debt. The further comment is that Mr. Brady was negligent in his duty as trustee, not as an

attorney. These are the main charges in this article.

I must first direct your attention to the bill of costs that came under the consideration of the writer who wrote with reference to the hardships upon what he calls "small debtors." He says that a guinea had to be collected, and the costs for this collection amounted to £1 5s. 1d., and the way the writer refers to these charges in the article, the defendants contend, to be fair comment, and it is for you to decide whether it is fair comment or not. The charge was certainly made, and the debt was only a guinea. He writes: "I do not doubt for a moment that Mr. X had every legal right to do as he did in this case; namely, to hand the matter over to himself as his own attorney at the outset. But I think the creditors in the estate would be justified in asking what Mr. X has done in his capacity as trustee before running up law costs amounting to 25s. for a paltry debt of one guinea." As that is really the central feature of this case, I will direct my remarks first to that point, and after that has been disposed of, there is very little more to be said. Was the writer justified in saying that the trustee had not used sufficient diligence before he instituted legal proceedings? The circumstances which the writer of the article had in mind were these: He found that a letter of demand was promptly sent by the plaintiff, acting as attorney as he thought. The attorney's letter of demand being so promptly sent shows this: That the trustee stands aside and does nothing, and it is the attorney who comes forward and takes matters in hand. The writer says that the trustee should have done more. The question is, should he have done more? First as to the question in regard to the letter of demand. At what stage was the case taken out of the hands of the trustee and put into the hands of the attorney? If it was done at too early a stage, you would have the right to say that the trustee should have done more. Should he have instituted proceedings at once? The facts which the writer had before his mind were that Mr. Brady was appointed trustee, and at once a letter was written which in its form was a letter of demand. The writer says: "Here are legal proceedings being instituted by a preliminary letter of demand, written by the attorney, and it is wrong that he should do so, seeing that the trustee should attempt to collect the money without the attorney's letters of demand." It is his duty to do so. Has he done so? Well, we find nothing that Mr. Brady has done, except write a letter of demand. The writer of the article says he wrote it as attorney, and complained that he did not do his duty as trustee before instituting the proceedings, but that as attorney he set

about making legal demands before he had made every effort to obtain the money as trustee. What does Mr. Brady say? He says: "When I wrote that letter after I became trustee, it was not as an attorney's letter of demand at all." But how is the writer of the article to know that? The writer had before his mind this demand threatening legal proceedings. He took it to be a demand by the attorney. Mr. Brady says: "No, it was not a demand by me as attorney, it was a demand by me as trustee; I was still working as trustee." Now, how would anybody reading that letter have taken it? Would he have taken it, as the writer of the article did, that the attorney had come up all of a sudden making demands and the trustee was doing no further work? If you say that the writer was justified in thinking that the attorney was now busy, you would consider whether the writer was not correct in saying that the trustee, under the circumstances, was not diligent enough, and was not doing his duty, and that is one of the objections that result when a trustee hands over the business to himself as attorney.

This is really the main point of the case; the charge of negligence on the part of the trustee, of not doing more as trustee before acting as attorney. Mr. Brady says that when he wrote that second letter of demand he was only acting as trustee; he was simply doing his duty as trustee. If you say that is so, you will say that Mr. Brady did use greater endeavours than the writer of the article seemed to imagine. He actually, as trustee, wrote these letters and did his best, and only ultimately came in with his services as attorney. But this is what the writer had before him. The writer in this case I take to be Mr. Tewson, and what Mr. Tewson communicated to Mr. Palmer the latter is responsible for; but in taking the responsibility he also took the information as it appeared to Tewson.

Upon the question as to whether Mr. Brady was acting as attorney or still doing his duty as trustee—which is a question that you must answer for yourselves—he himself says that he was acting as trustee, but at the back of the summons appears these words: "Take notice, that you are required to bring with you and produce at the hearing hereof on Friday, the 22nd February, 1907, letters of demand written and sent to you by the plaintiff's solicitor, bearing dates January 11th and February 11th." Mark you, by "the plaintiff's solicitor." Mr. Brady calls them letters of demand from himself as solicitor. I do not say he might not by an accident have put it that way, but, whatever he explains away now, what he told Tewson was that there were two letters of demand

written by him as attorney. In the face of that you will consider whether at the time that Brady dealt with these letters he led Tewson to believe that they were letters of demand written from him as attorney. That will dispose of this point. If you think he sent them as attorney, or rather that his action was such as to justify the writer of that article in thinking that he was acting as attorney instead of acting as trustee, the question is: was he right at such an early stage to begin the work as attorney instead of acting as trustee? That is the point: whether the writer was justified upon the facts before him in saying that costs were being made by Mr. Brady, as attorney, when he should have done the work as trustee. If you think that he took up the matter as attorney, professionally, too early, the writer was justified in saying so. The case hinges also upon another point. The writer had in view, upon the face of the article, that it was inadvisable for attorneys to act as trustees. This is an opinion. It is not a reflection upon anyone. In itself it cannot be considered as a reflection upon Mr. Brady that he acted as a trustee, although some people looking upon this article casually would say it is an attack upon Mr. Brady, because he happens to be an attorney and was acting as trustee. This is the statement made, and there is no charge in that, because it is perfectly legal to say of a man that he has done so. There is nothing wrong in it, because he had a perfect right, as an attorney, to take the position of trustee. Therefore, in that allegation there is no libel, but it may become libellous if there is something behind it which conveys a charge that Mr. Brady, acting in this dual capacity, did something wrong and illegal. There might be such a case, but, on the face of it, it contains no imputation of anything wrong. This is one of the issues raised by the writer. He says it leads to evil consequences in that the attorney begins to take up the business as attorney and making costs before the trustee has done his part of the duty, and, not only this, but it leads to temptation. It seems, to my mind, to be conveyed by this article: "Here is an attorney taking advantage of his position as trustee." If that were so, as a matter of fact, then it would be a very fair comment to make that under the circumstances the attorney might take advantage of this position. The advantage is supposed to be this, that he makes costs and makes a profit out of the estate. The object of the writer seems to be to point out that, under certain conditions, it is a temptation to the attorney not to do his duty as trustee. Now, the idea apparently was that an attorney could legally make these costs. The

Q 1

writer says: "I admit that it is quite legal, but the charges are rather large." The word "extortionate" was not used. Now the question is, and you should dispose of that point also, are the charges legal? The object of the writer seems to be that he wants to check costs being run up for the benefit of attorneys who are trustees in insolvent estates. But the law has been beforehand with this subject, because it has been made a rule that an attorney shall not run up costs for his own benefit, to put money into his own pocket when he acts as trustee for an estate, except under circumstances which do not here exist. There may be circumstances under which the creditors may bestow these rights upon a trustee, but in this case they have not been bestowed. What the effect would be if they had done so it is not necessary for me to say. The creditors authorised Mr. Brady to act as trustee, and he thereupon took upon himself to act as attorney. The law then says this: That if you act as trustee whilst you are an attorney, you will do the work as trustee only; if you manage this estate as attorney and take upon yourself to do certain legal work in connection with this estate as attorney, you shall not charge for that. In England the law is clearly laid down that assignees or trustees in estates shall not, for their own profit, run up costs as attorneys. Such costs are not allowed, and it has been decided time after time that such costs are not legal. Here, as has been pointed out, we have not had any special case in point, but you have heard what the practice is: that such charges are not to be made, and that if an attorney helps an estate with his services as attorney, he does it as trustee and must charge nothing as an attorney. What the writer said in the article was that these charges were legal, but they were incurred rather too early, but, as a matter of fact, whether or not they were incurred too early, there are items in this account which are not allowed, and are known not to be allowed, and consequently they are illegal. I have before me the bill which is filed amongst the papers in the insolvent's estate. In connection with the item "demand and postage"—whether it is a demand made before insolvency or after insolvency, I do not want to go into nice technicalities—it is sufficient that the law will not allow it. Mr. Brady himself says, as you see on the endorsement behind the summons, that he acted in both these demands as attorney for the trustee, and that is the inference that would be before anyone who had to deal with the circumstances of this case before the evidence was given in this Court. Well, there is a demand made for which



3s. 1d. is charged, and the trustee is not allowed to make such a charge. Mr. Tewson has paid that amount. The Master would not have allowed the charge. Then there is the charge for summons—5s. That is another charge which the Master would not allow. The reason is this: these charges the attorney puts into his pocket, and the law says he should have done that work as trustee, and if the trustee is so kind as to put his legal services at the disposal of the estate, the estate will accept the services, but the attorney will not be allowed to charge. It has been pointed out to you that, if another attorney had been appointed, the same charges would have been made, so what difference does it all make? In other words, if, as trustee, Mr. Brady had appointed another attorney, the same charges would have been made, so, consequently, where is the injustice when he himself takes the money. The injustice is based upon the principle that the law will not allow a man to take advantage of his position as a trustee. The law will not allow a trustee to enable himself, in some other capacity, to make a profit out of this work, and that is why it is not allowed. But, as far as costs are concerned, if he pays money out of his own pocket, for the benefit of the estate, he may recover it. Stamps upon the summons he would be entitled to recover. If you consider that the summons should have been issued at all in this case, you may take it that the expenditure on the stamps must be refunded. "Stamps on Power" would be a legal charge. The amount of money which was paid to the messenger for his fees would also be a legal charge. The charge for drawing the bill of costs would not have been allowed. The charge for drawing the "Notice to produce" would not have been allowed. Consequently, gentlemen, you have this bill of costs, which bill was before the writer, and you have to determine whether the writer was fair in saying that Mr. Brady had taken advantage of his position as trustee to enable him to make a profit out of the estate. These are not his words, but that is the implication: that he neglected his duty as trustee and set about making costs as an attorney.

Then much has been said, fairly and properly, as to the application of the words "Illegal charges" at the head of the article. It seems to me that the defendant Palmer was very anxious to escape the application of these words to the article, stating that he used the words "Illegal charges," not as referring to the article at all, but as referring to the letter below it. The question, however, remains: are they not applicable to the conduct of the plaintiff? The words at the head of the article are these: "Illegal charges by attorneys." It is said that these words

do not really refer to this article at all. If you believe that, you will not trouble yourself about these words when you deal with the article, but, supposing that you are not satisfied and think that they do embrace the article also, then you will say to yourselves: are they not applicable to the conduct of Mr. Brady? Did he make illegal charges? I have put it to you now how far certain charges are not to be made, and not to be allowed, and that such charges are illegal. It has been suggested to you that, very often in a bill of costs, charges are entered by attorneys honestly thinking that they may recover them: that an attorney may make charges in a bill of costs which, under the circumstances, he is not allowed to charge. Under such circumstances they are struck out of his bill, but he is *bona fide* under the impression that he ought to get them. If the rule of law is that an attorney who acts himself as trustee, and who has got no power from the creditors to charge as an attorney or to act as an attorney, will not be allowed to make such charges, and if he makes them, he knows he makes charges which the law does not allow, or, rather, he ought to know it, and that he is making illegal charges.

The object of the article is said to be to call attention to the double capacity in which the trustee-attorney acted. They are said to be general remarks as to the inadvisability of this, and, as such, they are perfectly justifiable. But your attention is called to special remarks; special imputations applying to the particular case. You will consider whether these are fair comments justified by the facts, and, under the circumstances, not libellous. First you will inquire what are the facts contained in the article that have actually been proved, and then, having these facts, you will say to yourselves, "What would a man with these facts before him fairly say upon them?" It would be in the interests of the public if a man found that the legal charges made in Court were rather high, to raise the question and say that attorneys and barristers charge fees which are too high, and that the public should be protected against them. Comments such as these would be very fair if there was no malice behind them or no reflections made. As I pointed out to you, supposing a particular case was brought to the notice of anyone who took an interest in those matters, who wrote an article upon it, and names were given there of attorneys and counsel, and all the circumstances of the case, and, we will take it, that it was a fair-minded man who took up the case with the intention of exposing, not dishonesty in the individuals, but only the high charges from which he considered the public must be protected. Suppose, gentlemen, Mr. Jones, an attorney, gets



£1,000 in a case, and someone takes up the matter, saying that the public should be protected, and such charges should not be allowed. Any ordinary person reading the article would say it was an attack on this attorney, but you would have to consider, as a jury, whether it was an attack on him, or whether it was an attempt to expose an abuse.

Gentlemen, that disposes of the article itself. The two main points to consider are whether Mr. Brady acted wrongly in charging these fees, and whether he stepped in too soon to act as attorney when he ought to have done more as trustee, and whether when he charged £1 5s. 1d. for collecting a guinea, anyone who became aware of the fact would be right in saying, "These charges are too heavy for collecting such a small sum," and would be right in calling public attention to that. These are the matters for you to consider: whether the facts will bear these comments and whether these comments are fair. Now, as to the more serious imputations conveyed in the letter which follows upon the article. You say that pretty strong language is used in that letter, and again with reference to the letter the first thing you have to consider is: Is there any reference to Mr. Brady? Does that letter refer to Mr. Brady? Well, the writer of the letter in Cradock did not refer to Mr. Brady, so that it is not a case like the article which is complained of where the original writer had in mind the person he was dealing with. The writer in Cradock wrote a general letter upon the abuses to which his attention had been called in a previous article. That previous article is a general reference to trustees charging as attorneys, and there is a request for information, and the writer in Cradock supplies this. The question is: Does it refer to Mr. Brady? Would the public take it to refer to Mr. Brady? You have had two members of the public before you, Mr. Gabriel and Mr. Berlyn. These are the only two gentlemen who have come before you on the point to state whom it referred to, and they state that the article referred to the plaintiff, but not the letter. Now was it intended to apply in fact to Mr. Brady? Upon that point you will take the evidence and consider what reliance you can place upon it. The evidence given is that by Mr. Palmer and he says as a matter of fact: "I swear that it did not refer to Mr. Brady, and I did not intend it to refer to Mr. Brady." That is what he said on oath, but of course, you can accept his statement or not. Is he corroborated by the circumstances? He says that the letter was in answer to an enquiry which had been made beforehand by him in this paper, and at the time the enquiry was made it referred to quite another case that took place in

Port Elizabeth. That is a statement upon oath. Of course, no one has appeared to deny that statement, and if you accept it then you have a letter in reference to quite another matter written by a person some distance off who was not at all aware of the circumstances of this particular case. Mr. Palmer has told you that it was merely accidental that these two matters, the article and the letter, were put in together. But the plaintiff says that even this was done to damage him, by conveying an imputation which was not true in fact. He says the letter is bolstering up the article and aiming a blow at him obviously, and to the knowledge of anyone who should read that paper. Well, gentlemen, it is quite possible by such means for a man to commit a libel. It is quite possible by some clever manoeuvre to injure a man, and do it in such a way that you might escape the consequences. But you will consider whether, upon the evidence, that has been attempted. Mr. Palmer says that it was not his object. He says that he takes a great interest in this matter of small debts collecting charges, and had made this enquiry beforehand, and had got this letter from Cradock about the same time that he received Tewson's article, and therefore it happened that they were put in together. Gentlemen, it is a matter which I must leave in your hands. If you find that the letter had no reference to Mr. Brady, and was not put in to damage his character, you will leave it out of account, and you will deal with the article which you may say clearly refers to Mr. Brady, and in regard to that you will say whether the comments were fair and were justified by all the circumstances of the case.

The jury retired, and after an interval of an hour, said that they had, by six to three, agreed on a verdict for the plaintiff, the damages to be £25.

Judgment was entered accordingly.

[Attorney for plaintiff: C. Brady.  
Attorney for defendant: D. Tennant.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

PHILIPS AND FECHTER V. } 1907.  
RHODIE. } July 4th.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

## SCHMIDT V. SCHMIDT.

Mr. Van Zyl moved for provisional sentence on a judgment of the Resident Magistrate's Court, Wynberg, for £88 1s 1d., with interest on the sum of £100, at 6 per cent., from the 11th May, 1906, and for £2 11s. 10d., taxed costs, and for certain landed property specified to be declared executable.

Defendant handed in an affidavit.

Mr. Van Zyl explained that the defendant in the Resident Magistrate's Court raised a counter-claim, which the Magistrate held was not *bona fide*. His proper course was to have appealed from the Magistrate's judgment.

De Villiers, C.J. (to defendant): You can bring your action for your counter-claim.

Mr. Van Zyl read the defendant's affidavit. It appeared that he is a farmer, residing on the Claremont Flats, and that the plaintiff is his son. He said that he had a counter-claim against plaintiff for over £200, and he prayed the Court to refuse provisional sentence, and order the plaintiff to go into the principal case.

Defendant (in answer to the Court) said that he intended to proceed with his counter-claim.

Judgment granted, execution to be stayed until the 31st August, to enable defendant to proceed with his counter-claim, defendant in the meantime to be interdicted from selling or transferring the land mentioned on the back of the summons.

## REHABILITATION.

Mr. Douglas Buchanan applied for the release from insolvency of James Spence Wilson, of Draaibosch, division of Komgha. Counsel said that the application was made under the 107th section of the Insolvent Ordinance, and the conditions had been fulfilled which were laid down in *ex parte Van Broemtsen* (12 S.C., 239).

Granted.

## GENERAL MOTIONS.

*Ex parte* KNOX. } 1907.  
                                      } July 4th.

Mr. Douglas Buchanan (for petitioner) said he observed that, in his absence yesterday, the Court had been pleased to grant leave to sue by edictal citation at the same time as a rule was granted on the application to sue *in forma pauperis*. He pointed out that there had been some difficulty in ascertaining the exact whereabouts of respondent, and he had applied for an extension of the return day of the rule until the 1st November. Respondent was believed to

be employed at H.M. Dockyard, Devonport, England.

De Villiers, C.J., said that, before making a final order, the Court would want more evidence as to the domicile of respondent.

Mr. Buchanan said that respondent came out to this country to work at Simon's Town, and there met the plaintiff, who was born at Simon's Town, had resided there, was married there, and for a few years lived with her husband there until he deserted her. These points were mentioned when the application for leave to sue *in forma pauperis* came before the Court.

De Villiers, C.J.: I believe there have been some decisions in the Eastern Districts Court somewhat conflicting with the practice here, and I should like to consult Mr. Justice Buchanan, before whom the application came originally, before giving judgment. I shall consider this question of domicile.

## BEARD V. BEARD.

Mr. Swift moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Rule made absolute.

*Ex parte* SMITH.

Mr. M. Bisset moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* GRAY.

Mr. Gutsche moved for an amendment of petitioner's name in the Debt Registry. Petitioner was described as "Joseph Gray," and he desired to have his full name substituted.

Order granted as prayed.

*Ex parte* VAN EYSEN.

Mr. Douglas Buchanan moved on the petition of the widow for leave to raise a mortgage of £500 on the estate property in order to carry out necessary improvements at a brickfield.

De Villiers, C.J.: In this case the Master reports unfavourably, and I confess I do not see sufficient ground for over-ruling the opinion of the Master. The petition contains no statement that there is a demand for bricks, and there is no explanation why the property has been allowed to get into dilapidation, and it appears that the petitioner has sons of age who might help her, probably will help her, if the Court does

not order the money to be raised in the manner proposed. There will be no order in this case.

*Ex parte* SLUITER.

Mr. P. S. T. Jones moved for an order authorising the payment of certain money from funds standing in the name of the minor. Counsel said that in April, 1902, the Court ordered that the sum of £500 be paid to the widow in support of the maintenance of the child, who was the sole heiress, and the present application was for the purpose of having this year at least a further sum of £500 paid to her, because of the minor having proceeded to England to finish her education. The Master, at the end of his report, made the following observation: "No doubt the minor will benefit by the tour, but I think the original allowance should for the present be discontinued, and instead thereof £100 per annum be allowed for a period, say, not exceeding six months." Counsel said that applicant was prepared to take an order in terms of the Master's report.

Order in terms of Master's report.

*Ex parte* ESTATE RIGGE.

Mr. M. Bisset moved, on the petition of certain relatives of Lucy M. Rigge, a widow, for the appointment of a *curator ad litem* to represent the respondent in proceedings to have her declared of unsound mind and incapable of managing her own affairs, and a curator appointed of her person and property.

Order granted appointing Mr. Sutton as *curator ad litem*, summons returnable on the 2nd August.

## SUPREME COURT

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

#### PROVISIONAL ROLL.

CRUYWAGEN V. BRAND. { 1907.  
{ July 5th.

Mr. Sutton (for plaintiff) moved for a certain provisional order of sequestration to be superseded.

Provisional order superseded.

CIAREMONT MUNICIPALITY V.  
AMARDIEN.

Mr. Howes moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

DENGLER V. KLIBBE.

Execution—Movable and immovable property.

*Where in one case execution had been levied upon the movable property of a debtor and a return of nulla bona had been made to the writ, the Court granted leave in a subsequent case to levy execution on the immovable property without first executing on the movables.*

Mr. De Villiers moved for provisional sentence on a promissory note for £52 10s., payable at Queen's Town on the 17th January, 1907, for costs advanced, with interest from due date.

Order granted.

Mr. De Villiers also applied for leave to issue execution against the immovable property of defendant, without first levying execution against the movables. Counsel produced a judgment given against defendant in another case, in which a writ had been issued against his movables, and a return of *nulla bona* had been made.

De Villiers, C.J.: I think this has been done before upon another return of *nulla bona*. Leave will be granted.

WESTERN WINE AND BRANDY CO., LTD.  
V. MOORE.

Mr. Struben moved for provisional sentence for £20, balance due upon a promissory note, with interest from the 29th April.

Order granted.

HART V. BROLIN.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent. The matter, he said, had previously been before the Court, but owing to defective service, the return day had been extended.

Order granted.

#### ILLIQUID ROLL.

STANDARD BANK OF SOUTH AFRICA V. PHILIPS. { 1907.  
{ July 5th.

Mr. De Villiers moved for judgment, under Rule 329d, for £1,689, with in-

terest at 7 per cent. from the 1st January, 1907, being the amount of a certain overdrawn current account, and for the property specially hypothecated under a certain deed as security to the aforesaid claim, to the extent of £1,600, to be declared executable. Personal service had been effected, but defendant did not appear.

Order granted.

#### BERGMANN V. FERREIRA.

##### Summons—Amendment.

*The defendant, Jan Hendrick Ferreira, accepted service of a summons against Pieter Ferreira for the price of certain cattle seized by him, and, it being clear that the defendant was the person intended to be sued, the Court allowed an amendment of the summons from Pieter to Jan Hendrick.*

Mr. P. S. T. Jones moved for judgment under Rule 329d for £73 2s. 6d., due to plaintiff by defendant, being value of certain clothing, foodstuffs, and other articles of general merchandise taken from plaintiff's store at Karos, Upington, by defendant on or about the 12th November, 1906, with interest and costs of suit. There was also a prayer for damages, but counsel intimated that he did not ask for judgment thereunder. He added that he had to apply for an amendment of the defendant's name which should not be Pieter Ferreira, as stated in the summons, but Jan Hendrik Ferreira, who had been served personally and had accepted service.

[De Villiers, C.J.: The Sheriff's return is that service has been made upon Pieter Ferreira.]

Mr. Jones said that he had been briefed with a copy of an affidavit by the Sheriff's officer, but he had been unable to obtain the original signed by the Sheriff's officer before coming into Court.

The matter was ordered to stand over pending production of an affidavit of service upon Jan Hendrik Ferreira.

*Postea* (July 8th).

Mr. Jones read an affidavit by F. W. Herbert, an officer of the Deputy Sheriff, who said that he served the summons on defendant on the 22nd June. The defendant's correct name was Jan Hendrik Ferreira, the leader of the Ferreira raiders. Among the Ferreira raid prisoners at the Breakwater Convict Station, there was no one bearing the name of Pieter Ferreira.

[De Villiers, C.J.: Your summons is against Pieter Ferreira. Has an amended summons been served upon defendant?]

Mr. Jones: No. The affidavit was put in to show the identity of the individual against whom we are taking action.

[De Villiers, C.J.: How can the Deputy Sheriff say? How does he know?]

Mr. Jones: The position is that the whole of the goods were said to have been taken by the Ferreira raiders, of whom Jan Hendrik Ferreira was the leader. We are suing him, and by some mistake he is described in the summons as Pieter Ferreira.

[De Villiers, C.J.: Were there not two Ferreriras in that raid?]

Mr. Jones: Yes, but they say there is not one bearing the name of Pieter Ferreira at the Breakwater Convict Station, and it is really the leader of the raid whom we are suing.

[De Villiers, C.J.: You don't ask for damages?]

Mr. Jones: No, the third prayer of the summons is withdrawn.

[De Villiers, C.J.: In strictness, there should be service of an amended summons upon Jan Hendrik Ferreira, because the summons is against Pieter Ferreira, and that is the only summons served upon him.]

Mr. Jones: Amendments have been allowed, for the matter has been discussed by your lordship in *De Stadler v. Morris* (9 Juta, 480).

[De Villiers, C.J.: The summons will have to be amended before judgment is given.]

Mr. Jones said that he had asked for an amendment on Friday last.

De Villiers, C.J.: It appears that really unnecessary expenses will be caused by fresh service, because it is quite clear that there is no other person likely to be liable, so that the Court will order the amendment by altering the name of Pieter Ferreira to Jan Hendrik Ferreira, and give judgment as prayed, except for damages.

#### WOODSTOCK MUNICIPALITY V. BETTINGTON.

Dr. Greer moved for judgment, under Rule 319, for £58 15s., balance of owner's rates, £9 10s., water charges, 9s. 10d., sanitary charges, £1, balcony rents, and £11 10s., street construction rates, with interest *a tempore morae* and costs.

Defendant appeared in person, and said that he wished the Court to remove the bar so that he could plead to the claim. He explained that he had been busily engaged in another case in this Court recently, and he had had his hands full.

[De Villiers, C.J.: What would your defence be?]

Defendant: I dispute the rates.

[De Villiers, C.J.: You mean that they had no right to impose these rates?—That they were unjust rates.]

[De Villiers, C.J.: In what sense?—They are heavy charges, and the Municipality are not entitled to what they have charged.]

[De Villiers, C.J.: Not authorised by the Act?—Yes.]

[De Villiers, C.J.: You must consider whether it is worth while throwing good money after bad. What other case were you in?—I was in the action of *Bettington v. Scott*.]

[De Villiers, C.J.: You have not produced an affidavit of merits?—I am not acquainted with the procedure of the Court.]

Dr. Greer said he was instructed that the Municipality did not wish to be unduly hard upon the defendant, but it seemed difficult to understand what possible defence he could have to this action, and it might be in the defendant's own interests not to allow bar to be removed.

Defendant: It is a case of sending the ratepayers into bankruptcy, or fighting the Council. If they are not compelled to lower their rates, it means that the ratepayers are thrown into bankruptcy.

[De Villiers, C.J.: There is no doubt that the rates are becoming almost ruinous.]

Defendant: Well, then your lordship, it is best to fight it.

[De Villiers, C.J.: But the Legislature has given the Municipality these powers.]

Defendant: There is a provision that the properties shall be valued at what they are worth.

[De Villiers, C.J.: Properties are valued, and you have a right to object to the valuations.]

Defendant: Last year, instead of lowering the valuations, they said they could not lower the rates owing to the bond-holders. Why should they be afraid of the bond-holders? It might look as if I were throwing my head against a brick wall, but I think the brick wall is very rotten, and that my head will go through.

[De Villiers, C.J.: Parties are generally very sanguine, and I am afraid the wall will be too much for you in this case.]

Defendant: Never mind, your lordship; I will chance it.

[De Villiers, C.J.: Have you got means to defend the action?]

Defendant: That will depend on the result of the other case. If the other case goes against me, then it won't matter. Replying to further questions, defendant said that he would file an affidavit of merits if he were given an opportunity.

[De Villiers, C.J.: You have had ample time, and you have failed to comply with the rules of Court.]

Defendant (replying to another question) said that he did not make an offer of any portion of the claim.

[De Villiers, C.J.: The summons in this case was issued so far back as the 22nd May, the declaration was served on the 22nd June, and on the 1st July defendant was served with notice demanding plea, and he failed to file his plea, and now, when the case is all ready for judgment, he comes into court and says he wants time. Now, time can only be given upon an affidavit of merits, and other sufficient ground, to the satisfaction of the Court. That is not provided here.]

Defendant (interposing): I must see a legal adviser on those points.

[De Villiers, C.J.: But it is too late, and I think the truest kindness to you is to give judgment, because it will only be a waste of time to remove bar.]

Defendant again interrupted his lordship, and said that he disputed several of the amounts. He found fault with the charge of £11 10s. for street construction works, but he was unable to tell the Court how much he thought he was really liable for.

Dr. Greer said that the charges claimed went back a couple of years.

Defendant: I think it will be best for your lordship to pass sentence, and let the property be sold. I ask for no mercy whatever from the Woodstock Municipality, which refuses relief in cases of distress.

[De Villiers, C.J.: Judgment will be granted. I think, however, some of these rates are almost ruinous.]

Dr. Greer: That may be so, but still in the special case —

[De Villiers, C.J.: Unfortunately, very large powers are conferred upon these Municipalities by Statute, but it has reached a pitch now that the ratepayers, many of them, will be wholly unable to pay.]

Dr. Greer: One felt a certain amount of sympathy for the defendant, but with regard to this special case one feels that no defence could be set up.

Judgment as prayed.

## GENERAL MOTIONS.

*Ex parte* WARD. { 1907.  
July 5th.

Mr. M. Bisset moved for an order declaring petitioner of sound mind, discharging his estate from curatorship, and releasing Mr. W. A. Currey from his appointment as curator. Counsel produced a consent by Mr. Currey, and an affidavit by Dr. Sinclair Black, as-



assistant medical superintendent at Valkenberg, in support of the application.  
Order granted as prayed.

#### CARROLL V. QUINE AND OTHERS.

This was an application to make absolute a certain rule nisi interdicting respondents from proceeding with certain works upon a wreck in Table Bay, alleged to have been located by applicant. Mr. Pohl was for applicant; there was no appearance for respondents.

Mr. Pohl put in a consent paper signed by respondents, consenting to the application, and to pay the costs.

Order in terms of consent.

#### *Ex parte* JACKSON.

Mr. Marais moved for an order authorising the amendment of a certain transfer deed and mortgage bond by the insertion of petitioner's correct name instead of "Rupert Jackson."

Order granted as prayed.

#### FITZGERALD V. ARGUS PRINTING AND PUBLISHING CO., LTD.

Mr. M. Bisset moved for leave to the applicant to prosecute an appeal to the Supreme Court from a judgment given by the Eastern Districts Court in an appeal brought by the present applicant against the present respondents.

Counsel stated that notice of appeal was given in due time, but owing to delay caused by pressure of work in the Eastern Districts Court, the record did not finally reach the Registrar of the Supreme Court in sufficient time to enable the case to be set down before three months had elapsed. Notice of appeal was given on the 7th March, and the record did not reach the Supreme Court until the 15th June. Counsel referred to the 23rd section of Act 35, 1896.

Leave granted, case to be set down for the first Monday in August.

#### *Ex parte* ESTATE RIGGE.

Mr. M. Bisset applied for an amendment of an order granted by the Court in this matter on Thursday. The Court had appointed a *curator ad litem* in certain lunacy proceedings, and made the summons returnable for the 2nd August. Counsel now applied for the return day to be fixed for the 12th July.

An order was made accordingly.

#### *Ex parte* PATERSON AND CO.

Mr. Roux moved, as a matter of urgency for the appointment of Gerald

D'Arcy Orpen as provisional trustee in the insolvent estate of Harry H. Soowen, carrying on business as a hotelkeeper at Muizenberg, with power to carry on the business pending the election of a trustee.

Order granted.

#### SWART AND OTHERS V. TRUSTEES OF JEFFREY'S BAY. 1907. July 5th. „ 8th.

Servitude — Registration — Servient tenement — Conditions of sale.

*In 1852 the predecessors in title of the applicants sold a portion of the estate in lots for erven, one of the conditions of sale being that the purchasers shall have the right of bringing the water from the springs, provided that they make a proper dam and enter a pipe two feet above the bottom of the dam. The servitude was registered in the title deeds of the purchasers, but not on that of the sellers. After having failed for 55 years to give effect to the servitude, the respondents being erf-holders, proceeded to construct a dam for the purpose of leading out the water in terms of the servitude.*

*Held, that the respondents should be interdicted from proceeding with the work unless and until they have obtained a registration of the servitude as against the title deeds of the applicants.*

This was an application to make absolute a certain rule nisi restraining the respondents from trespassing on the applicants' farm The Fountains, situate at Jeffreys Bay, Humansdorp.

The applicants were Magdalena J. Swart, Mimmie E. Swart, Cornelia H. Swart, of Humansdorp, and Matthys G. Swart, of Adelaide, who, along with two or three others, were owners of the farm The Fountains, which was bequeathed to them by their parents. In their petition, they said that they held clear titles, with no servitude registered against their title deeds. The respondents claimed the springs on the farm, and had gone on the farm, and started works for the purpose of taking water from the property. Respondents

had been warned to desist, but they persisted in their acts.

From the affidavits filed by respondents, it seemed that certain five owners of the farm Zeekoe River and Klein Zeekoe River had in 1853 laid out a township at Jeffreys Bay, and had then sold certain erven, on condition that the purchasers should have the right of bringing the water from the springs, provided that they made a proper dam and entered a pipe 2 ft. above the bottom of the dam. This condition was registered with the transfer deeds of the erf-holders. There were no other springs from which water could be brought to Jeffreys Bay. About that time the erf-holders had no money with which to construct works. After that, the then holder of the farm made an opstal at the springs, and built a house, and called it The Fountains. The farm was partitioned, and eventually bequeathed to petitioners. Since the sale all the occupants of the erven at Jeffreys Bay had obtained their water at the springs.

In reply, the petitioners said that the conditions of sale were not attached to the title-deeds of the sellers. There was nothing to show what springs were meant, as there were many springs on the farms held by the sellers, some of which were nearer the township than those now claimed. Shortly after the sale one of the sellers built a house, and also made an orchard and garden on the springs in question. On the 31st December, 1868, the farms were partitioned, and a portion was cut off and transferred to the trustees. No mention was made of the servitude claimed in any of the deeds then passed. Applicants' grandfather subsequently acquired a portion of what was then known as The Fountains, for valuable consideration. Their father subsequently acquired more of it by exchange, and an amended title was issued in 1899, after due notice, and no reference was made to any water rights in favour of the respondents. Originally forty lots were laid out and only 22 were sold, and the remaining 18 were sold in 1902 by Frederick Human, who was one of the original sellers, and no mention was then made of the alleged servitude. None of the inhabitants of Jeffreys Bay took water as of right.

Mr. Roux was for applicants; Mr. Benjamin, K.C., appeared for respondents (Pieter L. Swart and Isaac Newton) to show cause against the rule being made absolute.

Mr. Benjamin argued that the persons who had succeeded to this property were the descendants of the original grantors, and that, as such, the servitude would be binding upon them. The original grantors laid out certain erven in connection with their property, and those erven were subject to certain conditions. Those conditions were attached,

possibly by inadvertence, to the title deeds of the purchasers, not to the title deeds of the vendors, so that the purchasers and their successors in title would have come into these erven with knowledge of the fact that this servitude had been originally granted. He argued that the servitude would be binding upon the owners of the servient tenements, and quoted *Judd v. Fourie* (2 E.D.C., 41), *Burge*, 3, 437, *Voet*, 8, 1, 6, and *Jansen v. Fincham* (9 S.C., 289).

Mr. Roux said he admitted that if his clients were universal successors, then it was not necessary that there should be registration of the servitude, but he did not admit that they were universal successors. Their predecessors in title had given valuable consideration. The servitude had been lost by non-user *per modum et tempus*. A servitude might be obtained by grant, by prescription, or by a decree of Court, but in the present case none of these requisites had been fulfilled. If the conditions of sale imposed a servitude against the springs, which he did not admit, then respondents had lost it because they had not built the dam and laid the pipe within thirty years afterwards. Furthermore, he did not admit that the applicants' springs were referred to, as there were other springs. If there were a servitude, it was a servitude in favour of individual erf-holders, and the trustees as such had no *locus standi*. In any case, they should bring a declaratory action to enforce the rights. Counsel quoted *Grotius*, 2, 37, 7, *Voet on Servitude* (8, 6, 7, and 8, 6, 9), *Van der Linden I.*, 11., 4, *Edmeades v. Scheepers* and *Edmeades v. Mostert* (1 S.C., 334), *Braun v. Powrie* (20 S.C., 476), *Steele v. Thompson* (13 Moore's P.C. Cases, 280), and *Maasdorp's Institutes* (vol. 2, p. 204).

*Cur. Adv. Vult.*

*Postea* (July 8th).

De Villiers, C.J.: In this case application is made to have a rule nisi granted by my brother Hopley made absolute. The petitioners are owners of a farm called the Fountains, in the Humansdorp district, and on that farm there is a spring from which the respondents now claim the right to lead water by means of pipes to a watering place called Jeffreys Bay. This right is claimed by the respondents by virtue of certain conditions of sale made on the 21st January, 1852, the 11th condition being the following: "The purchasers shall have the right of bringing the water from the springs, provided that they make a proper dam and enter a pipe two feet above the bottom of the dam, each purchaser bearing an equal share of the expenses, and all erven sold hereafter shall be subject to a proportionate charge to defray the expenses of the first pur-

chasers." The then owners of the property transferred these even to the different purchasers, and upon the deeds of transfer of the purchasers the conditions were duly registered. But, unfortunately, there was no registration of the servitude against the servient tenement, that is, against the property of the sellers, and from 1852 until last year no serious attempt was ever made to give effect to that servitude either by obtaining a registration of the servitude as against the servient tenement or by actually leading the water from the springs. What was done from time to time seems to have been for the people from the bay to send up carts or by other means to obtain water from the springs, but the owners say it was done but paid for. It was paid for, not in cash, but in fish. But anyhow, one thing is clear, that the servitude appearing upon the conditions was never acted upon, the pipe was never laid, and no registration was ever obtained as against the proprietors. The contention of the respondents now is that, inasmuch as the petitioners are not purchasers but are universal successors to the original settlers, they are bound by the original contract by which this right was given. It is by no means clear, however, that they should be treated in this case as universal successors, because their grandfather, Pieter Lafras, actually purchased this property, and transfer was made to him. But then it is said that, although he was a purchaser, he was aware of the conditions, and therefore he could not take advantage of the fact that there was no registration. Then after his death his son Matthys acquired the property. He was the universal successor, he was the heir, and his children also acquired as heirs. But, in my opinion, the length of time which has elapsed from 1852 to the present time certainly threw upon these erf-holders the duty to claim a registration of the transfer as against the servient tenement. They have failed during these 55 years to assert their rights practically, and I think that now, after these heirs have been in possession for this long period, they should not be harassed without clearer proof of the rights of these people to this water. I think, therefore, that, under all the circumstances, the rule should be made absolute, with costs, but leave should be given to the respondents to institute an action for the discharge of the interdict, for registration of the servitude, and for the costs of the present application, including repayment of any costs that may be paid by respondents under the present order.

Mr. Roux (for applicants) asked if the Court would put respondents to terms as to when they should bring an action.

[De Villiers, C.J.: You have got everything you want; you have got your interdict.]

Mr. Roux said that his clients might wish to sell the land, or other contingencies might arise.

Mr. Benjamin (for respondents) said that if a time were fixed the respondents should be allowed a considerable period in which to institute their action.

[De Villiers, C.J.: When do you think you would be able to bring an action?]

Mr. Benjamin: I think the earliest would be the November term.

[De Villiers, C.J.: The action must be brought before or during the November term.]

[Applicants' Attorneys: R. Van der Byl and De Villiers. Respondent's Attorneys: Not on record.]

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## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

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### REVIEW.

REX V. PAGE.

{ 1907.  
July 8th.

Act 43 of 1885—Previous conviction — Corporal punishment.

*A prisoner cannot be sentenced by a Magistrate under Act 43 of 1885 to corporal punishment, unless he had been convicted more than once within three years.*

De Villiers, C.J.: The case of *Rex v. Page* (from the Magistrate's Court, Cape Town) came before me, as judge of the week. The accused was charged with the crime of shopbreaking with intent. He was sentenced to 12 months' imprisonment with hard labour, and to receive 12 cuts with the cane. That was after the case had been remitted by the Attorney-General under the Act 43, 1885. The proof of the previous conviction was on account of the fact that on the 19th August, 1902, the accused had been sentenced to be detained in the Porter

Reformatory. Well, the limit under the Act is three years. Under Act 43, 1885, corporal punishment can only be inflicted in case of a second or subsequent conviction within the space of three years. That portion of the sentence referring to cuts with the cane will be struck out. For the rest, the sentence will be confirmed.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

KRIGE V. WILLEMSE. { 1907.  
July 8th.  
Aug. 5th.

Negotiable instrument—Signature obtained by fraud—Holder in due course—Negligence—Bills of exchange—Act (19 of 1893).

*A person who is induced to sign a promissory note in favour of a payee or order by the false representation of such payee, that the document is something wholly different is not liable as maker even to a bona fide holder for value, provided that in so signing he acted without negligence.*

This was an appeal from a judgment of the Hon. Sir John Buchanan, sitting as a Divisional Court, in appeal, from a judgment given by the Resident Magistrate of Ceres, in an action brought by appellant against respondents, for judgment upon a promissory note for £50 (17 C.T.R., 285).

Appellant, Evelyn W. Krige, is an attorney practising at Ceres. He sued Johannes P. Willemse and his wife, Christina J. Willemse, and also Saul Gerber, for judgment upon a promissory note for £50, purporting to have been made by the Willemses and endorsed by Gerber. Gerber admitted the joint debt, the money having been paid to him, but the Willemses denied liability on three grounds, viz.: (1) That they denied their signatures to the note; (2) that the note was obtained by fraud and false pretences; and (3) want of consideration.

The Magistrate, in his reasons for judgment, said that he believed defendants' witnesses in preference to some of the plaintiff's witnesses. He believed that the daughter of the Willemses signed the names of her parents, and that Gerber induced her to do so, with the representation that it was a

receipt. He gave judgment for plaintiff against Gerber, with costs, and absolution from the instance as regarded the Willemses.

Buchanan, J., said that the first question one had to consider was whether the finding on the facts by the Magistrate could be sustained by the evidence. The Magistrate had found certain facts, and there was evidence to support him, and as far as this appeal was concerned, he must accept his finding. The next question was whether upon the facts so found by the Magistrate, the plaintiff had a right to recover. He (the learned judge) assumed that there was consideration given by the plaintiff to Gerber for the promissory note. But could this document be treated as a promissory note at all? In this case the Magistrate found that there was no intention to contract. There was no intention to give a promissory note; there was only the intention to give a receipt. Willemse seemed to be an old man, whose eyesight was very bad, and he was about to go to Cape Town to take medical advice about his eyes. He could neither write nor read his name at the time. If he accepted the Magistrate's finding, he was bound to say that there was no contract, and no promissory note was made or intended to be made between Willemse and Gerber. Gerber got a paper signed, or rather he got the names of the defendants written by their daughter upon the piece of paper, under the belief that she was signing a receipt for an amount which Willemse had received from Gerber. This being the case, he (Mr. Justice Buchanan) could not say that the 27th section of the Act helped the plaintiff. The learned counsel for the appellant said he did not care for a judgment against Mrs. Willemse, as the parties were married in community. It was, therefore, the question of the husband's liability which was before the Court. The husband was a man who was nearly blind, and it was admitted that he never put his signature to any paper at all. He heard his daughter asked to sign a receipt, and he made no objection to her doing so. He (the learned judge) thought that, upon these facts, he ought not to be held liable, even to a third person who held the document for value. There was no contract between him and Gerber. There had been no negligence on his part which would estop him from pleading want of liability. Under these circumstances, he thought that the appeal must be dismissed, with costs.

Mr. Schreiner, K.C. (with him Mr. J. E. R. de Villiers), for appellant; Mr. Benjamin, K.C., for respondents.

Mr. Schreiner argued that the plaintiff was holder of the note in due course. Willemse's daughter was authorised to sign the note. Any allegation of fraud must be proved up to

the bill. The Magistrate did not say there was fraud, but even assuming that there had been fraud, there had been negligence on the defendants' part, which debarred them from disputing plaintiff's claim. He cited *Standard Bank v. Du Plooy* (16 S.C., 161), *Everett and Stroud on Estoppel* (p. 277), and *Price and Seeligman v. Prince* (1 Roscoe, 188). On the face of the document, the person must have known what he was signing, that he was clearly undertaking a responsibility. Section 27 of Act 19 of 1893 gave the definition of law both here and in England under the Bills of Exchange Act. The fundamental security in a negotiable instrument by these legislative Acts would be swept away if it were possible for people to come afterwards and simply say they did not know what they were signing. The principals in the case of *Lewis v. Clay* (77 Law Times, p. 653), although the decision there went for the defence, were all in favour of the applicants in the present case. Krige was in the same position here as if he had been a bank discounting the note. On the point of the signature the defence broke down altogether, and with regard to fraud it required to be proved to the hilt, and the Magistrate did not venture to say that he did find fraud. He simply said the evidence of the Willemsees was more satisfactory than that of some of the plaintiffs. Counsel submitted that fraud had not been clearly established in this case, and referred the Court to the cases of *Foster v. McKinnon* (Chalmers, p. 277) and *Bernhardt v. Du Toit* (2 Juta, 359).

Mr. Benjamin submitted on the question of the facts it was purely one of credibility, and the Magistrate exercised his discretion in the matter, and he found that he must accept the statements by the defendants and not the statements by the plaintiff. The evidence of the two defendants and their daughter was perfectly consistent, and the Magistrate was justified in accepting their evidence. Counsel quoted the case of *Foster v. McKinnon* (Law Times, 4; Common Pleas, 704) and Chalmers on Bills of Exchange (p. 277). Section 27 of the Cape Act corresponded to section 29 of the English Act. Counsel also cited *Young v. Groat* (4 Bingham's Reports, 253), *Scholefield v. Londesborough* (1 Q.B., 1895, p. 536), *Colonial Bank of Australasia v. Marshall* (1906, A.C., 559), and *Smith v. Prosser* (heard in the Court of Appeal on the 4th and 5th June last). He submitted that there was no negligence on the Willemsees' part and that the Magistrate's judgment should be sustained.

*Cur. Adv. Vult.*

*Postea* (August 5th).

De Villiers, C.J.: This is an appeal against a judgment of a

Divisional Court dismissing an appeal from the Resident Magistrate's Court of Ceres. The action was on a promissory note for £50, made by the defendant Willemse in favour of one Gerber or order, and by the latter endorsed and delivered to the plaintiff. The Magistrate granted absolution from the instance on the ground that the defendant had been induced to allow his daughter to sign his name by Gerber's false statement that the document was in reality a receipt. There was some conflict in the evidence as to whether the defendant had signed the note himself, or whether it was signed by his daughter, but I accept the Magistrate's finding that his signature was affixed by his daughter. The defendant himself stated that he was satisfied with her signing, because he had been told by Gerber that the document was a receipt. He added that he could not sign because his eyes were too bad, and he could not read the document. The 90th section of the Bills of Exchange Act, 1893, enacts that where by that Act any instrument is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. We may take it, therefore, that the case should be treated as if the defendant had signed the promissory note himself. The mere fact, however, of the defendant having written his name at the foot of the note is not conclusive as to his liability thereunder. The object of the maker's signature is to authenticate the document, and give effect to his promise to pay, and if such signature was obtained from him by a fraudulent representation that he was signing a receipt, there is really no contract between him and the payee. It would follow that no liability is incurred to a holder in due course to whom the payee has endorsed and delivered the note, unless circumstances exist which legally preclude the person so signing from setting up the defence of fraud, or unless the 27th section of the Act created such a liability. That section enacts that "a holder in due course is a person who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." The section then proceeds thus: "In particular, the title of a person who negotiates a bill is defective within the meaning of this Act, when he obtained the bill or the acceptance thereof by fraud or duress, or force



and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud." There is much force in the argument of the plaintiff's counsel that if the plaintiff had no notice that the defendant's signature had been obtained by the payee's fraud, he should under this section be treated as a holder in due course, but, upon the whole, I feel bound to accept the view which has found favour in the English Courts, to the effect that an identical clause of the English Act does not apply to a case like the present. In the case of *Foster v. MacKinnon* (4 L.R., C.P., p. 704), which was decided before the passing of the English Act, it appeared that the defendant had been induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. In an action against him as indorser at the suit of a *bona fide* holder for value, the jury were directed that if the defendant's signature to the document was obtained upon the fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of negligence in so signing the paper, he was entitled to the verdict. It was held by the Court of Common Pleas that it was a proper direction. The ground of the decision was that not only was there fraud, but 'the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended. If this view be correct, then I quite agree that it would have made no difference if the Act had then already been passed, for if in contemplation of law the defendant had really not signed as indorser, there is nothing in the Act to render him liable to the holder. In the case of *Lewis v. Clay* (77 L.T.R., N.S., p. 653), which was decided after the passing of the English Act, it was held by Lord Russell, C.J., that a person who had been fraudulently induced to sign a note as joint maker in the belief that it was a wholly different document, if he has acted with due care and without negligence, is not precluded from setting up the true facts as a defence, not only against the payee, but also as against a holder in due course. "I think it well," said his lordship, "to point out that cases like the present differ widely from those in which the party sought to be charged has agreed and intended to enter into contractual obligations by bill or note, but has been defrauded into agreeing, or been defrauded in the manner in which the bill or note has been dealt with. In such cases he is liable, on

principle and authority, to any one who has dealt with the bill or note in good faith and for value." He added that in his opinion the Bills of Exchange Act had made no alteration in the law in this respect. It is important, however, to observe that in both the English cases just cited the jury had negatived the existence of negligence on the defendant's part. The law of England still stands as it did before the passing of the Act, that a person who is induced to sign a bill or note by the false statement that he is signing a wholly different instrument cannot set up the fraud as a defence to a holder in due course if in so signing he acted with negligence (see Chalmers on Bills, sec. 91). As to the law of this colony, the principle has been recognised that a defendant cannot set up the fraud of a third person as a defence against the claim of a plaintiff who has been induced by the culpable negligence of the defendant in signing an instrument without due inquiry as to its contents to act to his (the plaintiff's) prejudice upon the belief that the instrument is a genuine one. In the case of *Standard Bank v. Du Plooy* (16 S.C.R., p. 161), the defendant had signed a guarantee bond for Van der Heever in favour of the Standard Bank, in consideration of which the bank granted certain banking facilities to Van der Heever. The defence was that the defendant had been induced to sign the document by Van der Heever's false representation that it was a power of attorney to pass transfer of certain property, but the full Court held that Van der Heever's fraud would afford no defence, seeing that the defendant had acted with negligence in signing. The difference between the two cases is this, that there the form of guarantee specified the bank as being the party in whose favour the obligation was contracted, whereas in the present case the payee is Gerber, and not the plaintiff. It was pointed out in the *Standard Bank* case that it was not the case of a "cessional" document, which is clearly a misprint, for the statement that it was not the case of a cession of a document. It was not then necessary, nor is it now necessary, to inquire what would have been the rights of a person to whom the obligee of a bond obtained by fraud had ceded it. We have now to deal with a document which contained a promise to pay to the payee or order, and was therefore in such condition that the payee by indorsing it could transform it into a negotiable instrument payable to the lawful holder. If the defendant was aware of the contents of the document he would have been legally presumed to know what the legal effect of his signature would be. If he culpably neglected the obvious precaution of acquainting himself with the contents of the document before signing

it the resulting liability to the holder in due course would be the same as if the promise had been to pay such holder. I am clearly of opinion that by our law also, the rule that a person who is induced to sign a promissory note in favour of a payee or order by the false representation of such payee, that the instrument is a wholly different one, is not liable to a bona-fide holder for value must be qualified by the proviso that in so signing the note he acted without negligence.

The question then arises whether the defendant acted with reasonable care and diligence. This is a question of fact dependent not upon the credibility of the witnesses, but upon the inference which should be drawn from the admitted facts of the case. Unfortunately, the Magistrate did not direct his attention to the point, for he seems to have decided that because Gerber had been guilty of fraud, the plaintiff was not entitled to recover. The two English cases to which I have referred, have been much relied upon as showing under what circumstances negligence has been negatived by English juries, but upon questions of fact, findings in other cases cannot be of much assistance. In the case of *Foster v. Mackinnon*, the defendant, who was a gentleman far advanced in years, swore that he had never accepted or indorsed a bill of exchange, but there was evidence that the signature was his, and that he wrote the indorsement under the following circumstances. The defendant had previously, at the request of one Callow, signed a guarantee for £3,000, and Callow now asked the defendant to put his name on it, telling him that it was a guarantee, whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given, and out of which no liability had arisen to him, put his signature on the back of the bill. The jury, it is true, returned a verdict for the defendant, but the full Court of Common Pleas granted a new trial on the ground that the verdict was against the weight of evidence. The case, so far as it goes, is therefore rather in favour of the plaintiff in the present case. As to the case of *Lewis v. Clay*, the circumstances under which the defendant had been induced to sign the note were also very special. Lord William Nevill, an intimate friend of his, had requested him to sign a document. The defendant asked what the document was about, to which Lord William Nevill replied that he would show it if the defendant insisted, but he would rather not, as it was a private matter, and he wanted a power of attorney in connection with his sister, Lady Cowley's marriage settlement, and certain divorce proceedings then pending. The jury found that there was no negligence, and Lord Russell's judgment was

given, not on an application for a new trial, but upon the findings of the jury in the action which had been tried before him. In the present case there is much to be said in favour of the plaintiff's contention that the defendant had been guilty of such negligence as to estop him from setting up the defence of fraud. The conclusion, however, at which the learned Judge in the Divisional Court arrived was that there is not sufficient proof of negligence, and with this conclusion I understand my brother Hopley to agree. Seeing that this question of negligence was not raised at the trial, and seeing also that the judgment was absolution from the instance only, I consider that the course most consistent with justice would be to dismiss the appeal and allow the question of costs to stand over, with leave to the plaintiff, if so advised, to institute a fresh action, either in the Resident Magistrate's Court, or in this Court, in which latter case a summons will be dispensed with. The plaintiff can then decide for himself whether he will proceed afresh either in the Magistrate's Court or in this Court. An opportunity will thus be afforded to the parties to give further evidence not only upon the question of negligence, but upon the questions whether the defendant had really been induced by Gerber's false statements to authorise the signing of the note, and whether, and to what extent, the plaintiff gave value for the note. The case to be brought to trial before the end of next term.

Maasdorp, J.: I concur.

Hopley, J.: I am of the same opinion.

Mr. Benjamin (for respondent) asked whether the Court would make any order as to costs in case an action were not brought by the plaintiff.

The Chief Justice: I think there would not be much additional expense in applying for costs.

[Applicant's Attorneys: Dempers and Van Ryneveld. Respondent's Attorneys: Faure, Van Eyk and Moore.]

# SUPREME COURT

## FIRST DIVISION.

[ Before the Hon. Mr. Justice MAASDORP. ]

WILLIAMS V. INSOLVENT { 1907.  
ESTATE WILLIAMS. } July 9th.

Mr. McGregor, K.C., for the plaintiff, moved for judgment, with costs, in terms of a consent paper signed by the attorneys for the defendant. The claim was for an order setting aside the attachment of certain furniture.

Judgment in terms of consent paper, with costs.

ESTATE DAPINO V. AUTO- { 1907.  
MATIC PIT CO. } July 9th.  
Aug. 6th.

Patent rights—Assignment—Registration—Act 17 of 1860, Sec. 28.

*One J. obtained certain letters patent in this Colony, and afterwards assigned them to one W., who assigned them to D. D. granted certain interests in the patent to certain two other persons and subsequently joined them in assigning all rights in the patent to the defendant Company for valuable consideration. The former assignments were all duly registered, the latter was not. In 1906, D.'s estate was sequestrated as insolvent, and his trustees claimed the patent rights as part of the estate, on the ground, that as the assignment to defendants had not been registered, no property in the patent had passed to them.*

*Held, that although registration is prima facie evidence of proprietorship in letters patent and is necessary under Act 17 of 1860, Sec. 28, to pass property therein from a grantee to an assignee, it is not necessary in order to pass property in a patent from one assignee to another.*

This was an action brought by the trustees in the insolvent estate of Eugenio Dapino for a declaration of

rights as between themselves and the defendant company, in respect of the ownership of certain patents and the rights, privileges, and profits thereunder.

The plaintiffs' declaration was as follows: (1) The plaintiffs reside in Cape Town, and sue in their capacity as the joint trustees in the insolvent estate of Eugenio Dapino, which was compulsorily sequestrated by order of this Honourable Court on or about the 28th of June, 1906, and whereof the plaintiffs were duly appointed as such joint trustees on or about the 20th of July, 1906. The defendant is a company with limited liability, whose head office is in Cape Town. (2) On or about the 14th of November, 1903, letters patent for a certain invention known as an "automatic pit to be used for drainage purposes" were taken out in this Cape Colony by one Wilfred Thomas James Johns, which letters patent were duly assigned to one William Birmingham White on the 15th day of December, 1905, and again assigned by the latter to the said insolvent on the 28th of December, 1905, the said last-named cession being duly registered as by law required on the 25th of January, 1906. (3) Prior to the 30th of December, 1905, the said White and one Francois Boucharel had obtained letters patent for the said invention in the Transvaal Colony, Orange River Colony, and Natal, and on or about the date last mentioned the said White and Boucharel ceded to the insolvent the said letters patent, and all their rights, title, and interest in and to the said invention and the use thereof in South Africa. The said cession was duly registered in favour of the insolvent, as regards the Transvaal letters patent on the 24th of January, 1906, the Orange River Colony letters patent on the 24th of January, 1906, and the Natal letters patent on the 23rd of January, 1906. (4) On or about the 30th of December, 1905, the insolvent entered into an agreement for working the said patent with one Hermann vom Dorp and one Maynard Nash. (5) Shortly thereafter the defendant company was formed for the purpose of acquiring the said patent rights and of exercising them, and on or about the 31st of March, 1906, the insolvent, together with the said Vom Dorp and the said Nash, entered into an agreement with the defendant company, whereby the three former purported to sell to the latter the rights conferred under all the above-mentioned letters patent, with the full and exclusive benefit thereof. The said agreement has not been registered in terms of the Company's Act, section 17. (6) Thereafter the defendant company proceeded to work and exploit the said patents in this colony and elsewhere, and they still continue to so exploit them, and claim to be the proprietors

thereof, and entitled as such to the profits derived from working the said invention. (7) The said patent still stands registered in the name of the insolvent in the register of proprietors, kept in terms of section 28 of Act 17 of 1860, and no cession thereof, as by law required, has been given by the insolvent to either the said insolvent, Vom Dorp and Nash, or to the defendant company. The plaintiffs say that there has been nothing tantamount to a delivery to either the insolvent, Vom Dorp and Nash, or the defendant company, of rights under the said letters patent, and that the company has not and never had title to the said letters, but that in law the insolvent was after registration of the cession to him and up to his insolvency the exclusive proprietor of the said letters and the rights thereunder, all of which have accordingly become vested in the plaintiffs. (8) The plaintiffs say further that the working and exercising of the said patent rights by the defendant company as aforesaid were wrongful and unlawful, and that the defendant company is not entitled to any benefits derived from such working. Wherefore the plaintiffs claim: (a) A declaration of rights as between themselves and the defendant company in respect of the ownership of the said patent and the rights, privileges, and profits thereunder. (b) A declaration that the insolvent estate of the said Dapino is the exclusive proprietor of the said letters patent, and is exclusively entitled to work the said invention and to all profits derived therefrom. (c) An account by the defendant company of all its dealings with or in respect of the said patent. (d) Debate of such account. (e) Payment of all and any profits made by the defendant company from the working or exploitation of the said patent rights. (f) An interdict restraining the defendant company from making any further use of the said invention or further exercising the said patent rights. (g) Interest *a tempore morae*. (h) Costs of suit.

The defendants' plea was as follows: (1) Defendant company admits the allegations in paragraphs 1, 2, 3, 4, 5, and 6 of the declaration, save that it says that for greater certainty it craves leave to refer to the originals of the agreements referred to in paragraphs 4 and 5 when produced at the trial, and save that it says that the agreements were duly signed by the parties thereto; (2) it says that in or about January and February, 1906, and prior to sequestration of the estate of Eugenio Dapino as insolvent, the various letters patent, the subject matter of this action, were handed by Messrs. Van Zyl and Buissinne, acting for Bouchel and White, to Messrs. Syfret, Godlonton and Low, acting for Dapino, and who were likewise acting for a certain partnership, on behalf of

which partnership they received them in accordance with the agreement, and thereafter so continued to hold them until about 29th March, 1906, when it commenced and continued to hold them on behalf of the defendant company. (3) It says that it admits that the patent still stands registered in the name of the insolvent Dapino in the register of proprietors kept in the terms of section 28 of Act 17 of 1860, but it otherwise denies all the allegations of fact and conclusions of law contained in paragraphs 7 and 8. Wherefore defendant company prays that the claim be dismissed, with costs.

Mr. Burton, K.C. (with him Dr. Greer), for plaintiffs. Mr. Benjamin, K.C. (with him Mr. Howes), for defendants.

Joshua Pell, clerk in the Master's Office, produced the record in the proceedings of the insolvent estate of Dapino. There were no schedules filed; it was a compulsory sequestration, and he could not say whether there were any assets in the estate.

Carl Brauer, clerk in charge of patents in the Colonial Secretary's Office, produced a book containing the register of proprietors. The patent was first issued to W. T. J. Johns on November 14, 1903. Then it was assigned by Johns to Wm. B. White on the 15th December, 1905. On the 28th December, 1905, there was another cession by White to E. Dapino, and Dapino stood in the book as the registered proprietor. The book only referred to the Cape Colony.

Ise Levy, incorporated accountant, Cape Town, one of the co-trustees in the insolvent estate, and one of the plaintiffs, stated that as yet no assets had been handed over by the insolvent. The debts proved amounted to about £330. On going into the affairs he ascertained that the insolvent had acquired certain letters patent which were held by the company, but there was no registration of any assignment. Two of the directors had proved private debts against the estate. Witness took counsel's opinion, and succeeded in getting copies of certain agreements between Dapino and Messrs. Vom Dorp and Nash and the company. Prior to the defendants' plea in this case he could get no information as to where these letters patent were. Witness had received no information from his co-trustee about the details of this matter. He did not see any share register or minute book, the only information he could get with regard to the shares was from the counterfoils on the share block, which showed that 448 shares had been issued to Dapino, 447 to Vom Dorp, and 98 to Maynard Nash.

By His Lordship: He had done nothing as yet with regard to the shares issued to the insolvent.

Mr. Burton closed his case.



William Henry Low, partner in the firm of Syfret, Godlonton and Low, stated he acted on behalf of Mr. Dapino in connection with some negotiations, with Messrs. Van Zyl and Buissonne, who were acting on the time on behalf of White and Boucharel. The latter were registered at that time as the proprietors of this patent. White and Boucharel claimed to be entitled to the letters patent of this invention in the other colonies. On the 28th December an agreement was signed between Dapino and White and Boucharel for the assignment of these letters patent. That was the agreement put in. The company was registered on the 29th March, 1906. Subsequently he received instructions to draw up an agreement between the company and the partnership in respect of these rights. That was executed by two directors of the company, and by the members of the partnership. It was then lodged for registration, and subsequently returned to witness, the Registrar requiring an endorsement of identification, and that the agreement should be counter-signed by the secretary. Witness signed it for identification, but knew nothing of it being signed by the secretary. The instructions came entirely from Nash with regard to these agreements. Dapino signed the documents, but took no further part. The charges had been rendered to Mr. Nash first of all, as acting for the company, and subsequently rendered to Messrs. Le Roux and Wege, acting for Nash. From the time he received these letters patent until the execution of the vendor's agreement he would have handed them over to the partnership on payment of the charges, and after the execution of the vendor's agreement he would have handed them over to the company. In January, February, and March he was acting for all three parties. The agreement between the partnership and the company was drawn up by witness.

Cross-examined by Mr. Burton: He simply acted as attorney in connection with the registration of the company.

E. Dapino stated that his 448 shares were held by Vom Domp against an advance of £60. Witness paid no money at all in connection with the acquisition of these patents. All the money had been supplied by Vom Domp.

Cross-examined by Mr. Burton: He was to get 45 per cent. of the profits for doing the work. The company had been carrying on the work in the Cape Colony, but not in the Orange River Colony, Transvaal, and Natal, until February last, when operations ceased owing to the bad times. The company was to be found at Vom Domp's office in Burg-street. There were seven shareholders. The work had been going too slow to make any profit. Witness did not know that Vom Domp had proved in his estate for £60

as an unsecured debt. He did not trouble much about the affairs of the company.

Maynard Nash, who was a party to two of the agreements, said the books of the company were kept at Burg-street, although under the agreement of the 30th December the books should have been kept at his office, but it was found inconvenient to keep them there. From time to time witness wrote up the books. Through Vom Domp's books he ascertained on April 22 there was a debit balance of £1,551 on the working of the Automatic Pit Company. Vom Domp paid every penny in connection with the working of the company.

Cross-examined by Mr. Burton: The company was practically the same, as the old partnership. It was a very small matter, and no share register was kept. In course of time he thought a share register would have been kept. The debit balance of £1,551 in Vom Domp's book meant that he had advanced that amount beyond the £750. Witness could get up an intelligible account of the company's affairs, but he had never been asked to do so. This would probably take him a week.

Re-examined by Mr. Benjamin: If a proper account were drawn up the company would show a loss.

Mr. Benjamin closed his case.

Mr. Burton said the trustees' case was based upon the provisions of the 28th section of Act 17 of 1860. The provision there was clear and imperative. It was a provision which it was difficult to see how the defendant in this case was going to get over. Until a person was registered in that book, the only person who was deemed by law to be the sole and exclusive proprietor was the person who appeared in that book. On the question of the view taken by the Court in regard to such matters generally, counsel cited the case of *McGregor's Trustees v. Silberbauer* (9 Juta, 36). If the principle in McGregor's case was to be applied to this case, then he would submit on the facts that the defendants were not in such a position that they could claim the same relief as the defendant did in McGregor's case. Counsel also referred to the case of *Preston and Dixon v. Biden's Trustee* (1 A.O.R., 322). The defendants had not said their position was unfortunate for them in law, but that it was one in which all the equities demanded should be rectified. In England, the effect of this provision had been held very strongly, as was shown by the decision of the case of *Chollet v. Hoffman* (7 Ellis and Blackburne, p. 686). The law of the Orange River Colony was practically the same as that of the Transvaal, and in neither was there any provision like there was in the law of the Cape Colony, and upon which plaintiffs based their claim in the present case. The com-



pany had no right to come to court and say that anybody but the trustees in the insolvent estate were the owners of the patent.

Mr. Benjamin, dealing with the account, which was claimed by the plaintiffs, said if ever there was a case of *bona-fide* possession it was that of the defendant company. Counsel cited Voet (41, 1, 33), Grotius (2, 6, 33), Van der Kessell (section 205) in support of his contention. The provision in the Patent Act was simply for the purpose, as far as the original grantee was concerned, of determining who was the person entitled to sue for an infringement of a patent. The Natal Act, No. 4 of 1870, had a similar provision to that of the Cape Act, but there was no such provision in the Orange River Colony Act, and sub-section 4, of section 33, of the Transvaal Proclamation of 1902 offered a sharp contrast to the law of the Cape Colony. Counsel submitted, unless it was absolutely forced upon the Court to extend the doctrine in the case of *Harris and Buissinne*, it would be very reluctant to do so. Coming to the facts of the case, counsel said that to show how Mr. Low regarded his holding of these letters patent, his bills had not been rendered to Dapino but to the company.

Dr. Greer having been heard in reply,

*Cur. Adr. Vult.*

*Postea* (August 6th).

Maasdorp, J.: On the 14th November, 1903, letters patent for a certain invention, known as the "Automatic Pit, to be used for drainage purposes," were granted to one Wilfred Johns, who assigned them to William White, on the 15th December, 1905, and White assigned them to the insolvent Dapino on the 28th of December, 1905; both these assignments were duly registered on the 25th of January, 1906. Dapino granted certain interests in the patent to Vom Dorp and Nash, and the three of them jointly assigned the patent for valuable consideration to the defendant company. This last assignment has not been registered in the register of proprietors, and on the 28th of June, 1906, the estate of Dapino was sequestrated as insolvent. Upon this state of the facts the trustees claim that at the date of the insolvency the patent was the property of the insolvent, and became vested in them for the benefit of creditors, and the company contend that upon assignment they became the proprietors of the patent. The question the Court has to decide is whether registration of the assignment of a patent by one assignee to another is essential to pass the ownership, or whether the property passes when the unconditional agreement to assign is concluded. Under the terms of Act 17 of 1860, a patent is the grant of a personal right which is capable

of assignment, and the right of assignment is usually provided for in the letters patent. Under the general rule of our law, a right which is capable of assignment passes by the mere agreement to assign. In the case of a cession of action, the right ceded passes to the cessionary at once, even without notice to the debtor, but a debtor who has no notice or knowledge of the cession can lawfully pay the original creditor. It has been held in several cases decided by the Supreme Court that an out-and-out cession of a right of action will, upon the insolvency of the cedent, avail against his trustees in insolvency. But it is contended in this case that the provisions of the Act bring the assignment of a patent within the rule laid down in the case of *Harris v. The Trustee of Buissinne* (2 Menz., 113), when it was decided that the property in land sold before insolvency, but not duly transferred and registered in the Registry of Deeds, remains the property of the insolvent, and becomes upon insolvency vested in the trustee under the Insolvent Ordinance. It becomes necessary, therefore, to inquire whether there is anything in the Patents Act enacting that the property in a patent which has been assigned shall not pass to the assignee until the registration of the assignment. Section 27 of the Act provides that: "There shall be kept at the office to be appointed as aforesaid, a book or books to be called 'The Register of Patents,' in which shall be entered and recorded all letters patent granted under this Act." Section 28 contains the following provisions: "There shall be kept at the same office a book or books entitled 'The Register of Proprietors,' wherein shall be entered the assignment of any letters patent, or of any share or interest therein, any licence under letters patent, and any other matter or thing relating to or affecting the proprietorship in such letters patent or licence; and a copy of any entry shall be *prima facie* proof of the assignment, licence, or proprietorship: provided always that until such entry shall have been made the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent." The contention that registration is necessary to pass the property in a patent must be founded upon the proviso contained in the latter section, without which there seems to be nothing in the section to alter the ordinary rule that unconditional assignment transfers the ownership at once, and conditional assignment transfers the ownership upon the happening of the condition. Without the proviso the registration would merely provide convenient evidence of dealings with patents, and even then the evidence would be merely *prima facie* proof. Now strictly construed the proviso only en-

acts that the grantee of letters patent shall be deemed to be the sole proprietor until the entry of and assignment by him, it says nothing of the ownership of assignees. I do not see upon what ground the Court can hold that the proviso should in this respect be extended to assignees. The Legislature, in this section, was expressly dealing with assignees, and seems to me to have deliberately selected the case of grantees, to distinguish their position expressly from that of assignees. While before the registration of assignment the grantee is to be deemed exclusive proprietor, the presence of the assignee's name as proprietor is only *prima facie* evidence of his proprietorship, which can be rebutted. It is unnecessary to search for the reasons for this distinction, but it may be pointed out that the section deals not only with assignees, but also with licensees, and persons holding rights affecting the proprietorship in letters patent, and although it might be considered desirable to enable these persons to record the evidence of their title, it might not be advisable to make their title entirely dependent on registration of such evidence. Still, this strict construction leads to this curious result, that an assignee who takes direct from the grantee, cannot become proprietor until his right is registered, whereas he may be divested of his right by assigning to another without that other assignee registering his title. However, I do not think the language of the section is such as necessarily to lead to the conclusion that the Legislature must have intended that where an assignee of a patent assigns it again to another person, the former shall, until entry of such assignment has been made in the register, be deemed to be the sole proprietor of such letters patent as is the case with the grantee. This would, it seems to me, not be an interpretation of the law, but an addition to or amendment of it. Nor does the bare fact that the register is called "The Register of Proprietors," the contents of which are *prima facie* proof of facts entered, carry with it the consequence that no one can be proprietor until his name appears upon the register as such. The two sections of the Act under consideration are identical with those of the English Statute of 1852, and yet very little assistance can be obtained from the English decided cases, because most of them deal with the later Statute of 1883, which seems to put an end to the distinction as to registration between the grantee and the assignees of letters patent. Under the later law, only one book, called the register of patents, is kept, and the grantees of patents no longer appear in a separate book from other proprietors. Section 87 of that Statute provides that: "When a per-

son becomes entitled by assignment to a patent, the Comptroller shall, on request, cause the name of such person to be entered as proprietor of the patent. The person for the time being entered on the register of patents as the proprietor shall, subject to such rights appearing from such register to be vested in any other person, have absolute power to deal with the same." Under the present law in England, grantees and assignees stand on the same footing as regards registration. But even then it will appear, upon comparing section 87 with section 23, sub-section 2, that registration affects proprietors differently from other matters of which it is only *prima facie* evidence. It was decided in the case of *Chollet v. Hoffman* (7 Ellis and Bl., 685), under the earlier Statute, that an assignee, taking from the grantee, could not sue until his assignment had been registered, otherwise, as the Statute provides that before such registry the original patentee should be deemed the sole owner, a defendant would be liable to be sued at one and the same time by the grantee and assignee of the letters patent. And Lawson, in his work on Patents, page 468, says: "The reasoning in the case of Chollet and Hoffman appears equally to apply to the 87th section of the present Statute, and it would seem that under the present Act, as under the Act of 1852, registration of the assignment is necessary to enable the assignee to maintain an action for infringement." It would, therefore, seem that the only case upon the point in question, under the earlier Act, is one which decides that an assignee taking from the original grantee cannot in an action claim to exercise rights of ownership before his name has been entered as assignee upon the registers, but there is no case either in the English Courts or our Supreme Court dealing with the effect of registration in passing the ownership of letters patent from one assignee to another. In the form of letters patent given in the schedule to the Act, the letters patent purport to be: "Give and grant to John Doe, his executors and assignees, the full power and authority to make, use, and vend the said invention," and it may be contended that the assignee may himself be regarded as the grantee after he completes his assignment. But however that may be for certain purposes, and notwithstanding the form of the letters patent, I cannot help, in view of the language of sections 27 and 28, coming to the conclusion that the distinction for purposes of registration remain between the original grantee and the assignees. Upon the agreement being entered into between Dapino and Vom Dorp and Nash, the attorneys who acted in the matter were allowed to remain in possession of the letters patent, and intended to hold them on behalf of the partnership. Again, when

the assignment to the company took place, they held the letters patent for the company, and it is quite clear that Dapino, after the assignment to the company took place, did not regard the custodians of the letters patent as holding them on his behalf. If, therefore, actual delivery of the letters patent were necessary to complete the assignment, then there is proof of such delivery. I come to the conclusion that the plaintiffs are not entitled to the declaration prayed for, and judgment must be given for the defendants, with costs. There is also a claim in respect of the letters patents in the neighbouring colonies, but counsel seemed to admit during the argument that it was hardly within the jurisdiction of the Court to deal with the adverse claims to property in those patents. Moreover, the law in those colonies was not laid before the Court, and it is quite possible that different principles may prevail under those laws. Upon that part of the case the Court will grant absolution from the instance.

[Plaintiff's Attorneys: Friedlander Brothers. Defendant's Attorneys: Le Roux and Wege.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### ADMISSION.

{ 1907.  
July 9th.

Mr. W. Porter Buchanan, K.C., moved for the admission of Reginald Arthur Theophilus as an advocate.

Application granted and oath administered.

#### BOOSE V. MILLS AND OTHERS.

Mr. Roux moved as a matter of urgency on the application of Mills and others for an order for the removal of the above action from the roll for the 12th July pending the confirmation or otherwise of the provisional order of sequestration of the plaintiff's estate. Applicants said that a provisional order had been made against the estate of Frederick Boose (the plaintiff) on the 3rd July, returnable on the 16th July. If the case were not removed from the roll defendants would be compelled to incur needless additional costs.

Mr. Rowson (for respondent) read an affidavit by Mr. Boosé, who said that he had every reason to believe that the provisional order for the sequestration of his estate would be withdrawn. If not, he believed he would be able successfully to oppose the same, and had reason to believe that the final order would not be granted.

Mr. Rowson urged that the case should be postponed until a day out of term as soon after the 16th July as the Court would be pleased to allow.

Mr. Roux submitted that the case should be withdrawn, and set down for some date next term, after the provisional order had been disposed of.

Buchanan, J.: I do not think this application was necessary, because, by the Insolvent Ordinance (sections 23 and 24), all actions pending either by or against an insolvent are stayed by the insolvency. Immediately the provisional order of sequestration was granted, no further proceedings could be taken by the insolvent, and the action could not possibly come on for trial this term. As formal application has been made to strike off the case, the Court will strike it off the roll, and leave matters there. Costs may be costs in the cause.

### PROVISIONAL ROLL.

#### PETERSEN, LTD. V. WEBBER.

This was an application for the final adjudication of the defendant's estate as insolvent.

Petitioners alleged that defendant was liable for £4,849 15s. 1d., with interest from the 4th June, for goods sold and delivered. Defendant had been in partnership with two others, carrying on business as a chemist under the style of Cameron and Hamilton, at Observatory-road, Salt River, and Sir Lowry-road. Defendant subsequently agreed to take over the liabilities of the partnership, and he granted a bond against his property to the amount of £3,500.

The defendant's position was that he was solvent, and that his assets were in excess of his liabilities. The three branches of his business were all bringing in good returns.

Mr. P. S. T. Jones for plaintiff: Mr. W. P. Buchanan, K.C., for defendant.

Mr. Buchanan said that the application was made under the Act 38, 1884, on the ground that defendant was insolvent, and that it would be for the benefit of the creditors that his estate should be sequestrated. The plaintiffs had lulled the defendant into a false sense of security by giving him amounts of goods from time to time far in excess of what he was paying them from time to time, and had then launched an ultimatum that unless he agreed to a most stringent deed of inspection they would sequester his estate. Under the circumstances, the onus was strongly upon the plaintiffs to produce clear, unmistakable, and absolute proof that defendant was insolvent. Plaintiffs, he submitted, had not sufficiently discharged the onus to entitle them to a final order against the defendant.

Buchanan, J.: In this case there has been no act of insolvency committed,

and, consequently, the provisions of the Insolvent Ordinance do not apply, but the application for provisional sequestration is made under the Act 38, 1884. The Act of 1884 requires that the petitioning creditor shall show that the estate is insolvent, and that it is for the benefit of the creditors that the sequestration shall take place. In this case, in answer to the affidavits made by the petitioning creditor, the debtor himself has filed a schedule by an accountant, which shows a deficiency in his estate of £650. The statements in the affidavits have been directed to several of the items in the account, and on looking at the account itself, it is clear that the deficiency stated is the very least that can be expected in the estate. It seems much more probable that the deficiency will be much greater. I think, on the papers before the Court, there is no doubt that the defendant is insolvent. The petitioning creditor is a creditor for over £4,000, and this account is payable on demand, and if sequestration were refused it would only lead to an immediate action being brought to recover this amount. I asked counsel to suggest an answer to such an action which would prevent judgment being given for the amount of the debts, and he was unable to do so. It would thus only be postponing the evil day if sequestration were refused at the present stage. The debtor entered into his arrangements with the petitioning creditors at the end of 1906, and passed a hypothecation for the then existing debt of about £3,500. The petitioning creditor agreed to continue supporting the debtor, as he said, on the understanding that any advances subsequent to that date should be paid monthly as the goods were supplied. Instead of that, we find that at the end of May, 1907, the indebtedness had increased from £3,650 to £4,723, an increase of about £1,100 during that period, so that the defendant has not complied with the conditions upon which time was given. In this case there is an insolvent estate, there is inability to pay, the debts are due, and it is in the interest of the creditors, that the sequestration should go through, because it seems that the estate is going from bad to worse month by month by being allowed to run on. These circumstances satisfy the requirements of the Act to which I have referred, and I think the sequestration must be made final with costs. Final adjudication granted.

EBERT AND CO. V. DICKSON AND TURNBULL.

Mr. Inchbold moved for the final adjudication of the defendants' estate as insolvent.  
Order granted.

LAMBERTO V. BASSO.

Mr. Wallach moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £50 and taxed costs amounting to £59 odd.

Defendant said that he was without means, and was unable to make any offer. He had taken goods to Lobito Bay, and had lost his goods and caught fever.

No order.

HIDDINGH V. BRADY.

Mr. Upington moved for provisional sentence on a mortgage bond for £2,000, with interest from the 1st July, 1906, bond due by reason of non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

DISTRIBUTING SYNDICATE FOR ( 1907.  
COLD STORAGE V. WALDER. ) July 9th.

Mr. Wallach moved for judgment under Rule 319, in default of plea, for £247 10s., with interest *a tempore morae*.

Judgment in terms of declaration.

COURTENAY V. PLATNAUER.

Mr. Louwrens moved for judgment under Rule 329d, in terms of summons, for (1) an account of certain goods entrusted by plaintiff to defendant to be realised by him for plaintiff's account, (2) debate; and (3) payment of such sums of money as upon debate may be found due to plaintiff, with interest and costs.

Buchanan, J.: Judgment will be given for an account, account to be delivered within 14 days, with costs.

DE WIT V. DE WIT.

This was the return day of a summons calling upon defendant and the curator *ad litem* to show cause why the defendant should not be declared of unsound mind and incapable of managing his property.

Mr. Marais was for plaintiff.

Mr. Marais read affidavits by C. J. Roux, R.M. of Riversdale (the curator *ad litem*), Dr. De Vos, and the defendant's mother in support of the application.

The matter was ordered to stand over until to-morrow (Wednesday) for further information on several points,



no additional costs to be allowed for the second hearing.

*Postea* (July 10th).

Mr. Marais stated that he had now been instructed that Mr. Jacobus F. van Wyk, who was suggested at *curator bonis* to defendant, was prepared to give security.

The Court made an order declaring defendant to be of unsound mind, and appointing his mother curator to his person, and Mr. J. F. van Wyk *curator bonis*.

### REHABILITATIONS.

Mr. Douglas Buchanan applied, under section 14 of the Act 38, 1884, for the rehabilitation of Cornelius J. J. Olivier. The trustee, in his report, commented on the fact that Olivier had not kept books.

Buchanan, J.: The law requires everybody who goes into business to keep books. The applicant has not kept books. Application refused, but leave given to apply again in six months.

Mr. De Waal applied, under section 14 of the Act 38, 1884, for the rehabilitation of Charles Roberts.

Granted.

### GENERAL MOTIONS.

*Ex parte* ESTATE HULLEY. { 1907.  
July 9th.

Mr. Roux moved for an order authorising the executor testamentary to raise a loan of £500 on security of the farm Ben Lomond in the district of Umzimkulu.

Order granted.

*Ex parte* CLOETE.

Mr. Inchbold moved on the petition of Anna J. C. Cloete as executrix testamentary of her late mother, for leave to raise a sum of £300 on mortgage of the landed property. In order to secure that no one would be prejudiced, petitioner said that she would be prepared to insure her life for £300. The Master recommended that the application be granted subject to security being given for the payment of the premiums. Counsel said that half the property would in any event revert to petitioner's estate, and he urged that it would be sufficient if the petitioner insured her life for £150, and gave security for £150.

Order granted in terms of Master's report, insurance to be for £150.

### HOFFMAN V. CAPE TOWN TOWN COUNCIL.

Mr. Lewis (for plaintiff in the action) moved for the appointment of a commission *de bene esse* to take the evidence of Morris Joseph, who was leaving for England—not later than the 20th July. Counsel said that he ought to mention that this was a pauper suit, and he did not see how the Commissioner would be protected for his fees. He had not any name to suggest to the Court.

Buchanan, J.: The matter will be ordered to stand over until to-morrow. You can see in the meantime if some counsel will be prepared to take the commission, and you may mention a name to-morrow. Of course, if your client is successful in the action, costs of the commission will be costs in the cause.

*Postea* (July 10th).

Mr. Lewis moved for the appointment of Mr. Toms to take evidence on commission.

Order granted.

### *Ex parte* ESTATE ALBERTSE.

Mr. Gutsche moved on the petition of the mother and natural guardian of certain three minors for leave to pass transfer of their undivided shares in defined portions.

Order granted.

### *Ex parte* INSOLVENT ESTATE MYERS.

Mr. M. Bisset moved for an order recognising Solomon S. Lorie as trustee of Estate Isaac Myers, of Johannesburg, and formerly of Birmingham, and authorising him to deal with the insolvent's assets in this colony. From the petition, it appeared that the insolvent was entitled to certain moneys in the business of Myers Bros., of Cape Town, but that Mr. Philip Myers would not negotiate or deal with the attorney appointed on behalf of the trustee to represent the estate in Cape Town, unless petitioner were recognised as trustee in this colony to deal with the assets. He prayed for an order declaring that, by virtue of his appointment, he was entitled to administer the assets aforesaid, and auxiliary to the order of the Supreme Court of the Transvaal recognising his appointment as trustee.

Buchanan, J., asked if the petitioner had got a request from the Transvaal Court.

Mr. Bisset said that he had not. He believed that, technically, that was the proper course; but in one or two cases the Court had granted an order. He cited *In re Motam* (15 C.T.R., 563).



Buchanan, J.: In the case of *Viljoen* (16 C.T.R., 860), there was a distinct intimation that there should be a request on future occasions. It was there pointed out that there should be a request from the Court of the Orange River Colony.

Mr. Bisset: I was not aware of that case.

Buchanan, J.: At present we have no statutory law in the country, although there is a Bill at present before Parliament, but we have the general Imperial Act, which governs this case (sec. 74, Cap. 71 of Victoria, 32 and 33). A rule will be granted on condition that a request is filed.

Mr. Bisset said that his client would apply for the necessary request.

Buchanan, J.: If the Bill now before Parliament goes through, it may obviate the necessity for a request. A rule nisi will be granted in terms of the prayer of the petition, rule to be published once in the "Government Gazette" and "Cape Times," and to be returnable on the 1st August, a request of the Transvaal Court to be filed in the meantime.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

VAN DER MERWE V. COLONIAL GOVERNMENT AND OTHERS. { 1907.  
July 10th.  
" 11th.  
" 24th.  
Aug. 13th

Railway — Expropriation — Compensation—Acts 9 of 1858, Sec. 11, 10 of 1874, 19 of 1874, Sec. 3.

*In June, 1874, R. P. M. offered to the Colonial Government gratuitously the use of sufficient ground on his farm for railway station buildings. His offer was accepted, and within three years the buildings were erected. The boundaries of the land thus acquired by the Railway Department were not demarcated at that time. It*

*was, however, fenced in 1884, but R. P. M. still remained the registered owner thereof. He died in 1886, his estate was sequestrated as insolvent, and the land in the estate was purchased by the plaintiff. In 1906, plaintiff claimed as against the Colonial Government an order of ejectment from all land on the farm occupied by them for railway purposes; or in the alternative, compensation and damages.*

*Held, (1) That as to the land occupied by the line of railway, the Government had acquired prescriptive rights thereto; (2) That the land occupied by the station was not acquired by contract from R. P. M., but was expropriated under Acts 9 of 1858 and 19 of 1874, Sec. 3; (3) That as R. P. M. had waived any right he might have had to compensation for this land, and as plaintiff had purchased with the knowledge that a portion of the land was occupied for railway purposes, he was not entitled to succeed in his action.*

*Gillet v. Colonial Government (7, C.T.R., 187) distinguished.*

This was an action for ejectment and damages in respect of the occupation by the Government of a certain piece of land, which the plaintiff said was his property, at Hex River Station.

The declaration was as follows:

1. The plaintiff is the owner of a certain portion of the farm *Vendutie Kraal*, situated in the district of Worcester, including the two erven hereinafter mentioned, and through which runs the line of railway belonging to the Cape Government. The first-named defendant is the Commissioner of Public Works, and as such represents the Colonial Government. The other defendants are owners of other portions of the said farm and are joined for reasons hereinafter stated.

2. In the year 1878 the plaintiff's father, Roelof Petrus van der Merwe, was the registered owner of a certain portion of the said farm, and on the 8th of October, 1879, he entered into a contract with the second-named defendant Gie by which he sold to the said Gie a certain portion of his said land, with the exception of the two erven aforemen-

tioned and two small portions called 10 and 20, which it is not material to locate, and on the 28th October, 1879, transfer was passed to the said Gie, and though the said erven and the pieces 10 and 20 formed no part of the land sold, the transfer passed to the said Gie did include portion of them, but it was so passed in error and by mutual mistake, and did not contain the true contract between the said seller and purchaser.

3. In June, 1886, after the death of R. P. van der Merwe, his estate was sequestrated as insolvent, and in the same year the trustee in his said insolvent estate sold to the plaintiff the said land, which belonged to the estate, including the erven and the said pieces of land 10 and 20, but owing to the initial mistake aforesaid the transfer to the plaintiff did not, owing to error and mutual mistake, include the whole of the erven and the said pieces of land. Thereafter the plaintiff claimed from the trustee in the said insolvent estate transfer of the remainder of the said erven and pieces of land sold to him, and thereupon the said trustee, in order to carry out the said contract of sale, sued the said second-named defendant Gie in this honourable Court for a rectification of the transfer passed by R. P. van der Merwe to the said Gie, so as to exclude the remainder of the two erven and the two pieces of land called 10 and 20. After pleadings filed, the said Gie admitted the said claim, and agreed to give possession of the remainder of the said erven and two pieces of land to the said trustee, who has given possession to the plaintiff, and to pass transfer thereof to him for the purpose of passing transfer to the plaintiff, and transfer thereof is being passed but has not been perfected, and the trustee in turn will pass transfer to the plaintiff.

4. In July, 1889, the plaintiff sold a portion of the said land sold to him by the said trustee to the third-named defendant, P. J. de Wet, excluding the two erven but including the pieces 10 and 20, but owing to the aforesaid errors the transfer to P. J. de Wet did in error and by mutual mistake transfer to him a small and upper part of the two erven but not the two pieces 10 and 20. The said De Wet has given possession to the plaintiff of the said upper part of the two erven, and is ready and willing to pass transfer thereof upon receiving in turn transfer of the two pieces 10 and 20, and upon completion of the transfers by the said Gie and the said trustee as aforesaid the plaintiff will transfer the two said pieces to De Wet, and the latter will transfer the upper part of the said two erven, and pending the completion of the said transfers the plaintiff is entitled to the possession and occupation of the said erven.

5. The aforesaid railway runs through the said erven, and was constructed after

the year 1876, and was built upon land which was cultivated, and the Cape Government has from time to time taken possession of more and more of the said erven, and has built upon it a station, a goods shed, stationmaster's quarters, porter's cottage, platelayers' cottages, native labourers' cottages, and has enclosed portions of the said erven for gardens and poultry runs and is using the land for these purposes.

6. The plaintiff says that the original occupation and possession by the Cape Government of the erven in question for the construction of the railway was wrongful and unlawful, that the construction upon and fencing in of portions of the erven from time to time as aforesaid was wrongful and unlawful, and that the first-named defendant is now in wrongful and unlawful occupation of the said land and is not legally entitled to possess and occupy the said erven for any of the purposes aforesaid, and that the plaintiff is entitled to claim that the first-named defendant shall quit and give up possession of the said erven to the plaintiff so that he may complete the possession and occupation given to him by the second and third-named defendants, and that the first-named defendant shall remove from the said erven all the rails, buildings, enclosures and matters and things placed thereon by the Colonial Government from time to time, but the first-named defendant refuses to quit and give up possession or to remove the buildings, etc., as aforesaid. By reason of the premises the plaintiff has suffered loss and damage to the extent of £2,000.

7. Further and alternatively, the plaintiff says that, if this honourable Court should find that the first-named defendant is entitled to use and occupy any portion of the said erven for any of the purposes aforesaid, he, the plaintiff is entitled to fair and reasonable compensation for the same.

Wherefore the plaintiff claims: (a) An order declaring that the first-named defendant shall quit and give up possession of the said erven, and that he remove from the said erven all rails, buildings, structures, enclosures, and other matters and things placed thereon by the Colonial Government, and that the plaintiff be placed in possession of the said land; or, alternatively and further in case this honourable Court should find that the first-named defendant is entitled to use and occupy any portion of the said erven for any of the purposes aforesaid, an order declaring that the plaintiff is entitled to fair and reasonable compensation for the same, and (b) an interdict restraining the first-named defendant from trespassing upon the said erven by himself, his servants, or agents; (c) the sum of £2,000, as and for damages; (d) alternative relief; (e) costs of suit as against the first-named defendant.

The plea of the first-named defendant was as follows:

1. The first-named defendant admits paragraph 1 of the declaration.

2. He admits paragraphs 2, 3, and 4, but denies that the allegations therein contained disclose any right of action against the Colonial Government.

3. He admits that the line of railway runs through the said erven, and that it was constructed upon land which was partly cultivated, and that that Government has built upon portion of the farm Vendutie Kraal, acquired by it, a station, a goods shed, stationmaster's quarters, and cottages such as are described in paragraph 5, but otherwise denies the allegations contained in the said paragraph, save that parts of the said erven are used by occupiers of the cottages as gardens and poultry runs.

4. The said line of railway was constructed under the powers conferred by Act No. 19 of 1874, and that portion of the farm Vendutie Kraal over which it runs was duly expropriated and taken possession of by the Colonial Government prior to August, 1876, pursuant to the powers conferred by the powers contained in the said Statute and Act No. 9 of 1858, and the said Government has had open, peaceable, and undisturbed possession thereof as of right for a period exceeding the period of prescription.

5. In the year 1876 Roelof Petrus van der Merwe, who was then the registered owner of the said farm, for valuable consideration, namely, that the station should be upon his land, made over and ceded to the Government a certain portion thereof, which portion was thereafter duly taken possession of and enclosed for railway purposes; the station, goods shed, and other buildings, and the gardens and poultry runs mentioned in paragraph 3 hereof are upon the land herein referred to, and the plaintiff has not and never had any right in regard to that portion of the farm.

6. The plaintiff purchased the land referred to in the declaration, with full notice and knowledge of the facts set out in the preceding paragraphs numbered 4 and 5, and he had not at any time any right to claim compensation.

7. The said farm was held by the said Roelof Petrus van der Merwe upon perpetual quitrent tenure, subject to the terms of the Proclamation of the 6th August, 1813, and other laws relative to such tenure, and the said Van der Merwe in or about the year 1878 claimed compensation for the expropriation referred to in paragraph 4, but inasmuch as the benefit and advantage derived by him by reason of the formation of the railway exceeded the amount of the compensation which might otherwise, under section 12 of the Act No. 9 of 1858, have been claimable by him, the said claim was rejected.

8. The defendant further says specially, that inasmuch as more than thirty years have elapsed since the expropriation referred to, no compensation is now claimable in respect of the said expropriation.

9. The first-named defendant denies paragraphs 6 and 7, save that he refuses to quit and give up possession of the said erven.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Mr. Burton, K.C. (with him Mr. Bisset), for plaintiff. Mr. Schreiner, K.C. (with him Mr. H. Jones, K.C.), for the first defendant. The other defendants did not appear.

A clerk in the Deeds Office produced a deed of transfer in favour of Roelof Petrus van der Merwe, dated November 29, 1886. The date of sale was the 31st August, 1886. The sale to Naude was on the 28th February, 1878.

John Brown Ellis, Civil Engineer, of Worcester, stated that in August last year he proceeded to Hex River Station and framed a plan of the locality. The plan showed the land in question, which had been fenced in by the Government. In 1883 witness was Government District Engineer at Touws River, and had the line from Worcester fenced in upon instructions from the Government, which included this particular ground. In April, 1884, the station ground was fenced in on a special plan sent to him from Cape Town.

Cross-examined by Mr. Schreiner: He had nothing to do with the preparations of the original plans.

Stephanus F. Naude, farmer, who owned portion of the farm Vendutie Kraal, said he purchased his property from old R. P. van der Merwe in 1878. When the latter sold to witness he reserved a couple of erven on which the station buildings stand. He did not know why Van der Merwe kept out the two erven. There was no cultivation of the ground, which is now fenced in, when he got there in 1878, although he could see it was arable land. Witness was there when the ground was fenced in. His cattle grazed right up to the railway line. In recent years the people working on the line made gardens and planted trees.

Jan. A. Beneke, assistant to the Pound Master at Worcester, stated that for some time he was living upon the two erven of the plaintiff at Hex River. He hired the two erven in 1880, from old Mr. Van der Merwe, for which he paid £18 a year. Witness cleared the ground, and started cultivating it.

Roelof Petrus van der Merwe, plaintiff, stated that his father, who was the owner of the property referred to, died in August, 1885. As far as witness could remember, his father was the owner of the whole farm ten years before. His father's homestead, The

Pines, was about a mile and a half from the railway station. He remembered the sale of a portion of the farm to Naude in 1878. Witness saw the railway built. His father's estate was put up for sale in 1886, and witness bought it provisionally. When his father sold to Naude, witness was aware that the two erven were kept out of the sale. Witness got possession of the two erven, and continued the lease to Beneke. Some time after witness got possession, Gie claimed the erven, and witness allowed him to enter into possession, until inquiries were made. In July, 1889, the balance of the farm, with the exception of the two erven, was sold to De Wet. In 1904 or 1905 he took steps, and had negotiations with regard to his rights, and as a result the second and third defendants agreed to let him have transfer. Immediately after he settled with Gie and De Wet, he had a letter of demand sent to the Government. During the last couple of years the cultivation by the Cape Government had been increased. When witness bought out his father's insolvent estate, he was not informed of any reservation on the property.

Cross-examined by Mr. Schreiner: He had conditions of sale with De Wet, but no contract.

Mr. Burton closed his case.

Harry H. Elliott, resident engineer of the Western System of the Railway Department, who had made investigations into the matter, said that not until July, 1906, was there any claim in regard to this matter. He could not trace the actual notices of expropriation, but he found that the resident engineer in October, 1875, had sent notices of expropriation out to the different farmers. The laying of the rails passed through the station yard in October, 1876. Before the laying of rails the earthworks should be completed some months before. There was an antagonism as to two sites, and in October, 1876, the Government intimated it accepted Mr. Van der Merwe's offer. The station buildings, according to the records, were completed at the same time as the line.

Henry Francis Mellet, ganger in the employ of the C.G.R., stationed at Worcester, stated he was on the construction of the line between Worcester and De Doorns. Shortly after the line opened witness lived at Hex River station. He remained there for about eighteen months. He remembered the fencing-in of the area though he had nothing to do with it. Recently he had looked at it, but could find no alteration. It was originally rough ground, and witness could not see any trace of former cultivation.

Cross-examined by Mr. Burton: He did not remember Beneke being at Hex River. After the 18 months he was not prepared to say if there was any cultivation.

Mr. Schreiner said the parties had agreed, without prejudice or without creating a precedent, that all the documents should go in, so that counsel would not require to go into the details of all the correspondence.

Edward Stapleton, chief clerk in the Surveyor-General's Office, where he had been since 1874, stated he was well acquainted with the practice of that office. With regard to the farm Van Dutie Kraal, he found there had been correspondence on the subject of compensation in regard to the original expropriation and construction of the railway.

Cross-examined by Mr. Burton: Where they obtained permission from the owner, and he made a cession, it was a rare thing to take transfer. In a case where a farm was a quitrent farm, the Government considered it had the right to take land, and so it did not trouble to take transfer or steps to get its title to the land secure. In those days the view of the department was that, where the line ran through a quitrent farm, it could take land for the line and station buildings without compensation.

Re-examined by Mr. Schreiner: In 1876 the station ground had been offered gratuitously by Mr. Van der Merwe, and accepted by the Government in that year.

Allan Grant Dalton, Engineer-in-Chief to the Railway Department, stated that in 1876 he was on the Midland station. The area at Hex River was smaller than usually required for such a station. The land for the station area was too small. There was correspondence to show that the department had been negotiating with Naude for extra ground for the station purposes.

Harry H. Elliott (recalled) stated he had made very full search of all the documents in the case. There was a report by a railway officer giving the measured lengths of fencing made by Naude on his part of the farm.

Cross-examined by Mr. Burton: The records went to show that De Vos received £200 for the area at De Doorns. Transfer had been taken of portion of the area from the present owner, who had received £360 from the Government for a store, and an additional area which was expropriated.

Samuel Atherton, of Worcester, stated that before the station was built, he managed for old Mr. Van der Merwe a store and an hotel near the station. There was a lively and good business done there, on account of the number of navvies employed at the construction work. He remembered in a conversation hearing Mr. Van der Merwe say to Mr. Golding, the engineer, "If you build a station on this farm, I will give you the ground free."

Mr. Schreiner closed his case.



*Postea* (July 24th).

Counsel were heard in argument.

Mr. Burton said that in this case plaintiff claimed an ejectment and damages in respect of the occupation by the Government of certain land at Hex River Station. He did not see how he could press the claim for compensation. He recognised that as regarded the land on which the rails were laid, the plaintiff could not press his claim. The substantial question in the case was as to the rest of the fenced-in area, where the Government had their railway station and the platelayers' cottages, and he contended that the Government clearly had no right to be there. So far as title represented by documents was concerned, the plaintiff was the owner of that ground. The Government had not acquired by prescription the right of occupation of the land in question. The Government had never purported to appropriate this ground. The defence of the Government was that they had acquired the ground by cession from old Mr. V. d. Merwe, and that plaintiff bought with full notice and knowledge of the cession. The Government based their case on a contract with old Mr. Van der Merwe. At the very best, when plaintiff bought there was a promise by old Mr. Van der Merwe to let the Government have the ground for station purposes, etc. Then old Mr. Van der Merwe became insolvent. He was the equitable owner of the erven. He had promised to let Government have the ground, and resting on what they believed to be a secure position, the Government took no further steps. The trustee was not bound by that promise, and he sold the erven. Plaintiff became the purchaser. It was important to remember that plaintiff purchased this property in an insolvent estate. Did the question of notice enter into the legal consideration of such a case? He submitted that the question of whether plaintiff had notice of the arrangements between old Van der Merwe and the Government would not in law affect a person in the position of plaintiff who had bought in an insolvent estate. Nothing could have prevented the trustee from selling the assets in the estate without reservation. The doctrine of notice did not apply in this case. The Government had neglected to secure its rights, when Van der Merwe became insolvent those rights fell into the estate, and plaintiff bought without reservation. Counsel went on to discuss the question of whether the plaintiff had any knowledge of the arrangements entered into between his father and the Government. He submitted that it was quite consistent with the probabilities that plaintiff had had no clear notice of the position when he purchased the land. If the Court found that the Government had been illegally upon the ground, then

the plaintiff would be entitled to some damages. Counsel quoted section 3, Act 19, 1874, sections 11 and 12, Act 9, 1858, *Logan v. Colonial Government* (18, S.C., 125), *Judd v. Fourie* (2, E.D.C., 41), *Richards v. Nash* (1, Juta, 312), *Jansen v. Fincham* (9, Juta, 289), *Grimbeck v. Colonial Government* (17, S.C., 200), and *Boxer v. Colonial Government* (13, S.C., 158).

Mr. Schreiner said his learned friend had stated that he did not intend to insist upon the claim for compensation, and yet he said that he did not abandon that claim. It was difficult to know what the claim was that he made on behalf of plaintiff. In 1876 old Mr. Van der Merwe pressed the Government to put the station on his property. Other people pressed the Government to put the station on their property. A sale by auction was arranged in 1878, and it was significant that the two erven were left out of the sale. All the cases showed that the Government had never taken transfer when they were taking unimproved quitrent ground. He cited section 3, Act 19, 1874. Plaintiff was the executor of his father's estate, and he surrendered the estate as insolvent. When he bought the ground he bought it at a reduced price, knowing of the ground that was in the occupation of the Government. The owner had consented to the gratuitous occupation by the Government. After all, it was a question of fair dealing. Plaintiff bought minus what the Government was in occupation of. He could not now be heard to say "Remove your station or pay me compensation." Where had the plaintiff shown that he acquired a right over against the Colonial Government to apply for an ejectment against them or compensation? There was absolutely no proof why the Government's quiet occupation should now be upset. The Government were occupying pursuant to the provisions of the Act 19 of 1874. Counsel cited *Grimbeck v. Colonial Government* and *Gillet v. Colonial Government* (14 S.C., 185).

Mr. Burton, in his reply, quoted *Slabber v. Bell* (4 Scarle, 3), and *Town Council of Cape Town v. Table Bay Harbour Board* (19 S.C., 117).

*Cur. Adv. Vult.*

*Postea* (August 13th).

Maasdorp J.: In the year 1874, Act No. 10 of 1874 was passed, providing for the construction of a railway from Worcester, via Hex River and De Staat, to Beaufort West, and in the year 1876 the construction work had advanced to the neighbourhood of what is now the Hex River Station, when it was considered necessary by the railway authorities to set about selecting a spot for a railway station, and to occupy it for railway purposes. The powers vested in them



for this purpose are those contained in section 3 of Act 19 of 1874, and it was by virtue of these powers that the Railway Department contemplated taking possession of and occupying the land required for the purpose of a station. The owners of land in the neighbourhood, becoming aware of the intention of Government, took steps to secure the locating of the station at a spot most convenient to themselves, and some of them being desirous of obtaining the advantages likely to arise from the presence of a railway station on their farms, held out inducements to the authorities in the shape of a free grant of land without claim to compensation. On the 22nd day of June, 1876, R. P. van der Merwe, owner of the farm Vendutie Kraal, situated in the Hex River Valley, offered to the Government gratuitously the use of sufficient ground on his farm for railway station buildings. On the 29th of September, Mr. Brounger, the railway engineer, reported in favour of placing the station upon Van der Merwe's farm, and on October 9, Mr. Elliott, the Assistant Commissioner, wrote to inform the owner of the land that his offer had been accepted by the Commissioner. The Railway Department took possession of a site for the station, and proceeded during the course of the years 1876 and 1877 to put up the necessary buildings as they were required. Van der Merwe's object in granting the land for the station was to reap the benefits arising in consequence of the enhanced value of the rest of his property, and in February, 1878, he made preparations for selling adjacent portions of his farm. On the 5th February, he informed the Railway Department that he was about to sell some of his land in the neighbourhood of the railway station, and as the land ceded by him to Government appeared to be undefined, he asked for a diagram or plan to enable him to trace the boundaries. And Mr. Elliott stated in evidence that it was in response to this application that plan No. 2,188 was prepared and filed in the Surveyor-General's Office. Van der Merwe was referred to the Surveyor-General's Office on the 2nd day of March by the Resident Engineer, where he was told he would soon be able to obtain the necessary information relative to the land taken by the Government for railway purposes at the Hex River Station. The land expropriated by the Government remained unfenced until the year 1884, when a wire fence was constructed, in consequence of representations made by the neighbouring farmers. Until the year 1886 R. P. van der Merwe remained the registered proprietor of that portion of Vendutie Kraal upon which the railway station is situated. He died during that year, and his estate was sequestrated as insolvent in June, 1886, when the land

belonging to the estate was bought from the insolvent estate by the plaintiff. I may mention here that in 1878 Van der Merwe, sen., started a claim for compensation for expropriated land, but that claim seemed to be confined to land taken for the railway, and not for the station. The Government refused to recognise his claim, and after the correspondence had run into the year 1881, the matter was dropped. It is quite clear that any right to compensation which had then accrued to Van der Merwe for land expropriated would not pass to a subsequent purchaser, and if such purchaser is now entitled to redress against the Government, his claim must be grounded on other considerations. In 1886 the plaintiff purchased from Van der Merwe's insolvent estate such land as was still vested in him. If the land in question was then duly expropriated and vested in the Government, it could not pass by purchase to the plaintiff. If, however, it should prove that steps were taken to expropriate the land, but everything had not been done to divest Van der Merwe of the ownership, then other considerations might arise. It was only in 1906 that the plaintiff advanced the claim he now makes against the defendant. As I have already pointed out, when the plaintiff bought the property the ground which the Railway Department had taken for the purposes of the Hex River Station was properly enclosed, and almost all the buildings now standing there were already constructed. The plaintiff admits that when he purchased the property he was aware that the Government was in occupation for railway purposes of the land and buildings. Such knowledge on his part has a material bearing upon the question at issue, but here again the matter is complicated by the circumstance that his title comes from the trustee in an insolvent estate, and supposing in the absence of certain necessary conditions, the title to the land vested in the trustee, the plaintiff would purchase all the trustee had a right to sell, and the question of notice of adverse rights in others would not arise. The plaintiff's claim embraces not only the area taken for station purposes, but also the land upon which the railway is constructed, and he prays that the defendant may be compelled to remove the rails, and give up possession of the land, or pay him compensation. It may be as well to dispose of this part of the case at once. Both parties seemed at the trial to agree that the actual line of railway stood on a different footing from the land taken for the station. The defendant pleaded that the ground occupied by the railway was expropriated more than thirty years ago, and has been in occupation of the railway department ever since as

their property, and consequently vested by prescription in the Government before the plaintiff instituted proceedings. I find it proved by the evidence that before the middle of the year 1876 the Government had demarcated the line from Worcester to beyond the Hex River Station, had taken possession of the ground, and the work of construction had advanced in sections further than the Hex River Station. In my opinion, therefore, the defendant has established his case as far as the line of railway is concerned. I need say nothing more upon this part of the case, because the plaintiff's counsel at the trial gave up all claim in respect of the ground actually occupied by the railway. The question of prescription does not affect the land taken for the purposes of the station, and it remains to be considered whether that land vested in the Government before 1886. The answer to that question depends upon what was done in virtue of the power given by section 3 of Act 19 of 1874. In my opinion, it is clear upon the evidence that the Government, through its officers, acted throughout under and by virtue of the powers they possessed under the provisions of that section, and not in terms of any special contract entered into between Van der Merwe and the Government falling outside the provisions of the Act. The 5th paragraph of the defendant's plea gave some ground for the argument on behalf of the plaintiff, that the case of the defendant depended upon a special acquisition of land by means of a contract, which could not avail without duly executed transfer, against the trustee of the insolvent estate, and a purchaser without notice, but it was admitted at the same time that there was sufficient in the defendant's plea to indicate that the Government claimed the station ground by virtue of expropriation. Under the provisions of section 3 of Act 19 of 1874, the Government entered upon, took possession of, and used the land required for the purposes of the railway station: before doing so it was necessary, under section 11 of Act 9 of 1858, to give previous notice to the proprietor. That ample notice was given will appear from the correspondence which passed between the Government officers and the agents of Van der Merwe. Considering that the land taken for station purposes was land which the owner was not bound by law to allow the Government to take and use without requiring recompense and payment, it would, under ordinary circumstances, be necessary for the parties to proceed in terms of section 12 of Act 9 of 1858, to ascertain the compensation which Van der Merwe was entitled to. But the Legislature seems to have anticipated the possibility of a case arising where the owner, as in this case, is willing to forego his claim to com-

pensation. The 12th section is intended to meet the case of a person who is entitled to compensation, "and who may think proper to require compensation." V. d. Merwe thought proper not to require compensation, and intimated as much to the Government. That is all in my opinion that his gratuitous offer of land for the Hex River Railway Station amounts to. It would, therefore, seem that the Government did everything it was necessary to do for the purposes of expropriation; unless actual transfer of the land is necessary effectually to complete the expropriation. Cases may arise in which the alleged expropriation is performed in such a manner that, without transfer, no notice is conveyed to subsequent purchasers of the land that it has been reduced by expropriation, and in such cases such purchasers might be entitled to redress. This happened in the case of *Gillet v. Colonial Government* (7 C.T.R., 187), where the Government contended that land had been expropriated to the extent of 30 feet on each side of the railway, but this contention was disallowed because there was nothing upon the land itself to indicate expropriation, and there was no notice of such expropriation to the purchaser. On the other hand, it was held in the same case that the test of expropriation is the actual use of the expropriated land for railway purposes; and that it was vain for the plaintiff in that case to attempt to prevent the department from using land on which there is an embankment for the line, however wide that embankment might be, or from using buildings erected for railway purposes. The ground in question, was to the knowledge of the plaintiff in the present case, when he purchased, enclosed, occupied and used by the Railway Department for railway purposes; and at the time he bought it had been so occupied for nearly ten years. At the time he brought his action, the Department had been in occupation for not much under 30 years. In my opinion, therefore, the plaintiff is not entitled to an order for ejectment, or to compensation, or damages. And judgment is given for the defendant, with costs.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Reid and Nephew.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

BINASE V. MAHLUTSHANA. } 1907.  
 } July 10th.

Set off—Necessaries supplied to wife—Prescription.

*The plaintiff claimed from the defendant the return of certain cattle, alleged to have been lent to the defendant about 12 years before, or their value. The defendant claimed to set off the amount of necessaries supplied by him to the plaintiff's wife, to which the plaintiff objected on the ground that the counterclaim had been barred by prescription.*

*Held, that as the counterclaim was capable of being opposed in compensation before the period of prescription had arrived, the plaintiff could not avail himself of the defence of prescription.*

This was an appeal from a judgment of the Acting Resident Magistrate of Stutterheim in an action brought by Petros Binase, of Nqamakwe, against Isaac Mahlutshana, of Upper Kabousie, to recover £20, value of certain oxen.

Appellant, it appeared, alleged that in 1895 he lent certain two oxen, of the value of £10 each, to defendant at Mockino Hill, defendant to be allowed to retain and use the oxen until they were wanted by plaintiff. In 1903 plaintiff requested the return of the cattle, and defendant then said that he had sold them and would be prepared to pay plaintiff the value. This he had failed to do. Defendant pleaded a denial of liability and a counter claim for £20. He said that plaintiff owed him £48 for maintenance of his (plaintiff's) wife, who is defendant's sister, during 1894 and 1895, and he deducted £29, the proceeds of the sale of the cattle, leaving a balance of £19 in defendant's favour. Further maintenance provided for plaintiff's wife in March and April, 1907, raised his claim to £23, which he reduced to £20 to bring the matter within the Magistrate's jurisdiction.

The Magistrate, in his reasons for judgment, said he considered that the £29 already received by defendant for the cattle was an adequate remunera-

tion for maintenance of plaintiff's wife until April, 1907. He accordingly dismissed the counter claim for the balance.

Mr. P. S. T. Jones was for appellant; Mr. Ingram was for respondent.

Mr. Jones said it was extremely difficult to ascertain from the Magistrate's reasons what he had really found. He submitted that the counter claim for maintenance of defendant's wife in 1894 and 1895 was not *bona fide*, and that defendant's evidence on this point should not have been accepted by the Magistrate. Counsel cited *Grassman v. Hoffman* (3 Juta, 282), and *Mason v. Bernstein* (14 S.C., 504), and referred to section 3, Act 6, 1861. He would not deny that £4 should have been allowed for maintenance in March and April, 1907, and he submitted that judgment should have been given by the Magistrate for plaintiff for £16.

Mr. Ingram commented on the long delay which took place before plaintiff claimed back the cattle and brought his action, and submitted that defendant's witnesses were entitled to credence. Delivery from plaintiff to defendant had not been proved. The cattle had always gone with plaintiff's wife, and in community, at any rate, she was entitled to deal with them. Counsel contended that plaintiff's wife had power to pledge her husband's credit for necessaries, and she was entitled to pass over the cattle to defendant. The claim for maintenance was not prescribed, because it did not refer to goods sold and delivered.

Mr. Jones having been heard in reply,

De Villiers, C.J.: The action was brought in the Magistrate's Court to recover two oxen which the defendant was said to have borrowed as far back as the year 1895, or their value. On the face of it, it is a stale claim of 12 years ago, and I think the Magistrate was quite right in requiring clear proof of the existence of such a claim and in allowing the counter-claim for what defendant had expended on behalf of plaintiff. It appears that plaintiff had been married to his wife by Christian rites, and as there was no ante-nuptial contract, we must take it that they were married in community of property. It seems that the wife had received certain cattle from her father about a year after her marriage, and her statement is that the two oxen now in question are part of the cattle which her father had delivered to her about a year after the marriage. Then it seems that the plaintiff was dissatisfied with his wife because she bore no children to him, and, as the Magistrate found, he put her away. She then went about, and naturally was taken up by her brother, who, for a period of time at all events, looked after her, the brother being the man to whom the plaintiff says that he lent two oxen. The case now on behalf of plaintiff is that

she really was not supported by defendant for the full period mentioned, but only during two months of 1907, but the defendant positively states that during 1894 and 1895 he did support plaintiff's wife, and the Magistrate must have believed the statement. On some points, no doubt, the sister contradicts him, or is not quite consistent with his evidence, but the Magistrate was satisfied that during a considerable period defendant did support his sister, and certainly for a sufficient period to make up the amount of £20, which is all he allowed. Seeing that these cattle had practically been left in the wife's custody, according to her evidence, and seeing that plaintiff had put away his wife, and that defendant had taken that wife (his own sister) and for a considerable period supported her, I consider that he was justified in claiming that there should be an allowance for that support which he had given to plaintiff's wife. But then, it is said that the claim is so stale that it has been actually prescribed. But plaintiff's claim is stale also. His claim is just as stale, and, at all events, the defendant's claim is one that is capable of compensation, and as soon as the plaintiff's claim arose defendant's claim already existed, and that therefore could be set off. So that I do not see that the question of prescription really applies in the present case, because it was a valid claim at the time when plaintiff's claim arose, and if plaintiff had then sued it could have been set off against his claim. The plaintiff cannot, therefore, now, by reason of having postponed his action until the period of prescription had arisen, claim the full benefit of his claim, and say as to defendant's claim that it is prescribed. I think, therefore, that the Magistrate is right, on the whole, on the facts, and that the appeal should be dismissed with costs.

HARVEY V. THOMAS. { 1907.  
July 10th.  
" 12th.

Evidence — Hostile witness —  
Cross-examination—Impeaching  
evidence.

*Where the Court is of opinion that a witness is hostile to the party by whom he is called, the Court may allow such witness to be cross-examined whether he has made a former statement relative to the subject-matter of the action and inconsistent with his present testimony, and if he does not admit that he made such a statement,*

*proof may be given that he did in fact make it.*

This was an appeal from a judgment of the Resident Magistrate of Mount Fletcher in an action brought by respondent against appellant to recover £45 19s. 6d., damages sustained by reason of a grass fire alleged to have been lighted by appellant.

The summons called upon defendant to show cause why he should not pay plaintiff £45 19s. 6d., damage to certain forage and fencing caused by defendant in having on the 12th September last set fire to or caused to be lighted a fire on his land at the farm Newton Peak, without proper notice or warning to plaintiff, and having negligently, carelessly, and for want of due and proper precaution, allowed the fire to spread to the farm Antelope Park. The defence was that defendant did not set fire to or cause to be fired the land on Newton Peak, which did not belong to defendant, and liability was denied. Defendant also claimed certain amounts in reconvention, but at the trial this claim was abandoned.

The Magistrate, in his reasons for judgment, said it was clear to the Court that the fire lighted on the farm Newton Peak spread to plaintiff's land, and that the defendant had lighted the fire, and was responsible for the damage caused. The Court based its judgment almost entirely on points of fact, deciding that plaintiff and his witnesses were to be relied upon. Judgment was given for the amount claimed, less 30s., in respect of certain wire.

Mr. Upington was for appellant (James D. Harvey): Mr. Gutsche was for respondent (Cecil St. C. Thomas).

Mr. Upington said that the appeal was brought on two grounds. The first was that upon the evidence there was no proof that appellant was the person who set fire to the grass. It was admitted that the farm belonged to defendant's sons. The other point was that the Magistrate acted irregularly in permitting plaintiff, in the course of the hearing, to lead evidence to contradict his own witness, one Christoffel. Counsel said that plaintiff appeared to have rested his claim mainly on this witness's evidence as to the identity of defendant, and then when the witness went into the box and said that he was not sure that he saw defendant light the fire, plaintiff was allowed to lead evidence to show that before the trial this man had stated that he saw defendant light the fire. Such evidence ought not to have been allowed, and as a consequence defendant had been prejudiced. He submitted that there was not sufficient evidence to identify defendant as the person who started the fire.



Mr. Gutsche submitted that the evidence of Edward and Africa was quite strong enough to connect defendant with the fire, apart altogether from Christoffel's. As to the alleged irregularity, no objection was taken at the trial, and it was now too late to raise that point. He quoted Stephen's Law of Evidence (p. 148).

Mr. Upington having replied,

*Cur. Adv. Vult.*

*Postea* (July 12th).

De Villiers, C.J.: This is an appeal from the Court of the Resident Magistrate of Mount Fletcher, in an action in which the plaintiff claimed £45 18s. 6d.. loss sustained by reason of the defendant's negligence in setting fire to certain lands on Newton Park, the fire having spread from there on to Antelope Park, the property of the plaintiff. The Magistrate found that the defendant had set fire to the grass, which had spread to the plaintiff's property, and he founded his judgment upon the evidence of certain native witnesses. One of these witnesses was a man called Stoffel. Stoffel, in his evidence, said that the man who set fire to the grass was a white man, wearing a white hat, but he could not be sure it was the defendant. Thereupon Stoffel was cross-examined by the plaintiff's agent as to whether he had not previously stated to the agent of the plaintiff that it was the defendant who set fire to the grass. He denied it, and thereupon the Magistrate allowed the evidence to be given to prove that the witness Stoffel had given a different version of the affair to the plaintiff and his agent. One of the grounds of appeal is that this evidence was wholly inadmissible. Now, the law of England upon the subject I think is stated correctly in Stephen's Digest of the Law of Evidence, Art. 131. There it is said that "every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any formal statement relative to the subject matter of the action, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it. The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is hostile to the party by whom he was called." The 48th section of our own Ordinance 72 of 1830 enacts that it shall be competent for any party to impeach or support the credibility of any witness produced against or for such party, in any manner and by any evidence in which and by which, if the case were depending in the English Courts, the credibility of such witness might be impeached or

supported." It is not quite clear whether, at the date of the Ordinance, the law was as stated by Stephen. In the case of *Greenough v. Eccles* (5 C.B.—N. 3802), Williams, J., referred to the right of a party to contradict his own witnesses by other evidence relevant to the issue, as a right not only established by authority, but founded on the plainest good sense. The Court there construed the term "adverse" in the 22nd section of 17 and 18 Vict., 125, as meaning "hostile," and I do not understand from the remarks of the Judges that, in their opinion, the 22nd section had made any material alteration in the law. In the present case it is not clear that the Magistrate found that the witness was a hostile witness before he allowed the cross-examination and the rebutting testimony. I assume that the Magistrate must have so found that the witness was hostile else he would not have allowed the cross-examination. If he found that the witness was hostile I am not prepared to say he was wrong in allowing the evidence to contradict the statement of the witness. On that ground I am not prepared to set aside the verdict. The question remains upon the evidence, was he justified in coming to the conclusion that the defendant set fire to the grass? Well, there is no witness who swears directly that the defendant was the man who did it, but certainly a witness did state that there was a man on horseback, who got down from the horse and set fire to the grass, and then proceeded to drive away the defendant's cattle. About the same time that this took place, it is undoubtedly true that the defendant did ride a horse, but he said it was not a bay horse; it was rather too dark, and he had a white hat, which he says had become dirty. There is nothing to show that any other person was upon that solitary farm riding a horse and firing the grass on that occasion, and it is difficult to believe that the person who set fire to the grass was not the person who wore this white hat and rode the horse, and afterwards drove the cattle away. Now, that is a question for the Magistrate as a juror. If the case had come before a jury I do not think the Court would set aside the verdict against the weight of evidence. The Magistrate saw the witnesses, and he believed they were speaking the truth. Apparently he did not believe the defendant's evidence, so that upon the whole I am not prepared to set aside the verdict of the Magistrate on the ground of this being against the weight of evidence. The appeal will therefore be dismissed, with costs.



### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### PROVISIONAL ROLL.

DE WET V. CHORWITZ. { 1907.  
July 10th.

Mr. De Waal moved for provisional sentence on a promissory note for £439 0s. 9d., with interest and costs. Granted.

#### GENERAL MOTIONS.

*Ex parte NEL.*

Mr. Toms moved on behalf of the tutors of the minor child, Valerie Nel, daughter of J. J. Nel, for an order authorising the Registrar of Deeds to cancel a certain bond.

The matter was referred to the Master for report.

*Ex parte MEIRING.*

Mr. Sutton moved for leave to sell certain property belonging to a minor. The property consisted of 1-264th and 1-2112th parts of a farm at Oudtshoorn, and authority was asked to sell it to another part owner, the land bequeathed to the minor being in itself valueless.

Order granted.

*Ex parte D.R. CHURCH, BARRYDALE.*

Mr. H. S. van Zyl moved for leave to sue one Max Alexander by edictal citation for arrears of quitrent amounting to £47 10s.

The property was attached to found jurisdiction, and leave was granted to sue by edictal citation, returnable on August 1.

*Ex parte COETZEE.*

Mr. Gutsche moved on behalf of the executrix of the estate of the late J. J. Coetzee for an order confirming the sale of a certain farm in the Somerset East district. The land had been bequeathed to the children, but, excluding this land, there was not sufficient property in the estate to pay the debts.

Order granted.

### SUPREME COURT

#### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

VOS AND SCHULTZ V. { 1907.  
GREEFF. July 11th.

This was an application for provisional sentence on a promissory note for £325, purporting to be signed by the defendant. The defendant denied that the signature was his.

Mr. Benjamin, K.C., with him Mr. Roux, was for the plaintiffs; Mr. Buchanan, K.C., with him Mr. P. S. T. Jones, was for the defendant.

Henry de Luke Vos, one of the plaintiffs, said he lived at Prieska, where his firm carried on business as general agents, auctioneers, etc. He was also a Justice of the Peace. In December, 1906, one Hirschhorn came to him with the note now sued upon, which was signed in two places by J. J. Greeff. Witness took the note to the Standard Bank on December 31. Hirschhorn came back, and witness discounted the note for him, having made inquiries regarding Greeff's financial position. The witness deposed as to payments made by him to Hirschhorn, who said he had sold wagons, mules, and donkeys to Greeff, and had received the note in payment. The witness also spoke to interviews with the defendant. Defendant came to the office, and asked to see the note. On it being shown to him, he fainted, and went out, but did not deny his signature. Upon his returning, he looked at the note for about ten minutes or a quarter of an hour, and then said the signature was not his. Later on Greeff was asked by the corporal of the police for information, but witness considered he did not give satisfactory answers. Witness was satisfied of the genuineness of the signature. A warrant for Hirschhorn's arrest was issued at the instance of witness. He thought that by this means he would get Greeff to speak the truth. Witness still believed the signature was genuine. Hirschhorn had gone away.

Hermanus Adriaan van der Merwe, assistant to the chief inspector of sheep for the Prieska and Kenhardt districts, said that he knew Greeff, and had had communications from him in writing. He knew Greeff's handwriting well. Towards the end of December, Vos showed witness the promissory note, and made inquiries of him as to the financial position of Greeff. Witness believed that the signature on the note was Greeff's. He thought the signature was a genuine one.

By the Court: He had seen about twenty letters from Greeff, and on

comparing these signatures with that on the note, he thought the signature was genuine. He had never seen a forgery in his life.

Thomas B. Daly, law agent, of Prieska, said he had acted as Greeff's agent, and had had correspondence with him. When shown Greeff's signature on the promissory note, witness considered it genuine. He had no doubt at the time, nor had he any doubt now about it being Greeff's signature.

Cross-examined by Mr. Buchanan: If it is not his signature, you say it is a clever forgery.

Witness: A very good forgery.

Further cross-examined: Witness considered Greeff a distinctly honest and upright man.

[Hopley, J.: Does the fact that he, on his oath, repudiates this signature shake you in the least as to this being his signature?]

Witness: No.

[Hopley, J.: Then you can't believe him an upright and honourable man?]

I am more or less astonished at the position. I don't know what to think.

[Hopley, J.: But you used to think him an upright man. Now you think him a dishonest blackguard, a rascally perjurer—is that it?]

I don't know what to think. Until now I have never had occasion to disbelieve him. It is a strange position. I don't know exactly what to think.

Thomas J. Melville gave evidence to the effect that he believed the signature to be Greeff's.

Daniel Cornelius Boonzaier, handwriting expert, said he had had put before him several signatures of Mr. Greeff, and had compared them with the signature to the promissory note. The witness pointed out various characteristics in connection with the signature. There was a peculiarity in the joining of the loops in the initial "J.," while the space was greater in every case between the two "J's" than between the second J and the G. There was also a peculiarity in the loop of the G, while in each instance the letters r e e f f were all joined together, whereas the r was not attached to the G.

Cross-examined by Mr. Benjamin: In your opinion, as an expert, would there be any doubt as to the genuineness of the disputed signatures?

Witness: I have scarcely any doubt. It is one of the surest cases I have had in my hands. Witness added that the signature on the document put in had too great freedom to admit of the theory that it had been traced. There was no sign of deliberation about it, such as would be found in a tracing on a window or through a paper on a table.

Hopley, J., pointed out that in all the signatures produced on which the witness had founded his evidence, there was the little characteristic that the

final "f" ended with a straight dash, whereas in the disputed signatures the dash ended in a different way.

The witness said that, of course, a person's writing varied, and in certain circumstances there might be such a trifling variation. The dash was not a flourish, but an abrupt finishing jerk.

Hopley, J., said that in the "g" there seemed also a discrepancy between the admitted signatures and the disputed ones.

Witness said this seemed to be a smudge. He was strongly of opinion that all the signatures were written by the same person. A forger must stop often in doubt, whereas in these disputed signatures there was no sign of hesitancy. The difference between the spaces occupied by the two signatures was also remarkable.

Other witnesses were called for the plaintiffs, it being stated that Hirschhorn left the district at about the end of December, after he received the money.

Jacob J. de Greeff, the defendant, said he knew Hirschhorn, and had seen him often. In October Hirschhorn came to his place and bought a mule for £13. Witness took merchandise to the value of £10 10s., and a balance of £2 10s. was left, which he said a certain Mr. Joubert would pay. Hirschhorn said he had a case coming on in Cape Town in November. Afterwards Hirschhorn wanted to buy sheep from witness, but witness refused to let him have any until he brought his uncle to sign a promissory note. Afterwards Hirschhorn came with his uncle, who signed the note. In December Hirschhorn came again, and said he wanted to pay the £2 10s. He asked witness for a receipt. Witness asked why he wanted a receipt, and Hirschhorn said he had lost his case, and was going to surrender his estate. Thereupon witness signed the receipt. Witness was sure it was a receipt. It was not the promissory note produced. It was not true that witness bought wagons, mules, and donkeys from Hirschhorn for £325. He had never bought anything of that kind from Hirschhorn, nor did he know that Hirschhorn ever possessed such things. It was on or about the 23rd January that witness first heard anything about the promissory note. When he heard of the matter, he caused a wire to be sent to the Standard Bank inquiring if there was such a note, and on receiving a reply, he immediately went to Prieska and saw Vos. He saw the note, and told Vos it was a forgery. Vos said witness must make an affidavit, and witness told him he would come back again. Witness went to see his attorney, who sent him to Mr. Vos, in order that they might go together to the Magistrate. Then witness made an affidavit. Later in the day a policeman came to witness with a message

that the corporal wanted to see him at the police station. He went there, and the corporal said he must make a declaration. Witness replied he had already made one declaration, but Vos and the corporal said he must make another. He replied to questions which were asked him, though he was unwilling. He swore he did not sign either of the documents put in, and alleged to bear his signature.

Cross-examined by Mr. Benjamin: He had never on any occasion bought stock or a wagon from Hirschhorn. He had never given anyone a promissory note for a greater sum than £100. He told Vos at once that the signature was not his. Then he fainted. Witness had heard about promissory notes which Hirschhorn had altered.

Mr. Benjamin closed his case.

After hearing Mr. Benjamin in argument on the facts, the Court gave absolution from the instance, with costs.

Hopley, J., said he was asked on the ground of the similarity of the signatures to say that this note bore the genuine signatures of the defendant. He perfectly agreed that the signature on the note were extremely like the admitted signatures of Greeff, but that was not sufficient to justify the Court in granting provisional sentence in the face of the circumstances of the case, and of the denial of the signature on oath by the defendant. If there had been a transaction between Hirschhorn and Greeff of the magnitude supposed, then one would have expected that there would have been some corroboration of such a transaction, which would lend colour to the view that this was a genuine note given for value received. But there was no evidence of any dealing between the two people involving this large sum. The only business which is proved to have been transacted by Hirschhorn and the defendant was the sale of one mule by the latter to the former, for which Hirschhorn paid; and it is said that on paying the last instalment of £2 10s. he obtained a receipt from the defendant, thus procuring a specimen of a signature which, it is suggested, that he must have used for forging the names appended to the note now sued on. Defendant's conduct throughout was consistent with his present statement that the signatures were forgeries, for long before the due date of the note he, on hearing, as he alleges for the first time, of the existence of this note, at once telegraphed to Prieska to ascertain if in fact there was such a document, and upon his hearing that there was, he journeyed to that place and repudiated liability. He went further, for he made an affidavit charging Hirschhorn with forgery, upon which a warrant for the arrest of Hirschhorn was issued. This was at the end of January, a date at which it seems quite

unlikely that defendant could have known that Hirschhorn had absconded. Hirschhorn has, as a matter of fact, absconded, or at all events it has not been found possible to arrest him upon the warrant which is still in force, and in the hands of the police of that district. To hold that this was Greeff's signature would be to hold that a man who had the reputation of being an upright man, was a perjurer. It would be unsafe for the Court to hold this must be Greeff's signature, and the Court would therefore grant absolution from the instance, with costs, leaving it to the plaintiffs, if they could get any new evidence, to re-open the matter, and plaintiffs would, in such an event have leave to claim the costs of the present case as part of the damages.

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### PROVISIONAL ROLL.

PINNOY V. DEISTIG. } 1907.  
July 11th.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £110 with interest from the 12th October, 1892, at 8 per cent., and for the property to be declared executable. Counsel said that he recognised that they could not ask for greater interest than the capital amount of the bond. Defendant was sued by edict.

Buchanan, J.: It has been constantly done. You must found jurisdiction if a man is out of the country. You have got an order founding jurisdiction and you have not taken it out. I think you had better found jurisdiction before you apply again. All these wasted costs cannot be given against the defendant. Attorneys ought to be more careful in these proceedings.

#### ILLIQUID ROLL.

RADLOFF V. PIENAAR. } 1907.  
July 11th

Mr. Struben moved for judgment under Rule 329d for £500, with interest from the 1st November, 1903, £25 money lent, delivery of 1,000 paid-up Kroon shares (Pretoria), 500 Waterval shares (Johannesburg), 500 Palabona Area shares, 500 shares in Murchison Range Gold Claims, and 500 shares in each property taken up by flotation by defendant between the 7th September, 1903, and the 6th November, 1904, and a declara-

tion that 600 deferred shares in Joubert Pienaar Syndicate are executable, with interest *a tempore morae* and costs.

Order in terms of claims (a), (b), and (c), with costs, shares to be delivered within one month.

#### HONEYBUN V. HERBERT, TRADING AS G. AND T. HERBERT.

Mr. De Waal moved for judgment under Rule 329d for £109 5s. 8d., balance of money collected by defendants and not accounted for, less £35 paid on account, with interest *a tempore morae* and costs.

Order granted.

#### STANDARD BANK V. PHILLIPS.

Mr. Watermeyer moved for costs against the defendant of an action in which he was sued under Rule 329d on the 5th July. Costs were not asked for in the summons, and it was omitted to apply for them when the Court gave judgment. Counsel now asked for an order against the defendant for costs of the action.

[Buchanan, J.: You must give notice to the defendant, or you can only have a rule at plaintiff's own expense.]

Mr. Watermeyer said that notice had not been given to defendant, but his lordship had granted an order in a similar case previously.

[Buchanan, J.: I should not have done it then.]

Mr. Watermeyer: It was only a clerical error in the printed form of the summons, which failed to mention costs.

Buchanan, J.: It is a mistake of the attorneys' in not putting it in the summons. They should do their duty properly. You may take a rule nisi calling upon defendant to show cause on the 1st August why he should not pay costs, no costs to be allowed for this rule. The process must be carried out at the attorneys' own expense.

#### GENERAL MOTIONS.

*In re* HEX RIVER VINE- } 1907.  
YARD CO., LTD. } July 11th.

Mr. Struben moved for confirmation of the report of the official liquidator. The report had lain for inspection, and no objection had been raised.

Report confirmed.

*In re* SOUTH AFRICAN GENERAL WORKERS' UNION LOCK-OUT CIGARETTE WORKERS' CO-OPERATIVE SOCIETY, LTD.

Dr. Greer presented the first report of the official liquidator, and applied for the usual order.

Usual order granted.

#### JORDAAN V. JORDAAN.

Arbitration—Disagreement as to umpire—Act 29 of 1898.

This was an application brought by Jacobus Louis Jordaan upon notice to Johannes Lodewicus Jordaan to show cause why the Court should not appoint an umpire in the matter of the arbitration or reference pending between applicant and respondent to determine the purchase price to be paid by respondent for applicant's share in the farm Doornkraal in the division of Somerset West.

The affidavits showed that the parties are sons of the late Gideon Jacobus Jordaan and his pre-deceased spouse, Johanna Magdalena, and are part proprietors under their parents' will of the farm Doornkraal. The property was bequeathed to them "on condition that one of them shall have the right to alienate his share only to one or more of the co-legatees or proprietors of the same farm or ground, and that for a price to be fixed by two impartial men, one to be chosen by him or her who wishes to sell or alienate and the other by him or them who wishes or wish to buy."

Applicant desires to sell his share, and respondent is prepared to buy it. They have appointed as their arbitrators F. van Eysen and J. A. Vosloo respectively, but the arbitrators wish to have an umpire appointed to decide between them in case of non-agreement. Applicant suggested three names, the Resident Magistrate, Mr. W. L. Lombard, or Mr. P. R. Botha, all of Somerset East, while respondent suggested Messrs. W. Hockly, ex-M.L.A., Frederick Wienand, ex-M.L.A., P. W. Michau, M.L.C., or M. Pretorius, M.L.C., the two former of Bedford, and the latter of Cradock.

Mr. McGregor was for applicant; Mr. Upton was for respondent.

Counsel having been heard in argument on the facts,

Buchanan, J.: The late Mr. and Mrs. Jordaan made a mutual will by which they disposed of certain of their property to their sons, and imposed a condition that none of the sons should have the right to alienate his share in the property to anyone except one or more of the co-legatees or proprietors of the farm, and that this alienation should be at a price to be fixed by two impartial men, one to be chosen by the person

who wished to sell and the other by the person who wished to buy. The applicant and respondent are two of these sons, one (the applicant) wishes to sell his portion of the farm, and the other (the respondent) is ready to buy. They cannot agree upon a price, and they have fixed upon two impartial men. These two men before going to arbitration cannot agree as to who should be the umpire in case of dispute between them. The parties agreed to arbitrate under the Act 29, 1898, which makes provision for the appointment where the parties themselves cannot agree, or where the arbitrators cannot agree. It appears this dispute has been going on for some time between the parties in Somerset East. The property is close to the town, and there is a good deal of local feeling about it. One umpire suggested is the Magistrate of the district. The Magistrate of the district, I think, where there is a dispute like this, had far better keep out of the matter, otherwise he might be a very useful man as umpire. The question in dispute is the value of a certain farm. It may be well that farmers in the neighbourhood, who know the value of the farm, should be called upon to decide this question. The two arbitrators are local farmers. A number of names have been suggested as umpire, and four names have been mentioned by the respondent of persons not exactly in the district, but in the neighbourhood, in the adjoining district of Bedford and Cradock. The applicant objects to two of the names mentioned from the Cradock district on the ground that they are both members of Parliament, and at present engaged in legislative duties. The other two names mentioned are Mr. Hockley and Mr. Wienand, both of whom are well-known men, and both of whom are impartial men, and both of them farmers. Under these circumstances the Court will order that Mr. Fredk. Wienand, who, I think, is the elder man, and, failing his acceptance, Mr. Wm. Hockly, be appointed umpire, who, in case of non-agreement of the arbitrators, shall determine the price to be paid under the conditions of the will, costs of the motion to be costs in the discretion of the arbitrators. The Court is asked to give some indication as to what course should be taken. This can only be done as advice to the parties. I cannot make a formal order on the matter. They will go to the arbitration under the terms of the will. They will have the will before them, and the conditions before them, and it will be open to the arbitrators to take any evidence they may want if they cannot of their own motion settle the dispute between the parties. If they find it necessary to take any evidence, they can take it, but that will not be part of the order.

*Ex parte* HARRIS.

Dr. Greer moved, as a matter of urgency, on the petition of Maurice Harris, for an interdict restraining one L. Levenshon from removing certain movables from premises situate in the Main-road, Simon's Town, pending an action to be brought by petitioner (who is the landlord of the premises) for £40, being amount of four months' rent.

Buchanan, J.: As this is an *ex parte* application, a rule nisi will issue, to operate as an interim interdict, pending an action to be instituted forthwith, leave reserved to the respondent, if so advised, to move to set aside the interdict.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BETTINGTON V. SCOTT. { 1907.  
July 12th.

On taking his seat, Mr. Justice Hopley said that he wanted to make a remark in open court about this case, which was standing over for judgment. Some person or persons had been addressing envelopes to him marked private, enclosing cuttings with portions underlined. This was highly improper and foolish, because it would not affect the mind of the judge at all. He would not be swayed by such consideration. The parties apparently knew they were doing wrong, and he (the judge) would take no notice of the cuttings, beyond handing them to the Registrar to be dealt with as he thought fit.

A lady had also approached him in Chambers, and wanted to make some communication about the case. This was an improper procedure, and if she had anything to bring to the notice of the judge, she should do so in open court by counsel.

GODDESS V. PIENAAR.

This was an action for the recovery of £52 7s. and £3, damages suffered by plaintiff by reason of defendant's failure to take delivery of certain four buck-wagons built for him by plaintiff.



Mr. Roux appeared for the plaintiff; there was no appearance for the defendant.

Myer Goddess, a coachbuilder and farrier, of Cape Town, the plaintiff, said that in December last defendant entered into an agreement with him under which he had to build four buck-wagons for defendant at a purchase price of £200. The wagons had to be inspected by Alfred Boag, a coachbuilder, and the balance of the purchase price had to be paid before delivery. Mr. Boag inspected the wagons when they were being built, and had given certificates that the work was satisfactory. When the wagons were completed, defendant promised to pay the balance of the purchase price (£158, as he had paid £42 in instalments) in a few days. He failed to do that, and plaintiff gave due notice on February 14 that if the wagons were not taken and the balance of the price paid, he would have them sold by public auction, and hold defendant responsible for all loss. He had to hire a store for £3 to keep the wagons in, and on defendant not taking delivery, he had the wagons sold by public auction. The four wagons fetched about £105 net, and plaintiff had consequently suffered damages in the sum of £52 7s., in addition to the £3 store rent.

Mr. Roux moved for judgment as prayed in the declaration, and also asked for the costs of an application made by defendant for a postponement, which costs had been reserved.

The Court granted judgment for £55 7s., with interest from May 10, and all costs, including the deferred costs.

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

COOK AND CO., LTD. V. ESTATE OF STEPHAN. 1907. July 12th.

Promissory note—Aval—Surety—Appropriation of payments.

*A., being indebted to B. in the sum of £4,325, including a promissory note for £1,500, made by A. in favour of B. or order, paid B. the sum of £4,275 on account. B. credited A. in his books with the payment, and the counterfoil of A.'s cheque book showed that the amount had been paid on account of his indebtedness, but the note was retained by B.*

*Held, that the plaintiff, who became holder with notice of such payment, was not entitled to recover the amount of the note from the defendant who had indorsed the note before B. as payee had indorsed it.*

This was an action brought by the plaintiff company to recover from the defendant estate two sums of £1,000 and £500 in respect of two promissory notes endorsed by the late Hendrik Rudolph Stephan.

The declaration set out that the plaintiff carried on business in Cape Town, and the defendants were the executor and the assumed executor in the estate of the late Hendrik Rudolph Stephan, and they were sued in their capacity as such. Some years prior to June, 1905, Frank Cook and James Wakelin carried on business in Cape Town under the style of F. Cook Company as importers of machinery, coal, and other merchandise. The said firm dealt largely with the Croydon Brick Company. The said firm from time to time supplied the company with machinery and coal, and did certain work in connection with the kilns. The company had made payments from time to time, and there was a balance remaining due to the firm on the 30th September, 1904, amounting to £2,675 13s. 1d. In consequence thereof the said firm refused to supply the company with any further goods without a guarantee of a substantial part of the balance. The company was in need of a further large supply of coal, and in October, 1904, the said firm agreed to supply the coal in consideration of two promissory notes, amounting in all to £1,500, to be signed by the company in favour of the firm, and guaranteed by H. R. Stephan, who was to signify his consent on the back of the notes. The two promissory notes for £1,000 and £500, due on the 20th December, 1904, and 19th January, 1905, and payable at 82, Strand-street, Cape Town, were signed by the company in favour of the firm and payment was duly guaranteed by H. R. Stephan, who affixed his signature to the notes. The notes were presented on the respective due dates, but the notes were dishonoured. Due notice of the dishonouring of the notes was given by the firm to H. R. Stephan. The business of the firm was thereafter floated into a company, which was duly registered on the 5th June, 1905, with limited liability, as "F. Cook Co., Ltd.," who took over the assets of the firm, and F. Cook Co., Ltd., thereupon became the legal holders of the promissory notes. The Croydon Brick Co. went into liquidation, and there was no dividend available for concurrent creditors, as the assets of

the company were swallowed up by a preferent claim of a bond for £20,000. The defendants neglected and refused to pay the amounts due, and judgment was claimed for £1,000 and £500, with interest and costs.

The plea set out that the defendants had no knowledge who the members of the said firm were, but they admitted that the firm did business to a considerable extent with the said company. The defendants had no knowledge of the allegations contained in paragraphs 4 and 5, that was as to the amount due on the 30th September; the refusal to supply further goods, and the agreement to supply the company with coal in consideration of these promissory notes being guaranteed. The defendants admitted the signing of the notes by the company in favour of the firm, and that the signature of H. R. Stephan was affixed, but they did not admit that the notes were given in pursuance of any such agreement as was alleged, or that Stephan guaranteed the payment of the notes to the firm, or that his signature signified such guarantee. The defendants did not admit the presentation of the notes as alleged, and they said, even if they were presented, they were not duly protested for non-payment in accordance with law and the plaintiff was therefore not entitled to recover thereon from the defendants. They denied the alleged dishonouring of the notes, or that due notice was given as alleged, or at all. They did not admit that the company took over the assets of the firm. The promissory notes were given by the Croydon Brick Co., Ltd., in October, 1904, to F. Cook on account of the amount then due by the former to the latter company. During the guarantee of the said notes, namely, down to the 19th January, 1905, when the second note fell due, the amount due by the former company to the latter company had increased to £4,272 and upwards, but not exceeding £4,325 18s. 4d., according to the books of F. Cook Co., and thereafter, on or about the 15th April, 1905, the Croydon Brick Co., Ltd., paid in cash to F. Cook Co. the sum of £4,272, and thereby paid and discharged the debt on account of which the said promissory notes were given, and by reason of the premises, the said promissory notes were paid and discharged, and the liability of the late H. R. Stephan (if any, which the defendants do not admit) was likewise discharged.

The plaintiffs, in their replication, admitted that the notes were not protested for non-payment, but the plaintiffs said it was at the special instance and request of Stephan, through his authorised agent, Miller, that the said notes were not so presented.

Mr. Upington (with him Mr. D. Buchanan) for plaintiffs; Mr. Schreiner,

K.C. (with him Mr. Burton, K.C., and Mr. Van der Byl), for defendants.

Frank Herbert Cook, managing director of the plaintiff company, said the company was registered in June, 1905. Prior to that he had carried on a general business, and for some years he carried on business with Mr. Wakelin as F. Cook Co. In 1903 he was supplying coal machinery and other merchandise to the Croydon Brick Company. On the 30th September, 1904, their indebtedness amounted to £2,675 13s. 1d. for goods supplied and work time. On more than one occasion the Croydon Brick Company had to be pressed for payment. At the end of September, 1904, the secretary of the company was informed that further coal would not be supplied. After several interviews, the secretary agreed to give bills for £1,000 and £500, payable at 60 and 90 days. When he received the notes from Davis, the secretary of the company, Stephan's signature was not on them, and witness could not discount the bills at the bank. The notes were returned as the bank manager told him Croydon's name was no good. The secretary brought the notes back with the signature of H. R. Stephan on the back. Witness discounted the £1,000 note, and proceeded to supply further coal to the company. If the coal had not been supplied the works would have been more or less closed. On the due date the secretary said he could not meet the note, and witness retired it with his own cheque. Witness went to see Stephan, but was told that he was too ill to see him. The manager, Miller, asked witness to hold the matter over until he could see Stephan, and endeavour to effect a settlement. Subsequently Miller told witness not to worry, that the notes would be settled all right. On the 19th January witness presented the note for £500 at the office of the Croydon Company, and was referred to Miller, who again asked witness not to note the bills.

Cross-examined by Mr. Schreiner: The company which took over from F. Cook Company at the time of the flotation had in the outstanding debts £848 3s. due by the Croydon Brick Company. There was no special endorsement making the notes over to F. Cook Company, Ltd. The auditor, who was acting for Stephan's, wrote off £500 due by the Croydon Brick Company in the accounts of F. Cook Company, Ltd., as irrecoverable. Letters with reference to the promissory notes were written and pressed in his book on the dates they bore. On many occasions he went to Miller about the debt before Stephan's death.

Harry George Davis, formerly secretary of the Croydon Brick Company, stated that on a number of occasions the company had difficulty in meeting the accounts of F. Cook Company. It

was on the instructions of the directors that he approached Mr. Cook to get a further supply of coal on two promissory notes. Mr. Stephan was a director, but was then ill. When witness heard from Cook that the notes were no good he took them to Millar, and when witness got them back they bore Mr. Stephan's signature. Stephan was more interested in this Croydon Company than anyone else.

Mr. Upington closed his case.

De Villiers, C.J., then intimated that argument might be heard on the question of appropriation.

Mr. Upington said the evidence of the person making the bill was that he had not then intended to discharge these notes, and the evidence of the person to whom the payment was made was to the same effect. In the books of the Croydon Company these bills still remained open. The secretary said his intention in making this payment was that it should be applied to what one might call the unsecured account, and it was quite clear arrangements had to be made for a further supply of coal at a later date. There was a mutual understanding that this money was to be applied to the unsecured portion of the debt. The secretary of the Croydon Company made no effort to get these bills back. They remained in the possession of F. Cook Company. If it had been intended this cheque for £4,272 was to be applied to a discharge, and these two bills of £1,000 and £500 in the ordinary course of business, the secretary of the Croydon Company would have got these bills back. If the documents were ineffective they would not have got these bills back. If the documents were ineffective they would not have been left in the hands of F. Cook Company. Counsel cited *Klopper v. Van Straaten* (11 S.C.R., 94), *Priest v. Stegman* (15 C.T.R., 407), and *Murais v. Michau and Hofmeyr* (16 C.T.R., 264).

Mr. Schreiner, having been heard in reply,

De Villiers, C.J.: This is an action brought upon two promissory notes, one for £1,000 and the other for £500. They were both notes made by Miller and Stephan in their capacities as directors of the Croydon Brick Co., in favour of F. Cook Co., and before the payee had endorsed the notes, they were endorsed by the late Mr. Stephan. A very interesting question has been raised as to what the actual legal position was of Mr. Stephan in reference to these notes, whether he is a mere surety or whether, by the operation of the Bills of Exchange Act, he should be treated as an endorser for the purpose of the present case. In the case of *Klopper v. Van Straaten* (11 S.C.R., 94), this Court held that a person who endorses a promissory note which has not been endorsed by the payee does not incur the liability of an endorser, but *prima facie*

incurs the liability of a surety, and that Act 19 of 1893 had not altered the law in this respect. In the case of *Priest v. Stegman* (15 C.T.R., 407), the Court would appear to have held that the liability of an endorser would be incurred under the 54th section of the Act. That section enacts that "where a person signs a bill otherwise than as drawer or acceptor, he or she thereby incurs the liabilities of an endorser to a holder in due course." But under the 27th section of the Act, a holder in due course is "a holder who has taken a bill complete and regular on the face of it," and it would be difficult to hold that a promissory note endorsed by a stranger, and not by the payee, is a note complete and regular on the face of it. It is not necessary, however, to decide whether Stephan was surety or endorser, because, in either case, he would be discharged if the maker paid the note. It appears, from the books of Cook Company, that at the time when the payment of £4,272 was made to them by the Croydon Company there was owing to Cook Company the sum of £4,325, and it appears to me clear, from the books, that the payment of £4,272 was made in respect of that existing debt of £4,325, so that from the books of the creditors it is clear they intended to appropriate the money to the payment of the existing debt, £4,325. Then, of course, it may be said it is the debtor that must appropriate, and not the creditor. When we look at the counterfoil of the cheque book, which was given by the debtors, we find that it was a payment on account. On account of what? On account of their indebtedness to Cook Company, that indebtedness being £4,325, which included this indebtedness of the two bills of £1,500, so that it is quite clear from the documents themselves, and from the books of the parties, that there was the appropriation of the payment to the past debts. Then it is said that the creditors retained these notes, and that they still intended to hold Stephan liable for these notes, but their intention to hold him liable cannot affect his legal right. If, at the time the payment was made it was not distinctly understood between the parties that the appropriation was not to be made in a certain way, then the appropriation would be to the older debts. The older debts would, in the first instance, be paid off, and if these debts were paid off, the promissory notes were paid off, and the mere fact that the creditors chose still to retain these notes cannot affect the rights of Stephan whether he is treated as security or endorser. In my opinion, it is quite clear that the debt has been paid, that the endorser or surety's liability has ceased, and that the plaintiff, who became holder with knowledge of the pay-

ment, is not entitled to recover the same amount again from the defendants as executors of the late Mr. Stephan. For these simple reasons I am of opinion that the judgment of the Court must be for the defendants, with costs.

[Plaintiff's Attorneys: Wahl, Fuller and De Clerk; Defendant's Attorneys: Van der Byl and De Villiers.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION. } 1907.  
                              } July 12th.

Mr. Payne moved for the admission of Frederick Kimberley Loewenthal as an advocate.

In the absence of applicant, the matter was ordered to stand over *sine die*.

Mr. Payne subsequently explained that Mr. Loewenthal had not yet arrived from Kimberley.

### PROVISIONAL ROLL.

SEELIGER V. JACOBS AND OTHERS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £550, with interest from the 1st May, 1906, bond due by reason of non-payment of interest, and for £1 5s., insurance premiums; counsel also applied for the property to be declared executable and the rents attached.

Order granted.

CHALWIN V. GENCEROV.

Mr. Payne moved for provisional sentence on a mortgage bond for £600, with interest from the 1st January, 1907, bond due by reason of non-payment of interest, and also for £5 9s. 10d., taxed costs of certain proceedings withdrawn at the request of defendant; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

PURCELL V. BOYD.

Mr. De Waal moved for provisional sentence on a mortgage bond for £3,500, with interest, less £18 1s. 9d. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

LESLIE V. BAILIE.

Mr. Louwrens moved for provisional sentence on a promissory note for £4,000, with interest from the 10th June, 1907, and costs.

Order granted.

Mr. Louwrens also moved for judgment, under Rule 329d, for an order upon defendant to render a full, fair, and proper account, duly supported by vouchers, of moneys received and paid out by him on plaintiff's behalf, and of all stock and goods and chattels belonging to plaintiff which were in his hands or received by him while he was her agent and manager, as from the 1st June, 1906, debate of such account, and payment by defendant to plaintiff of all sums found to be due to her upon such debate.

Buchanan, J., said that defendant was not yet in default, as the requisite ten days allowed for appearance had not elapsed. The Court could only grant provisional sentence on the note. The other matter must be set down for judgment after defendant was in default.

MEHNERT V. BOTHA.

Mr. M. Bisset moved for provisional sentence on a judgment of the Magistrate's Court at Aliwal North for £155, of the 22nd June, 1906, with interest from the 1st March, 1904, and 5 per cent. commission for collection, as stipulated in the note, less £15 paid on account, and also for £5 5s. 6d. taxed costs and charges incurred by plaintiff in obtaining the judgment. Counsel also applied for defendant's life interest in certain piece of quitrent land in the division of Wodehouse to be declared executable. A return of *nulla bona* was put in.

Order granted.

MACLEOD V. CAMERON.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

GOLDFOOT V. SIMSON.

Mr. Lewis (for plaintiff) applied for a postponement for a week pending negotiations for a settlement.

Mr. Roux (for defendant) opposed a postponement for a week, but said he was prepared to consent to a postponement for two months.

Ordered to stand over until Tuesday next.

Buchanan, J.: If the notes sued upon are not then in court I am afraid we shall have to refuse provisional sentence, and order plaintiff to go into the principal case.

## GENERAL MOTIONS.

*Ex parte* PIETERSE. { 1907.  
July 12th.

Mr. De Waal moved for the rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* THERON.

Mr. De Waal moved for a certain rule to be made absolute authorising the Registrar of Deeds to issue a certified copy of certain bond.

Rule absolute.

*Ex parte* SOUTH AFRICAN NEWSPAPER CO., LTD.

Dr. Greer moved to make absolute certain rule nisi authorising the reduction of the company's capital, and allowing them to dispense with the necessity of inserting "and reduced" in the company's name. All the shareholders, with the exception of two, had consented to the scheme of reduction. Service had been given according to rule, and no objection was now raised.

Rule absolute, one publication of the registration to be made in the "Gazette" as required by section 41 of the Act 25, 1892.

*Ex parte* SANDS.

Mr. Struben moved for an order authorising the removal of petitioner's name from the roll of attorneys. It appeared that petitioner, who had been admitted to practise as an attorney and notary in 1901, now desired to join the Bar.

Order granted.

ASTON V. BEAUFORT WEST MUNICIPALITY.

Mr. Roux (on behalf of the plaintiff) moved for an award of the arbitrator (Mr. Thomas Stewart), to whom the matter had been submitted, to be made a rule of Court. The arbitrator had awarded applicant £397 19s. 11d. for professional services rendered and costs. There was a consent paper filed on behalf of the Municipality.

Award made a rule of Court, as prayed.

*Ex parte* NICOLAS (BORN ECKSTEEN).

Mr. Benjamin, K.C., moved for an order admitting petitioner to sue Frederick Benjamin Andrews, an attorney, of Cape Town, *in forma pauperis*, for damages for alleged gross negligence as joint

receiver in the estate of petitioner and John Nicolas.

The petition was referred to counsel for certificate.

*Ex parte* KORTJASS.

Mr. P. S. T. Jones again mentioned the petition of Sophia Kortjass, widow, for leave to mortgage for £800 the property of the minors at Matatiele equally with her own, in order to enable petitioner to retain two of the farms in the estate of her late husband for the benefit of the family. The matter had been standing over for further information, and counsel now renewed the application, and said that since the first hearing petitioner had been able to obtain better terms. She was at first asked 8 per cent. interest, but had now been offered the money at 7 per cent. Counsel observed that the rate of interest in that part of the country seemed to be high.

Leave granted to the mother as natural guardian of her minor children to mortgage their portions, at the same time as she mortgages her own jointly, for £800, with interest not exceeding 7 per cent.

*Ex parte* STACK.

Mr. Louwrens moved, on the petition of Charles Stack, of Mount Ayliff, East Griqualand, for leave to sue one George Peel, of Johannesburg, by edictal citation, and for leave to attach a certain lease or such interest therein as respondent may have *ad fundandam jurisdictionem*. Petitioner said that Peel was the registered lessee of a certain piece of Crown land at Mount Ayliff, called McGregor's Mining Area, and that he (Stack) was entitled to one-third share of the lease and rights. He proposed to institute an action against Peel to compel him to give transfer and cession of the said lease. Petitioner also asked for an interdict against the Surveyor-General and Tredgold, McIntyre and Bisset, in whose possession the two original leases are, restraining them from parting with same pending the action.

Order granted for the attachment of Peel's interest in the lease *ad fundandam jurisdictionem*, and leave granted to sue respondent by edictal citation in an action to be instituted by applicant against Peel and others, citation returnable on the 12th August, with leave to serve intendit and notice of trial at the same time.

PINNOY V. DRISTIG.

Mr. Watermeyer applied for an extension of the return day and directions as to publication.



Ordered that publication be made as before, and that the return day be extended to the 29th August.

ANDREWS V. ANDREWS. } 1907.  
} July 12th.

This was an action brought by Bertha Andrews against her husband, F. B. Andrews, of Cape Town, for an order of restitution of conjugal rights, failing which a decree of divorce.

Mr. Gutsche was for plaintiff; there was no appearance for defendant.

Plaintiff said she was married to defendant at Johannesburg on the 21st June, 1905. Mr. Andrews was living in Cape Town both before and subsequent to the marriage. They entered into an antenuptial contract, under which defendant agreed to give her £500, and cede and transfer to her trustee a policy on his life for £1,000, and pay the premiums as they became due, and give up his interest in any wedding presents which he had received. Witness at present had the majority of the wedding presents. She had not received the sum of £500, nor the policy. Witness was born at Worcester, Cape Colony. After the marriage she stayed in Cape Town about three months, and afterwards went to her mother in Johannesburg. Witness and her husband went to England together later on. He left her in London, and proceeded to the Continent. They returned to Cape Town about January, 1906. Witness proceeded to Johannesburg, where, in April, 1906, she gave birth to a child. Witness had remained in Johannesburg about 17 months. Defendant promised to go and bring her back, but he did not do so. He had allowed her £10 a month. In January, 1907, defendant paid a visit to Johannesburg, but only stayed three days, promising to return in February and bring her to Cape Town. He, however, did not return in February. Defendant had not given her any satisfactory reasons for not taking her back. Witness came down to the Cape a few weeks ago with the intention of rejoining him. He did not, however, even come to the railway station to meet her, although she had written to him saying that she was coming down.

[Buchanan, J.: I suppose some dispute arose between you?]

Witness: No, nothing. He had forbidden me to come.

[Buchanan, J.: Have you any suspicion of anything?—No. Of course, people talk a lot.

[Buchanan, J.: It seems an extraordinary thing on his part.]

Plaintiff's father also gave evidence as to having received a letter (produced) from defendant. When witness saw defendant all that the latter said

was that he could not afford to keep his wife and child. When defendant visited his wife in Johannesburg they were apparently on affectionate terms.

Counsel read correspondence, from which it appeared that defendant had intimated his intention of withdrawing appearance if the claim for payment of £500 at once was withdrawn, plaintiff to have custody of the child, with reasonable access to him (defendant), and he on his part to pay £8 a month towards the maintenance of the child until her marriage.

Buchanan, J., said that the question of the conditions sought to be imposed by the defendant could be argued on the return day of the rule.

Order granted, directing defendant to return to or receive plaintiff on or before the 20th July, failing which, rule to issue calling upon him to show cause on the 1st August why he should not be ordered as prayed in the declaration, with costs of suit.

#### GRANT V GRANT.

This was an action brought by Charlotte Grant, of Burghersdorp, against her husband, Charles Dunraven Grant, for restitution of conjugal rights, failing which, a decree of divorce.

Mr. Toms was for plaintiff; there was no appearance for defendant, who was believed to be in Johannesburg.

Defendant had been sued by edictal citation, and leave had been given to plaintiff to have her evidence taken at the Circuit Court, Burghersdorp. Counsel read the record of evidence taken at the Circuit Court.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 19th August, failing which, to show cause on the 30th August why a decree of divorce should not be granted as prayed, service as before.

#### BOYES V. BOYES.

This was an action brought by Johanna Magdalena Boyes, of Prince Albert, against her husband, Charles Duncan S. C. Boyes, for restitution of conjugal rights, failing which, a decree of divorce.

Mr. De Waal was for plaintiff; defendant did not appear.

Plaintiff gave evidence, from which it appeared that she was a widow at the time of the marriage. Defendant was a dentist, but was not licensed to practise. He moved about the country a good deal, and ultimately left, saying that he was going to a country where he could practise in his own name. He sent the plaintiff a letter, in which he complained bitterly that

she had not helped him to get a practice out of her means. He expressed his disappointment with the marriage. Defendant was now in India.

Decree of restitution granted, defendant to return to plaintiff on or before the 19th October, failing which, to show cause on the 12th November why a decree of divorce should not be granted, with costs.

#### LESTER V. LESTER.

Mr. Watermeyer moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights. Counsel said that the rule had inadvertently been made returnable for the 14th July, which happened to be a Sunday.

Ordered to stand over until Tuesday next.

*Postea* (July 16th).

Decree of divorce granted with costs, and forfeiture by defendant of benefits of the marriage.

#### SILBERMAN V. SILBERMAN.

Mr. Lewis moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights.

Rule absolute, with costs.

#### EVANS V. EVANS.

Mr. Roux moved for a decree of divorce, with custody of the minor child, and payment of £3 per month as maintenance of the child, in default of defendant's compliance with an order of restitution of conjugal rights.

Rule absolute, with costs.

#### JANSON V. JANSON.

Mr. Toms moved for a decree of divorce and a declaration that defendant had forfeited her share of the benefits of the marriage, in default of defendant's compliance with an order of restitution of conjugal rights.

Rule absolute as prayed.

#### LEWIS V. INSOLVENT ESTATE WILLIAMS.

This was an application upon notice to the trustee in the respondent estate to show cause why an order should not be granted against him to forthwith pay taxed costs incurred by applicant in connection with certain proceedings in the matter of *Lewis v. Insolvent Estate Williams* (17 C.T.R., 521).

Applicant had, it appeared, instituted proceedings against respondent for an order for delivery of certain furniture

and fittings of the billiard room at the residence of insolvent, Saxmundham, Sea Point, which applicant alleged were his property. The matter came before the Court on the 11th June, and the learned Judge, while declining to grant the order asked for, suggested that the parties should come to terms, ordered applicant to proceed by action, and directed the question of costs to stand over. Subsequently negotiations were entered into, and after the declaration had been issued, W. A. Currey (the trustee), as he said, gave the applicant the benefit of the doubt, and said he was prepared to hand over the articles, only on the understanding that the estate should not suffer in the matter of costs. Mr. Currey complained that he had been rushed into the proceedings. The applicant, however, denied that he had rushed the trustee into litigation, and declined to accept the condition sought to be imposed.

Affidavits having been read,

Mr. Benjamin, K.C., was for applicant; Mr. Close was for respondent.

Mr. Benjamin said that the procedure adopted by applicant was not improper, and submitted that he was now entitled to his costs. The facts, his lordship found, were too complicated to be decided on motion, and ordered applicant to proceed by action. The applicant's attorney had not exhibited any undue haste. Respondent had ample time to investigate the claim of the applicant before proceedings were instituted. Even to-day the respondent occupied a most unreasonable position. He had handed over the furniture, and yet on the affidavits he impugned the *bona fides* of the applicant's claim. That was not in very good taste.

Mr. Close said that the trustee was faced with two claims, one by the insolvent's wife, and the other by his cousin (Lewis), representing all the furniture found in the insolvent's premises. He was entitled to facilities for a full and complete investigation into such an extraordinary situation, but he had not had an opportunity of going thoroughly into the matter. Counsel cited *Giratie v. Estate Goldess* (20 S.C., 552). He contended that the trustee had adopted a reasonable attitude throughout, and that he should not be mulcted in costs occasioned by the precipitate action of the applicant.

Mr. Benjamin, in his reply, said that if any one were responsible for the costs which had been incurred through the delay, it was David Ayr and Co.

Buchanan, J.: This is an application for costs, and a fundamental principle which guides the Court in granting costs is that where the parties are in the wrong, all necessary costs should be granted against those parties, but the Court always sets its face against allowing unnecessary costs to be piled up in any application or in any motion.

The matter originated out of an application on motion for an order to compel the trustee of an insolvent estate to deliver up certain property which he found in the insolvent estate, and which was claimed by applicant. At the time this motion came on the trustee certainly had not had a very long time to consider the matter, and he felt he was being rushed, and had not had time to consult the creditors fully. Well, I think the trustee deserved some little sympathy in the matter, but still, on the whole, I thought when the matter came on he might perhaps have come to some decision by that time. The application was made by affidavit on notice of motion, and so many questions were in dispute, and the question as to whether this applicant had any right whatever to succeed was so uncertain, that I felt it could not be decided on motion, but I allowed this notice of motion to stand as summons in the case. Now, there is nothing which requires that a summons should be taken out instead of a notice of motion, and had the application been altogether unfounded and unnecessary, then the applicant would have had to pay costs of the notice of motion, but the notice was allowed to stand as summons, and, as usual in such cases where a motion is brought forward and action is afterwards taken, the costs of that would become costs in the cause. Then we come to consider whether the motion was wholly necessary. The trustee in this case thought it advisable to give up the furniture, and thus admitted that he was in the wrong, and consequently he ought to pay the costs of the motion. He did not offer to do so, and while the delay was going on, the declaration was prepared and filed. Well, as the notice of motion was allowed to stand as summons, the next ordinary step would be to file declaration, but it was unnecessary to incur costs by respondent in that matter, and the costs of the original motion only will be allowed and the costs necessary up to and including the filing of declaration will also be allowed. Then come the costs of this application. Well, there has been a great deal of correspondence between the attorneys, and affidavits, all of which make very interesting reading, and are to some extent very entertaining, but they were wholly unnecessary to the parties of this case, and, looking at the way in which the matter has been conducted, I am not inclined to allow more as to the costs of this application than the bare costs of the application, excluding the costs of all the correspondence and all the affidavits filed. I think that a great deal of unnecessary licence has been taken by the parties, and I do not think these costs ought to be charged against the unfortunate clients in the case. The order will be that the costs of the original motion

will be allowed, and costs up to and including the filing of declaration be allowed and that costs of this application, excluding the costs of all correspondence and affidavits, be allowed. The rest of the costs will not be allowed.

## ILLIQUID ROLL.

### CHASE AND ANOTHER V RIGG.

This was the return day of a summons calling upon respondent to show cause why she should not be declared incapable of managing her own affairs, and a curator appointed to manage her estate.

Mr. M. Bisset was for applicants; Mr. Sutton appeared as *curator ad litem* of the respondent.

Mr. Sutton said that he had seen the respondent, and he was unable to satisfy himself that she was of unsound mind. He desired that the respondent should come to the Court and be seen by the judge, and suggested that the case should stand over until the 2nd August.

Mr. Bisset said that his clients did not oppose a postponement, but in the meantime it was desirable that some one should be appointed to manage her estate. He suggested that Mr. Coulter should be appointed interim curator.

[Buchanan, J.: He will have power to conserve the estate, but he must not part with any of the assets.]

The matter was postponed until the 2nd August, and Mr. Coulter was appointed curator of respondent's property pending result of the action, and Mr. Sutton to continue as *curator ad litem*.

## GENERAL MOTIONS.

CREAM OF WHEAT CO. V SOUTH AFRICAN IMPOR-  
TERS, LTD. { 1907.  
July 12th.

Trade mark—Unauthorized registration—Expunction.

This was an application upon notice to the respondents to show cause why the Registrar of Deeds should not expunge from the register a certain trade mark registered on the 2nd March, 1905.

Mr. Roux was for applicants; Mr. W. J. van Zyl was for respondents.

From the affidavits it appeared that the plaintiff company (of Minneapolis, Minn., U.S.A.) had been in the habit of selling their cereal food (called Cream of Wheat) to respondents and to no others direct in this country. Respondents complained that other firms were able to sell Cream of Wheat in South Africa, and to prevent this they registered applicants' trade mark. Appli-

cants having read in a certain paper that their trade mark was registered here in the name of respondents, decided to have this registration cancelled, and to apply to have their trade mark registered in their own name.

Having heard counsel in argument on the facts,

Buchanan, J., said that applicants had a trade mark which they wished to register, and which they found they could not now register owing to the previous registration of a trade mark by respondents. From the correspondence it appeared that applicants at no time agreed to appoint respondents as their agents, although they were willing to sell only to them for export to this country. Nowhere did it appear that applicants had in any way given respondents the right to register applicants' trade mark. Notwithstanding that respondents had registered it, and as they had no right to do that, the Court would authorise the Registrar to expunge the mark registered by respondents from the register. Respondents to pay the costs.

*Ex parte* { FERNWOOD ESTATE.  
ESTATE ALBRECHT.  
FRIEDLANDER BROS.

Transfer duty—Cancellation of sale—Act 5 of 1884, sections 18, 20 and 21.

*Where a sale of immovable property is cancelled and no portion of the purchase price has been paid, no transfer duty is payable: but where a portion of the price has been paid, duty is payable on that portion.*

Mr. P. S. T. Jones appeared for the applicants in each matter, and moved for the cancellation of certain sales. The principal question to be determined was whether the applicants were liable to pay transfer duties on the sales which it was sought to cancel, and if so to what extent. Counsel, in argument, cited *Ex parte Sterens* (6 C.T.R., 150), *Liquidators, South African v. Orange Free State Mining Association* (1906, T.S.C., 346), *Scott v. Isaacs* (12, C.T.R., 791), and *Estate Owen* (16, C.T.R., 79, 290, and 439).

[Buchanan, J.: There are three applications before the Court. In each case application is made for the cancellation of certain contracts of sale under the 18th section of the Transfer Duty Act, No. 5, 1884, which reads: "As often as any contract of sale, upon which duty shall be payable, shall be set aside or cancelled, or declared or

made void by the judgment of any competent Court, the transfer duty upon such sale, if unpaid, shall not be payable, and if paid shall be returned." I take it, therefore, that though no transfer duty is payable on a sale cancelled by the Court, the judgment of the Court may impose any condition that seems required by the justice of the case in granting this order for the cancellation of the sale. In the case of the Fernwood Estate, the Court will order that the sale be cancelled without any further condition. The rule will be made absolute, and no condition will be imposed. The effect of the order will be that there will be no transfer duty payable at all. In that case there has been no portion of the purchase price paid. In the two subsequent applications there have been payments made on account. When we look at the two subsequent sections of the Act, we find that the Act imposes a duty upon the transfer of any land from one person to another, but where no transfer is effected, then only in certain cases is the duty payable. Upon the 20th section, it is competent for the purposes of a contract sale by mutual consent to cancel that contract within six months, and if no part of the purchase price has been paid, or no consideration given for the cancellation of the contract, then under section 20 of the Act there is no duty upon such sale. In the case of Albrecht there was no written contract put in, and I do not think that that section applies to Albrecht's case, but it does apply to Friedlander's case. In the case of Friedlander a number of lots of ground were put up by the applicants for sale, a number of them were bought by different people, and on a number of these sales no portion of the purchase price has been paid at all. In regard to these sales, the Court, in ordering the cancellation of these sales, finds that they come under the 18th section, and the rule will be the same as the rule in the Fernwood Estate. All sales by which no purchase price of any kind has been paid will be cancelled under the 18th section of the Ordinance, and consequently no duty will be paid on those sales. In regard to the sales on which portions of the purchase price have been paid, the Court will apply the principle of the 21st section of the Act, which is to the effect that as often as a contract of sale upon which duty is payable shall be by mutual consent cancelled, and a part of the purchase price has been paid, then transfer duty shall be payable only upon the part of the purchase price which has been paid. The 21st section, it is true, is a section by which cancellation takes place by mutual consent, but where persons under written declarations of sale give the right of cancellation, if the conditions

[Applicants' Attorneys: Fairbridge,  
Arderne and Lawton.]

[Before the Hon. Mr. Justice HOPLEY.]

Application granted, oath to be taken before the Registrar of the High Court of Griqualand, at Kimberley.

Hopley, J.: As both counsel are agreed that Mr. Justice Buchanan only postponed the case last time on the understanding that if the notes were not produced to-day, the summons would be dismissed, I think I can only carry out his intimation, and order that the summons be dismissed, with costs.

Mr. Jones: One Gustave Donnian.



Mr. Louwrens submitted that the Court could determine the question on the affidavits. He cited *Bright and Others v. Duricood's Executors* (11 S.C. 357).

Mr. Jones said that it was a long-standing practice in cases of this kind to direct that evidence should be led as to the disputed signature, and he cited *Louw v. Harris and Freeman* (1876, Buchanan, 143).

The matter was set down for the hearing of evidence on the 28th August.

#### OUTDSHOORN BUILDING SOCIETY AND SAVINGS BANK V FRY.

Mr. Howes moved for provisional sentence on two mortgage bonds for £100 and £150 respectively, with interest, bonds due by reason of non-payment of instalments of capital and interest. Counsel also applied for the property to be declared executable.

Order granted.

#### ESTATE ALBERTYN V. WALLIS.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £850, with interest from the 1st January, 1906, bond due by reason of non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable and the rents attached. Service had been made upon defendant's agent, Mr. Cook, of Oudtshoorn.

Order granted.

#### LANIGAN V. FORD.

Dr. Greer moved for provisional sentence on a mortgage bond for £800, with interest from the 1st January, 1907, bond due by reason of non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

#### LANIGAN V. ESTATE LATE DUNWOODIE.

Dr. Greer moved for provisional sentence on a mortgage bond for £1,200, with interest from the 1st January, 1907, bond due by reason of non-payment of interest. Counsel also applied for the property hypothecated to be declared executable and rents attached.

Order granted.

#### STARLING AND CO. V. WAHLBERG.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### ESTATE SMITH V. HARTSHORN.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £450, with interest from the 1st January, 1906, and £1, premium of insurance, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and rents attached.

Order granted.

#### ILLIQUID ROLL.

##### LESLIE V. BAILIE.

Mr. Louwrens moved for judgment, under Rule 329d, for an order upon defendant to render a full, fair, and proper account, duly supported by vouchers, of moneys received and paid out by him on plaintiff's behalf, and of all stock and other goods and chattels belonging to plaintiff which were in his hands or received by him while he was her agent and manager, as from the 1st June, 1906, debate of such account, and payment by defendant to plaintiff of all sums found to be due to her upon such debate.

Order granted, account to be filed by defendant within three months.

#### GENERAL MOTIONS.

*Ex parte* VAN DEN BIGGE- { 1907.  
LAAR. { July 16th.

Mr. Lewis moved for a rule nisi calling upon petitioner's husband, Cornelius van den Biggelaar, to show cause why petitioner should not be admitted to sue him *in forma pauperis* for restitution of conjugal rights, and for leave to sue him by edictal citation. It was stated that respondent's whereabouts were unknown.

Rule granted calling upon respondent to show cause on the 30th August, and leave to sue by edictal citation granted, with leave to serve citation, intendit, and notice of trial at the same time, personal service, failing which one publication in the weekly edition of the "Cape Argus."

#### *Ex parte* GREEN AND CO., LTD.

Mr. Benjamin, K.C., moved to make absolute a certain rule nisi authorising the reduction of the company's capital from £200,000 to £144,000, approving of certain minute passed by the company, and dispensing with the necessity of inserting the words "and reduced" in the name of the company.

Rule absolute.

*Ex parte* CELLIERS.

Mr. H. S. van Zyl moved for an amendment of a certain ante-nuptial contract by the insertion of petitioner's correct name.

Order granted as prayed.

*Ex parte* COETSEE.

Mr. P. S. T. Jones moved for an order for the cancellation of a certain sale of farm property in the district of Philip's Town. The real question in the case was whether applicant was liable to pay double transfer duties.

Rule nisi granted, returnable on the 6th August, rule to be served on the Colonial Government.

*Ex parte* CAPE TOWN STOCK EXCHANGE, LTD.

Mr. Benjamin, K.C., moved for an order authorising the reduction of the subscribed capital from £725 to £475, ten of the 29 £25 shares issued having been bought in by the directors on behalf of the company. The nominal capital of the company is £5,000.

Rule nisi granted, returnable on the 6th August, publication once in the "Government Gazette," "Cape Times," and "S.A. News."

*In re* INSOLVENCY OF NESBIT AND ROWE.

Mr. Douglas Buchanan moved, as a matter of urgency, for the appointment of Marthinus C. Fourie as provisional trustee in the insolvent estate of Nesbit and Rowe, lately carrying on business at Malmesbury as hotel-keepers at the Mineral Baths Hotel.

Order granted as prayed.

WALKER V. BRUNT (N.O.).

Insolvent estate—Trustee—Expenditure by trustee on property of insolvent.

*Applicant's estate had been sequestrated as insolvent. The immovable property consisted of a house in a very dilapidated condition, and respondent, the only creditor who proved in the estate, having appointed himself sole trustee, spent a considerable sum on repairing the property before attempting to realize it.*

*Held, that he was not justified in charging the moneys so spent against the estate as part of the costs of administration.*

This was an application upon notice brought by Mrs. Walker, calling upon the trustee in her insolvent estate to show cause why the account called the first liquidation account should not be amended by striking out an item of expenditure, Glendore Villa, Claremont, £753, with the exception of £2 2s. paid to the "Cape Times" for advertising the sale of the property, and £12 2s. 1d. paid to the Suburban Municipal Waterworks for water rates, why he should not be ordered to file a correct and proper first liquidation and distribution account in the estate of the insolvent, and to pay costs of this application *de bonis propriis*.

Mr. W. Porter Buchanan, K.C., was for applicant; Dr. Greer was for respondent J. O. Brunt.

Having heard affidavits and counsel in argument,

Hopley, J.: The circumstances of this case are peculiar, and, as far as I know, the application, in form, at all events, is a novel one. In June, 1906, Mrs. Walker was in possession as the owner of the house called the Wilderness or Glendore Villa, at Claremont, which she had purchased not directly from the respondent in this case, but through a broker, who had purchased the property from the respondent, and had immediately re-sold it to her. She now says that misrepresentations were made to her as to the state of the property at that time, but of course she must hold to the property such as she found it. She paid something like £4,000 for the property, and I suppose paid £1,000 in cash, and there seems to have been a bond on first mortgage for £3,000. She bought the property with the idea of making a boarding-house of it; but very soon found that, owing to the badness of the times and the defective condition of the property, it was not possible to carry on such an establishment. Matters drifted from bad to worse, and the property also drifted from bad to worse, with the result that in June, 1906, she was compelled to relinquish the struggle. She was sued by the present respondent, Mr. Brunt, on his mortgage bond, and was forced into insolvency. Matters after that went on in the ordinary course. The estate was in liquidation, and meetings of creditors were called. In this particular case the only creditor that has proved at all is Mr. Brunt himself. He was the only one, and elected himself sole trustee. Since such election he has given himself as trustee directions from himself as creditor as to the management of this estate. Well, when he came into

the place he found that the property was in a very unsatisfactory and dilapidated condition, and the question then arose to himself whether he should at once proceed to realise this estate as it stood, or whether he should try to make it look better so as to fetch a better price in the market, or to make it more comfortable to live in? He is living at the house. He says that his idea all along was to sell it. Now comes the question whether in sending in his account and plan of distribution, which he has done after nine months, he is entitled to include a large sum of money which he has expended on the property in putting it into a better state. It is not a small sum, and the principle involved seems to me to be a very important one. In this comparatively small estate this property was put up to auction, and it had fallen into such a state that, although Mrs. Walker had a few years before paid £4,000 for it, the only bid the respondent could get was £1,000. That may be accounted for in more ways than one. Between the two causes, the depression in immovable property and the unsatisfactory state of the property itself, it was probably considered at the time by Mr. Brunt, and rightly considered, very difficult indeed to get rid of the property unless he spent more money upon it. Now, may he charge what he has spent, which amounts to over £750, against the estate, and may he, consequently, say that the liabilities of this insolvent estate have been increased, and fairly increased, by him by the amount of between £700 and £800? In my opinion he has no right to do this, if I may express an opinion upon it at this stage of the account. It comes to this, that practically this is an application to the Court to approve or disapprove of the account and allow it to pass, or otherwise. Now it appears to me that when an insolvent surrenders an estate he surrenders it as it is at the time of his insolvency, and the creditors must make the best of it in their own interests. The liabilities of the insolvent are stated and fixed and determined upon the day of the sequestration, and are not to have subsequent additions by large sums of money, however meritorious the object may be for which they have been expended. I think if such expenditure is incurred at all it must be done by the creditors at their own expense and at their own risk, and, even so, if they do it in such a way that eventually the insolvent is damnified, I should think the insolvent might have some cause of complaint. In this particular case expenditure has been incurred, and I do not think such expenditure ought to be fairly brought up in the account as part of the administration costs of this estate. That being my feeling, the only difficulty I had at the beginning of the case, was as to whether or not

the insolvent had a right to come here and object to the account, but on the whole I have come to the conclusion that it would be an injustice not to allow her to appear to show that a very much larger liability in her estate would be shown upon the account than would be the case if the liabilities were taken at the date she was forced into insolvency. Roughly speaking, she owed £3,000. If this account were allowed to pass, her liabilities would be increased to £3,700, or something like that. It is said that all this will go back to the estate by the enhanced price which will be obtained upon the sale of the property. I do not think that that necessarily follows. There may be a further fall in the property market, and even with this expenditure a lower price than the one which the trustee could have got a year ago might be realised. It is not right to encourage trustees to incur expenditure upon a sort of speculative hope that they will get higher prices for the thing they are about to sell. If all the creditors come together in solemn conclave and undertake to spend money so that the property may have a better prospect at a sale, they may do so, but even so, I do not think they have any right to increase the liabilities of the estate by the amount they may spend. The principle adopted by the trustee is one of which I cannot, as at present advised, approve. I think it would be unfair not to allow a person in the position of the insolvent to come and point out this state of affairs, and to ask the Court not to allow the account and plan to go through and be confirmed, and become a judgment of this Court without protest. If I were ruling finally upon this point, I should strike that item out by cutting it out of the account, but there has been a sort of consent, leading to a course of conduct which I think will facilitate the course of the liquidation of this estate, and which will be in the interests of all parties, so that I do not feel disposed in view of such consent to make a final order in regard to those items. Mr. Brunt has consented, through his counsel, to take the direction of the Court as to how he should proceed with this estate, and I think that, in accordance with previous rulings of this Court, I should direct that he do not further delay and speculate as to the rises and possible good prices and good offers that he might procure. They may never come. The Court has held more than once that it is the duty of trustees to realise promptly even if they have to do it at such prices as seem ruinous at the time; if the creditors chose to wait they may wait but only a reasonable time. In this case considerable time has elapsed, and I think that the direction of the Court, which I should be willing

to give, and which the trustee says he is willing to abide by, is that he proceed to sell this property within the next two months. I say nothing about these disputed items at the present moment as a final judgment. They ought to be cut out of this account. They may be brought up again in the final account, but I think it would be wise on the part of the trustee not to include them. The costs of this application will stand over until the final account is filed. If the respondent leaves out the items altogether, then I think he should pay the costs of this application. The order of the Court will be that, by consent the respondent undertakes to realise the house Glendore Villa within two months, the disputed items are to be expunged from the present account, and may, if respondent is so advised, be raised in the final account, costs to stand over to abide the ruling of the Court on such final account. If, however, the items are abandoned as against the insolvent estate by the respondent, then the respondent pay the costs *de bonis propriis*.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Van Zyl and Buissinné.]

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* GARLICK AND ( 1907.  
OTHERS. ( July 17th.

Dr. Greer moved, as a matter of urgency, for the appointment of Gother Mann (general manager and secretary of the South African Association) as provisional trustee in the insolvent estate of J. and A. Rae, trading in Strand-street, Cape Town, pending the appointment of a trustee or trustees, with leave to the provisional trustee to carry on the business.

[Hopley, J.: This is a very skimpy petition. The insolvents are hardware merchants, and this is not a case in which the assets might be destroyed if a provisional trustee were not appointed. One of the creditors asks for the appointment of a manager of an estate association to carry on a business which the insolvents themselves who may be presumed to understand their business, have been unable to carry on at a profit.]

Dr. Greer pointed out that the petition was presented by John Garlick and others. He took it that there were other creditors,

[Hopley, J.: I do not see any other creditor mentioned in the petition. It is a petition by Mr. Garlick's manager, Mr. Morton.]

Dr. Greer: It would be to the interests of the creditors to carry on the business as a going concern.

Hopley, J., said that he was by no means satisfied on that point. It was quite possible that it would be the best thing for the creditors that the business should be closed for the present.

Dr. Greer: The creditors, apparently, do not think so.

[Hopley, J.: One of them does not.]

Dr. Greer asked his lordship if he would be prepared to allow the matter to stand over for further particulars?

Hopley, J.: I should like to know the amount of the liabilities, the number of creditors, who are joining with the petitioner, and whether the vast bulk of the creditors are in favour of this risky proceeding. I cannot grant anything on the present petition.

### CAPE TOWN TOWN COUNCIL V. BOOSÉ.

This was an application to make final a provisional order granted on the 3rd July for the sequestration of the defendant's estate.

Petitioners alleged that defendant was indebted to them in the sum of £111 15s. 5d., being the amount of a promissory note for Municipal rates for 1905, with interest, and taxed costs of certain proceedings in the Magistrate's Court. There were also rates due for 1906 and 1907, and water charges. Petitioners held no security for the claim or any part thereof. The only asset which the defendant had been found to be possessed of was landed property in Roeland-street, Cape Town. Petitioners believed defendant was possessed of certain shares or mining rights. The market value of the property in Roeland-street could only be taken at £2,750, and it was mortgaged in two sums of £5,500 and £4,500. The former bond was held by the Church of the Province of South Africa.

Defendant denied that he was insolvent or that it would be for the benefit of his creditors that his estate should be placed under sequestration. He had now pending an action in this Court in which he claimed £16,000, which action he was prepared to carry to a legitimate conclusion. But for this action, the present proceedings would not have been commenced. Defendant also said that he had paid £10 on account of the rates. He added that he had been in good expectation that the provisional order would be superseded.

Petitioners, in replying affidavits, said that the negotiations carried on with a view of having the provisional order



superseded failed because defendant had not provided security. They denied that they had obtained the provisional order because of the action commenced by defendant against a third party. As to the payment of £10 by defendant, portion had been applied to payment of water charges on property at Sea Point, and the rest was put to his credit in the books.

Mr. Douglas Buchanan was for applicant; Mr. Rowson was for respondent.

Mr. Rowson, with the indulgence of the Court, read a further affidavit by defendant, in which he said that he had an interest in the Kensington Estate, Maitland. He appended a balance-sheet and claimed that he was not insolvent. Counsel argued that, in estimating the value of the defendant's assets, the applicants were not justified in taking the price that the property would fetch at a forced sale.

[Hopley, J.: Then what should we value property on?]

Mr. Rowson: On what it would fetch in normal times.

[Hopley, J.: But what are normal times, and when? Some people think that property will go still lower, and others are hoping that it will improve. How are we to know that normal values are not prevailing to-day?]

Mr. Rowson said that they could not take present values as normal.

Hopley, J., said that he was by no means sure whether people would not be ready to take property at a gift if the values continued to fall so much, and the rates continued to rise to such an extent.

Mr. Rowson said that he would like to get hold of some property on those terms.

Hopley, J., said he did not say that it had taken place, or that it would take place, but he could quite imagine that such a state of things might happen, say, in regard to a cottage at Maitland.

Mr. Rowson urged that the defendant had put reasonable valuations on his assets, and that the balance-sheet disclosed assets at £16,036, showing a balance in favour of defendant of £621 5s. 6d. Counsel went on to argue that the applicants had agreed to accept the South African Association, representing the first bond-holders, as debtors for the rates, the association having taken over the collection of the rents. The association had not shown that they did not take over the liability to pay the rates when they took over the *fructus* of the property. Mr. Rowson submitted that the applicants had not satisfied the requirements of section 3 of Act 38, 1884, by setting out the grounds on which they believed it would be for the benefit of the creditors that defendant's estate should be sequestrated. He contended that Mr. Boose

should be allowed an opportunity of fighting out his claim against the Muizenberg Syndicate.

Without calling upon Mr. Buchanan,

Hopley, J.: This is an application under Act 38, 1884, and it sets forth clearly enough in the petition that the petitioner considers that respondent is insolvent, and asserts that it would be for the benefit of his creditors that this estate should be sequestrated. At the time of the original petition he set forth that the respondent had certain property in Roeland-street, the present value of which was something under £3,000, or, at all events, the municipal value was less than £3,000. The actual value may be taken as somewhat higher; but there are two bonds against the property, which, irrespective of interest, amount to £10,000. On that asset alone there is hopeless insolvency disclosed. Petitioners also said that they believed that the respondent had something in the way of mining shares, but that they were not aware that he had any other property. One of his complaints is that they did not at that stage search the registers of the Colony to find out whether he had any more property. As far as I can see, what he says is that, had they searched in the Deeds Registry, they would have found that there was a thing called the Kensington Estate, Maitland, in which it is said that defendant has one-twelfth interest, but I don't know how anybody, even by minute searching, would have found that his name was mixed up with the Kensington Estate, Maitland. It seems to me that the onus lies upon the person attacked, the respondent, when it is alleged that he cannot pay his debts, of pointing out assets which would change the balance from one of insolvency to one of solvency. Defendant now puts in a statement of his affairs, in which he attempts to show assets larger than the liabilities which he admits. He admits liabilities amounting to £15,414, but he says that he has assets exceeding that amount, and he brings up his interests in the Kensington Estate at £9,920. I cannot possibly in these times take that as being anything like a proper valuation of that holding. There is nothing in the world here to show that that £9,920 is not an absolutely fantastic valuation at the present time. I cannot look upon values which prevailed at times of greater prosperity, when there was active speculation in land going on, as being the proper criterion. I cannot make a creditor wait for what defendant's counsel calls "normal times," and I cannot hold as a matter of common-sense that, because a few plots at Maitland have been sold for £28, the whole would work out at that figure, so that the price they would get would be something like £9,000 or £10,000. It



seems to me that that is not a fair valuation, it is not business-like, it is not practical, and it is not common-sense. As to the other items in the balance-sheet, I do not see how I can accept them at all. If I take the value of the land alone at present land prices, it seems to me that there is no ignoring the fact that defendant is absolutely and hopelessly insolvent at the present time. The Town Council have offered to withdraw proceedings if the defendant pays the costs or provides security for the costs, but even that the defendant has not been able to do. It is said that he has a large claim against a body called the Muizenberg syndicate. It is impossible for me to consider things of that sort. It may be a claim that will succeed wholly or partly, or it may be a claim which is utterly hopeless, and then again it may be against people who are substantial or who are wholly unsubstantial. I do not know what the nature of the claim is, and all I can say is that I do not think I can take it into consideration. If it is a substantial claim founded upon good legal grounds against a company that is substantial and worth going against, then if his estate is made insolvent the trustee may take up the claim. I cannot help feeling that the defendant, as a matter of fact, is in a hopeless state of insolvency at the present moment, and that a final order of sequestration should be granted. Final order granted, with costs, including costs of yesterday's postponement.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorney: E. J. Sydney.]

#### BLUMENFELD V. FIELD AND CO.

This was an application brought by Sophy Blumenfeld upon notice to Louis Klaas and George Wallis, carrying on business at Oudtshoorn as L. Field and Co., to show cause why Louis Leopold Leonard Nel should not be appointed provisional trustee in the insolvent estate of Isaac Klaas, with full power to administer and liquidate the estate. In a cross-application, respondents asked the Court to appoint J. A. Foster and J. R. King as joint provisional trustees.

From the affidavits, it appeared that the applicant, who is the insolvent's wife, and who was proceeding in her maiden name, claimed against the estate for the amount of a settlement made to her by insolvent under the ante-nuptial contract. She said that she represented the majority of the creditors in value. Respondents said that they represented the majority of the creditors in number. Hence the deadlock. In the course of the affidavits, questions

were raised as to the *bona fides* of certain claims which had been filed, and it appeared that the trustee or trustees would have some rather delicate problems to solve. The insolvent also filed an affidavit in which he denied that his estate was insolvent.

Mr. Upington was for applicant; Mr. Benjamin, K.C., was for respondents.

Hopley, J., suggested that the parties should agree to the appointment of Mr. Foster as sole trustee.

Mr. Upington thought the best course would be to appoint some outsider altogether.

[Hopley, J.: Very well; I think so, too, if you can only suggest a name.]

Mr. Upington said that he was unable to name anyone, and that his attorneys were not in court.

Hopley, J., said that they ought to have been.

The matter was allowed to stand over until to-morrow at 11 o'clock, and his lordship suggested that in the meantime the parties should endeavour to come to some arrangement.

[The Court did not sit on July 18th.]

#### KRAMER V. INSOLVENT ESTATE KOPELOWITZ AND CO.

This was an application brought by R. Kramer upon notice to the trustees in the respondent estate to show cause why applicant should not be given leave to purge default in an action instituted by the respondents against him, why the filing of plea should not be allowed to stand over pending Mr. Kramer's return from England, and why respondents should not pay costs of this application.

From the affidavits, it appeared that Mr. Kramer had in May last been ordered to Carlsbad for treatment, and that he was expected to return to this colony during August. It was impossible to draw the plea without instructions from the applicant. Respondents desired that the case should be heard during the August term. The estate, they said, would be prejudiced by the action being hung indefinitely up.

Mr. Schreiner, K.C. (with him Mr. McGregor, K.C.), was for applicant; Dr. Greer was for respondents.

Mr. Schreiner said that in February an action was commenced by the trustees to have Mr. Kramer declared a partner in the firm of Kopelowitz and Co. That action, however, was withdrawn, and subsequently a fresh summons was issued on the very day Mr. Kramer left by the mail steamer, viz., the 22nd May. The summons was vague, and later a declaration of an elaborate nature was issued, and it was impossible to answer that declaration in the absence of the defendant, who was expected to arrive in the Colony on the 20th August.

Dr. Greer said that the trustees were acting in a fiduciary capacity, and they desired the case to be heard at the earliest possible date. They had barred the defendant, and had come to the Court so as to get terms imposed upon the defendant. Counsel urged that the defendant should be put to terms to plead within a certain period after his return.

Mr. Schreiner submitted that the respondents should be ordered to pay the costs. Large costs had been unnecessarily incurred by reason of respondents' attorneys' unreasonable attitude.

Hopley, J.: In this case I think there must be leave granted to purge default and to plead. I think the plea should be served before the 31st August, if possible, unless the defendant comes with a request for further time upon good cause shown. The matter that troubles me most is the question of costs. In one respect, of course, the plaintiffs have the right to use the rules of Court so as to bring on litigation promptly, and even perhaps keeping within the rules laid down, to force the other side to come to terms. On the other hand, I personally do not like to encourage anything like an unnecessary putting into force, an almost tyrannical putting into force, of the rules of Court. Each case has to be considered on its merits, and in this case there is a great deal to be said for the point of view that the rules were not made to deal with a case like this where a person is not wilfully in default, but is forced to go away by reasons of health on the advice of his medical advisers. In such cases the rules of Court ought to be enforced with some sort of discretion, and if they are not, I would, as a rule, feel inclined to inflict the costs on the party so using them in a too stringent way. On the other hand, when a party who is in default craves leave to purge default, he is generally the person who has to pay costs. In the present case I think the party so craving the indulgence of the Court has very little blame to be attached to him on account of the state of his health, and on account of the way in which the pleadings were served. Still, I think that the respondents have not behaved in such a way as necessarily to make them liable to pay the wasted costs, and I think the wiser course would be to make the party that is unsuccessful in the long run pay these costs. The order will be that costs be costs in the cause.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

1907.  
{ July 23rd.

Mr. Pohl moved for the admission of David Gideon Conradie, as an advocate. Application granted, and oath administered.

Mr. W. Porter Buchanan, K.C., moved for the admission of Wilfred Brinton as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Mount Fletcher.

Mr. Upington moved for the admission of Cornelis Krog-Scheepers as an attorney, notary, and translator.

Application granted, oaths to be taken before the Resident Magistrate of Jansenville.

## PROVISIONAL ROLL.

LUNTZ BROS. V. HOVELMEIER.

Mr. Watermeyer moved for the final adjudication of defendant's estate as insolvent. Amended service by registered letter had been made as directed by the Court.

Order granted.

THESEN AND CO, LTD. AND OTHERS V. STEYN AND KOTZE.

Mr. Gutsche moved for the final adjudication of the partnership estate as insolvent.

Order granted.

STOFFBERG V. MARAIS.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £1,014 6s. 7d., due by reason of notice having been given, and for the property hypothecated to be declared executable.

Mr. Bissot opposed the application on behalf of defendant, who resides at Rooikopedam, Fraserburg. In an affidavit, defendant said that she considered she owed plaintiff £706 10s., less £200 paid on her behalf by Mr. Botes. She denied that she had received notice from plaintiff calling up the bond, or that he was entitled to claim £1,014. The farm, she said, was worth considerably more than the amount of the bond. From a letter sent by plaintiff to defendant, it transpired that the parties are brother and sister. Counsel also read affidavits by Attorney A. J. Botes and Attorney Jacobsohn.

Mr. Louwrens read a replying affidavit by plaintiff, who entered at some length into the transactions he had had with defendant, and said that she had met her indebtedness to him by a payment of £200 cash through Mr. Botes (her attorney), and by passing a mortgage bond for £1,014 6s. 7d. on the farm Rooikopsdam. At the time the bond was passed, defendant was truly indebted to him in the sum of £1,014 6s. 7d. The farm, if put up to auction, would not realise the amount of the bond and arrear interest.

Mr. Bisset read a further affidavit by defendant, in which she denied any knowledge of certain transactions alleged by plaintiff to have taken place between himself and defendant and her late husband. Counsel, in argument, contended (1) that no clear and unequivocal three months' notice had been given by plaintiff calling up the bond; (2) that, even if such notice had been given, it was waived by the subsequent conduct of the parties; (3) that in any event there was a complete novation of the debt on the bond and interest, inasmuch as plaintiff stated that he had purchased the farm, and (4) that the widow was not indebted to the plaintiff in the sum of £1,014, the amount of the bond. Plaintiff, he submitted, ought to be ordered to go into the principal case. A sum of £300 had been brought up twice over against the widow.

Mr. Louwrens contended that the letter in Dutch sent by plaintiff to defendant could only bear the interpretation that he gave her notice that he was calling up the bond. He gave her three months' time in which to raise the capital, and said that if she did not raise the capital he would take over the farm for the amount of the bond. Counsel submitted that there had been no waiver, and that it was clear defendant was indebted to plaintiff in the amount of the bond.

Hopley, J.: In this case, if the matter had been merely as to the amount that was due, the point that had taken up most of the time of the Court, I should have had no difficulty in granting provisional sentence, because it seems to me that when a person comes with a liquid document of this sort, which acknowledges clearly that a certain sum of money is due, it wants very much stronger and clearer evidence than has been set up for the defence here to convince the Court that provisional sentence should not be given for the amount sued for on the liquid document. But there are other defences raised here, and one is that there was no clear notice that this bond was to be called up, and if there were a clear notice there was an entirely new set of affairs set up by a novated contract of a different nature from the one arising under the document. With re-

gard to the waiver and the novation, I think they may be taken together. I do not think I should have refused provisional sentence on the ground of either of them, because it hardly lies in the mouth of the defendant to come here and say there was no sale and no arrangement that I should recognise, and yet because there was such sale and such arrangement argue that there was a novation or a waiver. I do not think I should have been impressed with those arguments, and the only thing that has given me any trouble is the form of the alleged notice in the present case. It is a condition of this bond that it shall be payable on three months' notice being given that it must be paid. Now, the plaintiff comes into court in the present case and says that he has given this three months' notice and that, therefore, he is entitled to judgment. Without such three months' notice he cannot claim that he is entitled to judgment. Therefore, we have to find whether he has at any time given a clear and unequivocal notice to the defendant to pay him this money. The bond was passed in October, 1903, and on the 4th January, 1907, there was a certain amount of interest overdue, an outstanding amount, and also the current year's interest, in all about £100, and on that date, the 4th January, the plaintiff wrote to the defendant, who is his sister-in-law, in the Dutch language, a letter which it seems to me has been fairly translated by the translator, in which he says: "I must remind you that on the 1st April the interest must be paid." He says "remind you," but I suppose he means, "I must lay down this condition to you." He goes on: "One year is in arrears and this year, that makes £100. Pay me the £100 and further the interest every year, I shall not call up the bond." That is clear. It is in the future tense in the original: "Betaal my de honderd pond en verder elke jaar de rente ik zal u de verband niet vragen." Then he goes on: "Maar als u my de rente de eerste April niet betaal dan zeg ik u de verband op en geef de verband aan Botes over en ik laat u dag vaar." He says: "But if you do not pay me the interest on the 1st April I shall call up the bond and give over the bond to Botes and have you summoned." Now, the two latter things, at all events, must be in the future tense. "If you do not pay me on the 1st April, then I shall hand over the bond to Botes, and I shall have you summoned." Now, those two tenses are used in exactly the same way as the verb in that portion of the sentence relating to calling up the bond. If the words quoted mean "then I shall hand over the bond to Botes, and then I shall have you summoned," then also the words which give the notice calling up the bond, as alleged, must mean

"then I shall call in the bond." If that is so, then if she does not pay by the 1st April he will have the bond called in, and he has never done so. It seems to me he has never said to her, as he might have done on the 1st April, "I now call in the bond." If he had done so he must still have waited three months before summoning her. Or he might have worded his letter differently, saying: "This is a notice that I do call up this bond, but I give you this opportunity, in which case I will let this notice lapse if you pay the interest on the 1st April." It seems to me he has never gone further, and that he has not brought the defendant properly before the Court in terms of the bond, and that provisional sentence must be refused, and, as he has not taken the proper steps, it must be refused with costs, including costs of postponement.

#### KING V. ESTATE JACOBS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £425, with interest at 9 per cent. on £205 9s. 9d. from 29th March, 1906, and on the balance from the 3rd August, 1906; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### FRANK V. ESTATE LOTTER.

Mr. Bisset moved for provisional sentence on a promissory note for £136 16s. 8d., with interest from the 1st January, 1907, and costs.

Order granted.

#### HODGSON V. HARRIS.

Dr. Greer moved for provisional sentence on a mortgage bond for £1,500, with interest from the 1st January, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and rents attached.

Order granted.

#### CAPE TIMES, LTD. V. CRANE.

Mr. Bisset moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £451 5s. 6d., with interest and £7 4s. 1d. taxed costs.

Defendant did not appear.

Decree granted, with costs.

#### WICHT V. BIRCH.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond

for £1,000, with interest from the 25th February, 1905, less £12 paid, and for £7 premiums of insurance, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and rents attached.

Order granted.

#### GRAAFF V. SHATZKY.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £3,600, with interest from the 1st July, 1906, and for £7 premiums of insurance; counsel also applied for the property hypothecated to be declared executable and rents attached.

Defendant admitted that the bond had become due. He said that he was without money, and that the property was unlet. He handed in a statement, from which it appeared that he had no objection to the sale. He ascribed his position to the depression.

Order granted.

#### BURMEISTER V. EXECUTORS ESTATE VAN RENSBURG.

Mr. W. J. van Zyl moved for an order upon the executors to forthwith frame and lodge with the Master of the Supreme Court a full and true account. Counsel (in answer to the Court) said that the action was really brought under Rule 329d, although it appeared as a provisional case.

Hopley, J., said that the wrong procedure had apparently been adopted. Plaintiff was not suing on a liquid document. When defendants were in default, plaintiff could have the case set down under Rule 329d.

The matter was ordered to stand over to enable plaintiffs' attorneys to look into the question of procedure.

#### PRICE BROS. V. DE KLERK.

Mr. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### OHLSSON'S CAPE BREWERIES, LTD. V. FERGUSON.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Mr. Buchanan also moved for the appointment of G. W. Steytler as provisional trustee in the insolvent estate, with power to carry on the business.

Order granted.

CAPE DISTRICT MUTUAL BUILDING SOCIETY V. ESTATE BRETT.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £177, with £7 4s. fines in terms of bond, and 7s. insurance premium, bond due by reason of non-payment of instalments; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

CLOETE V. SMUTS. (1907. July 23rd.

Mr. Upington moved for judgment, under Rule 329d, for payment of £76 6s. 3d., less £40 paid on account, for gravel supplied off plaintiff's farm Silverhurst, Constantia, during 1906, and for cancellation of a certain written authority to defendant to excavate and remove gravel from portion of the said farm, with interest and costs.

Hopley, J., said that he did not see how he could grant an order for cancellation on this application.

Mr. Upington said that defendant had had full notice that the cancellation was asked for, on the ground that the authority had become void by reason of his non-payment of the moneys due.

Order granted as prayed.

CAPE TIMES, LTD. V. FITZGERALD.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £37 9s. 4d., for goods sold and delivered, with interests *a tempore morae* and costs.

Order granted.

REHABILITATIONS.

Mr. Marais applied, under the 117th section of the Insolvent Ordinance, for the discharge from insolvency of Henry Stevenson.

Granted.

Mr. Howes applied, under the 117th section of the Ordinance, for the discharge from insolvency of John Charles Pritchard Eedes.

Granted.

GENERAL MOTIONS.

IRWINE V. GOLDSMITH. (1907. July 23rd.

Mr. Toms moved for the release of applicant, Alto Irwine, from civil imprisonment for disobedience of a decree directing him to pay 5s. a month in satisfaction of a debt.

Mr. H. S. van Zyl appeared for respondent to consent upon certain conditions.

Ordered that the applicant be released from civil imprisonment upon payment of arrear instalments due to respondent, it being understood that the writ of civil imprisonment is still of force, and may be enforced at any time when defendant is in default with his payments of 5s. per month, applicant to pay costs of this application.

*Ex parte* KELLY.

Mr. P. S. T. Jones (with him Mr. Watermeyer) moved for leave to petitioner to sue R. P. Houston, Ltd., *in forma pauperis* for £500 damages owing to injuries sustained by petitioner while a member of the crew of the S.S. Heraclides, and also for £15 wages.

Petitioner sustained his injuries in an accident at Angra Pequena, caused, he alleged, by the negligence of the respondents or their servants.

Rule granted, returnable on the 6th August.

*Ex parte* STEINHOBEL.

Mr. W. J. van Zyl moved for the amendment of a deed of transfer and mortgage bond by the insertion of petitioner's full name.

Order granted as prayed.

*Ex parte* STIGLINGH AND ANOTHER.

Mr. Toms moved for an order authorising payment of certain money unencumbered. The only other person who had an interest in the money consented to the application.

Order granted.

BLUMENFELD V. FIELD AND CO.

This was an application brought by Sophy Blumenfeld upon notice to Louis Klaas and George Wallis, carrying on business at Oudtshoorn as L. Field and Co., to show cause why Louis Leopold Leonard Nel should not be appointed provisional trustee in the insolvent estate of Isaac Klaas, with full power to administer and liquidate the estate. In a cross-application, respondents asked the Court to appoint J. A. Foster and J. R. King as joint provisional trustees.

Mr. Upington was for applicant; Mr. Benjamin, K.C., was for respondents.

The matter had previously been before the Court, and was standing over for the nomination of an independent person to be agreed upon by the parties.



Mr. Benjamin now said that he was instructed to press for the appointment of Messrs. Foster and King, or Mr. Timothy Smith.

Mr. Upington said that he was instructed to press for the appointment of Mr. Nel or Mr. Timothy Smith.

Hopley, J.: I think that Messrs. Foster and King on the one side, and Mr. Nel on the other, are both open to objection, and that a party has been found who will meet all the requirements of the case. I, therefore, direct that Mr. Timothy Smith be appointed provisional trustee in this estate, with power to liquidate it, costs of both parties to come out of the estate.

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*Ex parte* LINDSAY.

Mr. Marais moved, on behalf of the petitioner, for leave to sue her husband by edictal citation for restitution of conjugal rights, and for a declaration that a certain power of attorney is irrevocable. Petitioner alleged that while she was living with respondent at Ceres, in July, 1905, he left for America, and deserted her, and she was informed that he was now teaching at an academy in Boston, U.S.A.

Leave granted to sue by edict for restitution of conjugal rights and other relief, as prayed, citation, intendit, and notice of trial to be served together, personal service, citation returnable on the 24th October.

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## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

*In re* INSOLVENT ESTATE } 1907.  
BOYD. } July 24th.

Dr. Greer moved, on the petition of certain creditors, for the appointment of G. W. Steytler and Johannes van der Horst as provisional trustees in the insolvent estate of Charles Boyd, of the Lord Milner Hotel, Woodstock, with power to carry on the business pending the election of a trustee.

Order granted.

IMPERIAL COLD STORAGE AND SUPPLY CO., LTD. V. DISTRIBUTING SYNDICATE FOR COLD STORAGE.

Appeal to Full Court—Interlocutory order.

*A divisional Court of the Supreme Court can allow an appeal to the Full Court on an interlocutory order.*

This was an application for leave to appeal to a full Court from a judgment of Mr. Justice Maasdorp, delivered on the 19th June last.

It appeared that the Registrar, or his deputy, had declined to accept notice of appeal on the ground that this was an interlocutory matter, and that it was not competent, by section 27, Act 35, 1896, to accept the notice except by an order of the Court.

Mr. McGregor, K.C., was for applicants, the Distributing Syndicate; Mr. Schreiner, K.C. (with him Mr. Burton, K.C.), was for respondents, the Imperial Co.

Mr. Schreiner said his submission was that the procedure by which the referee placed a case before the Court for decision on certain points, and the Court made an order thereon, was interlocutory, and it was never contemplated by the parties that the matter would be protracted to a further stage by appeal. The respondents desired to have a decision from the Court as to whether this was an interlocutory order.

Maasdorp, J., said that he did not see what was to be gained by refusing leave to appeal to the applicants, and, furthermore, he was inclined to the opinion that the order was final.

Mr. Schreiner pointed out that large sums were involved, and if this matter went from the Divisional Court to the full Court, and then to the Privy Council, it meant that it would be hung up for a considerable period.

Maasdorp, J., said it would still be open to the respondents to raise the question as to whether it was an interlocutory matter when it came before the Court of Appeal.

Mr. McGregor submitted that this was not an interlocutory matter and, even if it were, the Court had full discretion to give leave to the applicants to go to the Appeal Court.

Maasdorp, J.: Whatever the result of the argument might be, I would grant leave upon an interlocutory order. Leave will be granted to appeal, costs to be costs in the cause.

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JANSEN V. VAN DER MERWE.

This was an application upon notice to respondent to show cause why an

order should not be granted authorising the Taxing Officer to tax and allow as costs between party and party an amount of £24 4s. paid by applicant to one J. P. MacMillan, an engineer, who had sworn certain affidavits.

The matter arose out of an application on motion brought by applicant for an interdict against respondent, re- for an interdict against respondent restraining him from proceeding with certain works in the Sunday's River, New Bethesda. The Taxing Officer only allowed £2 2s., as far as MacMillan was concerned, as a fair and reasonable charge for preparing plan. He declined however, to allow the witness's qualifying expenses. No objection was made at the time the Court made its order for the qualifying expenses of the engineer.

Mr. Burton, K.C., was for applicant; Mr. McGregor, K.C., was for respondent.

Mr. Burton, in argument, referred to *Wynberg Municipality v. Clayton* (3 C.T.R., 200).

Mr. McGregor cited *O'Shea's case* (12 S.C., 146), and *Kennedy v. Port Elizabeth Harbour Board* (5 E.D.C., 337).

Maasdorp, J.: I do not think that the decision of the matter in which this case arose depended at all upon any expert or technical evidence. The Court did not there decide between the respective merits of two sets of works that were in competition. Any sketch or picture of the ground made by an intelligent person would have served the purposes of the Court. It was suggested at the time that for future purposes it might be necessary to have the assistance of skilled people, in order to help the parties in such works as they might find it necessary to construct, but the whole of the case went off upon the ground that the respondent had entered upon the land of the applicant, and was constructing large works without having given notice to the applicant, or without having obtained his consent, and that the Court would not allow such large works to proceed. It was said at the time that in all probability the works might be mischievous and damaging to the plaintiff, but that did not depend upon information that the Court received from any skilled engineer in the matter. I have no doubt that the evidence of this particular witness was very useful to the Court, but no more so than that of the other gentlemen of experience who put in their affidavits in the matter. There are no such special circumstances in this case as would induce the Court to allow the qualifying costs of this witness, and the application must be refused, with costs.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

MOTLHABANE V. MATOLO. } 1907.  
July 25th

This was an application brought by Kgantlapane Motlhabane, Chief of the Batlapins, in British Bechuana land, upon notice to Solomon Matolo to show cause why he should not be ejected from certain premises at Manthe and interdicted from using a certain church and house there situate.

Applicant, in his petition, set out the grounds on which he claimed to exercise criminal and civil jurisdiction at Manthe under the findings of the Land Commission presided over by Sir Sidney Shippard. He drew attention to paragraph 43 of the Land Commission's report. About 16 years ago deponent entered into negotiations with the respondent to become minister, Matolo representing that he was a minister of the London Missionary Society. Deponent gave him permission to occupy a dwelling house and church. Matolo, however, gradually began to arrogate to himself certain authority never contemplated. Deponent had had to reprimand him for his conduct. About three years ago he had to warn Matolo for publicly questioning certain of his decisions and rulings. Thereafter Matolo, by secret and underhand methods, attempted to undermine his authority. Deponent had lately learnt that Matolo had no connection with the London Missionary Society, and he was not responsible to any body whatsoever. He had lately succeeded in undermining petitioner's authority to a large extent, and had succeeded in alienating his brother-in-law and his (petitioner's) young son. Petitioner had given him verbal notice to quit, but this Matolo had ignored. Instead of forcibly removing him and thus perhaps causing a disturbance, deponent preferred to seek the aid of the Court, and he prayed for an order for the ejectment of respondent and an interdict restraining him from using the said church and from entering Manthe or its precincts without petitioner's permission.

Respondent, in a replying affidavit, denied that petitioner held in trust for his people all the land at Manthe aforesaid. He denied that he had represented himself as being a duly authorised representative of the London Missionary Society. Petitioner informed him that a large section of the people were antagonistic to the society, and that he personally was also against the society. Deponent was an ordained minister of the Independent or Congregational Church. The house was the property of deponent, and the congregation

owned the church. He denied that petitioner had any right to order his removal, and said that that right was held only by his congregation. Respondent went on to say that petitioner had shown malice towards him, and to deny that he had done more than give friendly advice as a counsellor to the petitioner. The church he conducted had over 300 adherents. There was a feud amongst the members of the petitioner's family, but deponent had no part in this. He had not received verbal notice to quit. The consequences of his removal might be extremely serious.

An affidavit by petitioner's attorney, Mr. De Beer (Messrs. Rosenblatt and De Beer, of Vryburg) was also read, from which it appeared that it had been agreed that in case an ejection were granted any sums of money disbursed by respondent or property occupied by him should be repaid to him, and that the amount payable should be determined by arbitration before the Resident Magistrate of Vryburg.

Mr. Howes was for applicant; Mr. Benjamin, K.C., was for respondent.

Hopley, J., raised the question of whether the Court could on motion dispose of this matter.

Mr. Howes submitted that the matter was one that could be dealt with on affidavit.

Mr. Benjamin said his submission was that the matter could not be decided on motion, and that applicant should be ordered to proceed by action.

[Hopley, J.: It seems to me that it is impossible to judge of the rights of the parties upon a procedure of this kind. It may be that the chief is the fractious man and not the missionary. It may be that the chief has a perfectly good cause. He may not be the first ruler or the first king that has taken a priest on his shoulders and cannot get rid of him.]

Mr. Benjamin said that the chief held the land in trust for the benefit of the inhabitants, but he was not entitled to drive away any of the inhabitants solely upon the exercise of his despotic will. There was nothing to show that the chief had the right to eject the respondent from the house or restrain him from using the church. Petitioner had not even made out a *prima facie* case in support of his application.

Mr. Howes submitted that the affidavits would show that there was not the slightest doubt as to the property in the house and church. Respondent was an Ethiopian.

Hopley, J.: Without going deeply into the merits, and without deciding as to the admissibility of the affidavits on both sides, which are objected to by the respective counsel, it seems to me there is quite enough disclosed on the first two affidavits that have been read to show me that this is not a case in which the Court should proceed to an

order of ejection merely on a motion of this sort. In this case we have the chief of a native tribe in Bechuanaland, living on land which he holds under a decision of the Land Commission, as trustee over the members of his section or tribe, asking the Court to eject from that land a native minister of the Gospel, whom he himself introduced to that land, and established there some 16 years ago. Respondent has been labouring there, and seems to be, as far as the affidavits show, a most successful religious leader there. It is clear that if the respondent did come there some 16 years ago, he must have come there on some sort of contract. One of the things that would have to be discovered, and which cannot possibly be discovered on motion, is whether this contract has been clearly and properly carried out by the respondent. The application will be refused, applicant to proceed by action, costs to be costs in the cause. If no action is brought within three months, applicant must pay the costs of these proceedings.

#### COLLISON V. VAILE.

This was an application upon notice calling on the attorneys of the plaintiff to show cause why an order should not be granted postponing the action indefinitely until the matters pending between H. C. Collison and the defendant in England have been decided, or why a commission *de bene esse* should not issue to take the evidence of the defendant in London. The action was for an amount of £4,440, which the plaintiff company claimed on an account from the defendant, who up till recently was vice-chairman of the company, and was still a shareholder of the company. The moneys were alleged to be due by him to the company, which they said were illegally withdrawn from the company for his own private purposes in Johannesburg. The defendant said that Harry C. Collison was really to all intents and purposes Collison, Limited. As soon as Vaile went to England, which he did by arrangement with the company, Collison served a writ against him for the £7,500, being an amount of money which Collison said he had to pay on behalf of Collison, Limited, which the defendant indemnified. There was a further action by Vaile against H. Collison in London, and he wished a stay of proceedings at the Cape until the actions were decided in England. The affidavits of the applicant set out that he had a complete defence to the action on the merits. The action, although brought in the name of the company, had been instituted by one Harry Collison, who controlled a bare majority in the voting power over the

defendant and his friends. As soon as he arrived in England he was served with a writ for £7,550 paid by H. Collison to the Standard Bank, with a guarantee given by him in respect of an overdraft by the plaintiff company, which sum Collison alleged the defendant was liable to indemnify. The defendant's presence in England was necessary until the pleadings of the case were closed. Unless there was a postponement he would be seriously embarrassed in the conduct of his defence.

The replying affidavit of Mr. W. T. Buissonne, whose firm was acting for the plaintiff, stated that summons in the case had been issued on the 18th December, 1906, and the intendment filed on the same day. On the 1st February, 1907, the defendant entered an appearance, and filed his plea on the 12th February, 1907. On the 7th March, 1907, the application was filed, and the case set down for the 7th May. The defendant's attorneys requested further time, and the notice setting down the case for 7th May was withdrawn, and the case was then set down by consent for the 11th July. The defendant's attorneys applied for a further postponement, and deponent's firm wrote a letter drawing attention to the fact that the application for a commission might have been applied for long before, and in the subsequent communication deponent suggested that the case should be heard on Thursday, August 15, 1907. The deponents' clients had the strongest objection to go to trial without the personal attendance of the defendant, and they had the strongest objection to a further postponement. It would appear that it was quite possible for Vaile to attend the trial here during the month of August, and be back in England by the end of September. If the defendant left England on the 27th July he could be here on August 13, leave again on August 21, and be in England on September 7. There was a cable from H. C. Collison to the effect that Vaile would not be required in England before the middle of October, as the action was fixed for hearing in London on November 1, 1907. An affidavit by Mr. J. E. P. Close set out that along with Mr. G. W. Steytler he was acting as inspector of the business of H. C. Collison, Ltd., by virtue of an arrangement between the company and its creditors. The defendant had no defence whatever, as would be proved by documentary evidence. The action against the defendant was decided on at a general meeting of shareholders on November 26, 1906. Vaile had received 15,000 shares in the company from Harry Collison, 14,900 of which were a free gift, and 100 by payment in cash to qualify him as a director of H. Collison and Co., Ltd. On the 26th November, matters had reached

a crisis in the company, entirely through Vaile's mismanagement. At a second meeting of creditors held on 2nd December, 1906, the creditors made it a condition precedent that Mr. Vaile should resign his position as vice-chairman of the company, which he there and then did, signing a letter drawn up by the company's solicitors. When Vaile left for England, he had no connection with the company at all, having resigned in deference to the expressed wish of the creditors. The action in England was instituted by Harry Collison in his private capacity to recover from the defendant £7,500, which, through the defendant's inability to carry out his agreement, H. Collison was called upon to pay. Explicit instructions had been given to avoid any clashing of the lawsuits, and it had been the endeavour of the company's representative in London to have the litigation brought on as quickly as possible. The defendant had ample opportunity to appear in the present suit in person.

Mr. W. P. Buchanan, K.C., for the applicant (Vaile); Mr. Upington for respondents.

Mr. Buchanan having been heard in argument,

Hopley, J.: In this case I do not see any reason to interfere with the ordinary course of matters. It appears that Mr. Vaile has become involved in lawsuits with two parties. Shortly after he left this country he had an action instituted against him for £4,000 by the firm or company of Collison, Ltd. That matter has been standing over for a considerable time, and pleadings have been closed, and the case set down for hearing on the 15th of next month. On his arrival in England early in this year, Mr. Vaile was almost immediately served with a writ, and an action was instituted against him for a large sum of money there, at the suit of Mr. Henry Collison, who is the chief owner of the shares and debentures of the firm of Collison, Ltd., but the cause of action is not the same as that with which this Court is concerned, but it is a separate transaction and a separate undertaking, representing a sum of £7,500. In England Mr. Vaile is defending his action, and he is also bringing a counter-claim. So that there is important litigation, involving large sums of money, in both countries, and it now appears that the English cases, which are very likely indeed to be consolidated, will be heard on the 1st November, and Mr. Vaile says he cannot in justice to himself come out here to defend the action, because something detrimental to him may, in his absence, happen in England. Now, with two cases going against the same person, more or less, it is alleged by the same persons, at a distance of 6,000 miles apart, there is necessarily considerable inconvenience. I can quite



see it is most inconvenient for Mr. Vaile to have to defend himself in both countries, but it seems to me that the best solution of the difficulty is that one of the cases at one of the ends should be finished off as soon as possible, so as to leave him undisturbed to devote his energies and attention to the other, and that Mr. Vaile should come out here, face the action, and have done with it. The documents, some of them it is said in this country, will be wanted for the English case. Therefore, they will be all the more available when this Court has done with them. It has been suggested that an unfair advantage might be taken of Mr. Vaile in his absence. It seems that is hardly necessary to be considered very seriously, because, although he will be away, the well-known firm of solicitors in England that are representing him, and the able counsel, apparently, representing him, will be able to take care of him and his interests if anything is attempted behind his back, and while he is away on this necessary business in another country. It seems to me that no good cause has been shown for interfering with the ordinary course of events. The application will be refused, with costs, and to give applicant an opportunity of giving the necessary instructions and making the necessary arrangements after his arrival here, the case will be set down for the 29th August.

#### GENERAL MOTIONS.

*Ex parte* ESTATE DU ) 1907.  
PLESSIS. ) July 25th.

Mr. Upington moved on the petition of Johanna Cathrina du Plessis for leave to sell a certain erf and buildings in her mother's estate, situate in the town of Aberdeen. From the petition, it appeared that the property was bequeathed to petitioner and her sister on condition that in case one of them married it should go to the other, but in case the other married also it should be sold within six weeks and the proceeds divided between the two sisters or their descendants. Petitioner's sister had married, but petitioner was unmarried and had no intention to marry. The property was tenantless and had for some time past been bringing in no income to petitioner. She asked leave to sell the property and to invest the proceeds on mortgage of landed property. Petitioner's married sister consented. The Master said that he could not recommend any departure from the terms of the will, but in case the Court sanctioned the petition he suggested that the proceeds should be deposited with a trust company for investment. Counsel urged that nobody would be prejudiced by the application.

Hopley, J.: An order will be granted as prayed, with leave to the executor of the estate to sell this erf and buildings and deposit the moneys received from such sale in the hands of the Midland Agency and Trust Co., Graaff-Reinet, to be invested on security of landed property, the moneys issuing from such investment to be treated exactly as the rents from the property would have been treated.

#### *Ex parte* ZWART.

Dr. Greer moved, on behalf of the petitioner, sole heir in the estate, for the appointment of a *curator ad litem* to his mother, who was now in her 87th year and was absolutely incapable of managing her own affairs. Recently she had had a stroke, and was rendered practically speechless. The Rev. Alex. Stewart, of the Congregational Church, was suggested as a fit and proper person to act as *curator ad litem*, but it had also been suggested that the Resident Magistrate of Gordonia would be more accessible to the Court.

Mr. May, Resident Magistrate of Gordonia, appointed *curator ad litem* for the purpose of inquiring as to the mental capacity of the respondent, summons returnable October 15. The curator may report in writing, and proof may be by affidavit. The Rev. Alex. Stewart to be *curator bonis* until a final order is made by the Court.

#### *Ex parte* HUMPHREYS.

Mr. Van Zyl moved on behalf of the petitioner, Harold Francis Humphreys, a dentist practising in the division of Uitenhage and Humansdorp, for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which a decree of divorce, custody of three minor children, and forfeiture of any benefits under the marriage. The parties were married at Bromley, Kent, in 1899, and the petitioner came out to South Africa with the Imperial Yeomanry and served during the war. He had duly maintained his wife in England. He had continually asked his wife to join him, but this she refused to do, although the passage money had been sent to her. She never answered any of his letters.

Leave granted to sue by edictal citation for restitution of conjugal rights and other relief as prayed, the citation, intedit, and notice of trial to be served together, personal service, returnable September 26.

#### *Ex parte* HOPKINSON.

Mr. Upington moved, on behalf of petitioner, who resides at Gloucester,



England, for an order as to service of certain summons in an action petitioner desired to institute against one James Carter, now residing at Morecambe, Lancashire. Petitioner said that he was the legal holder of a mortgage bond for £1,500 passed by Carter upon certain property situate at Salt River. The interest from the 1st January to the 30th June, 1907, had not been paid, and the bond had consequently become due and payable. The rents from the property had been collected by respondent's agents in Cape Town, Messrs. Herold and Gie. Messrs. Herold and Gie were not, however, prepared to accept service in respondent's behalf. The only course, it seemed to him, was to proceed by way of edict, otherwise he did not know what complications might arise.

Ordered that the property and the rents in the hands of Messrs. Herold and Gie and the rents subsequently to be collected by them be attached *ad fundandem jurisdictionem*, and leave granted to sue by edict, citation returnable on the 24th September, personal service to be effected.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLAY.]

### GENERAL MOTIONS.

*Ex parte* COOMBER. { 1907  
July 26th.

Mr. W. Porter Buchanan, K.C., moved for an order authorising the Master to pay out to petitioner certain money. From the petition, it appeared that in August, 1903, the Court granted petitioner a decree of separation from her husband, Harry Coomber, and declared her entitled to the custody of the two minor children of the marriage, and ordered half the amount of a certain inheritance coming from petitioner's grandparents to be paid out to her, and the other half to be paid to the Master, and directed the interest on the amount to be paid to the petitioner for the maintenance of herself and the children. Petitioner entered into details as to her position, and prayed for an order authorising the Master to pay out of the funds in his hands a sum of £5 for the education of two minor sons at the Pretoria High School. From her present

means she was unable to pay for the education that she desired to give to the two boys. The Master, in his report, said he thought the spirit of the Act 7, 1895, would seem to support the application. It transpired that petitioner was married in community, and that she had been unable to discover her husband's whereabouts.

Order granted authorising the Master to pay out to the petitioner, in addition to the sums he is already paying out to her, a sum of £6 per month for the education of the minors Coomber, on proof from time to time that the money is being expended beneficially on the two minors mentioned, costs to be paid from the fund.

*Ex parte* ESTATE CONNOR AND ANOTHER.

Mr. Long moved for an amendment of an order granted by the Court on the 5th June last, authorising a mortgage to be raised on certain quitrent land in the division of Somerset East (17 C.T.R., 480). In the original petition no mention was made of another piece of land forming part of the estate, and an amendment of the order was now asked for to enable the bond to be passed over both pieces of ground.

Amendment granted as prayed.

*Ex parte* FULTON.

Dr. Greer moved for an order authorising the petitioner to raise a sum of £200 upon mortgage of certain property, situate in Napier-street and Somerset-road, Cape Town, in the estate of the late Margaret Tracey. Petitioner was the nephew and adopted son of the testatrix, and the property was bequeathed to him on condition that transfer should not be passed to him until he attained the age of 26 years, that he should take over the existing mortgage, and that he should not mortgage or transfer any part of the property. Applicant had now attained the age of 26 years. The executors had charges amounting to £157 5s. against the estate, but applicant was unable to pay these charges and to take transfer of the property, as he was out of work, had no trade or profession, and was without means. There was a bond of £700 against the property at present. Applicant asked for leave to raise a further sum of £200 on mortgage to enable him to pay the executors' charges, costs of the present application, and costs of raising the loan.

Hopley, J.: It is true that in this case there is a prohibition against the applicant mortgaging or selling the property. At the same time, the will says that he is to take over this property, and it makes no provision for

any funds to him wherewith he may pay such charges as the executors have now formulated against him. It would, seem, in the special circumstances of this case, that the whole of this bequest would have to lapse or become futile if some relief were not given whereby it might become possible for the legatee to receive his legacy. Certain funds are needed for the purpose of obtaining transfer of the property into the name of the applicant, and it appears that a further encumbrance of the property is the only means of obtaining the necessary funds for this purpose, whereby the wishes of the testator may be carried out. In the special circumstances of this case the Court will authorise the sum of £200 to be raised upon this property by way of mortgage for the purpose of getting transfer into the name of the applicant, and meeting the necessary costs and charges to be incurred, including the costs of this application.

An order will be granted as prayed, or, in the alternative, that a sum of £900 be raised for the purpose of paying off the existing bond and for the purposes mentioned in the petition.

*Ex parte* SOUTH AFRICAN NEWSPAPER CO., LTD.

Dr. Greer moved for an order approving of a minute under section 41 of the Companies Act, dealing with the reduction of the company's capital from £60,000 to £30,000. The Court had already confirmed the reduction of the capital, but by an oversight the form of the minute required by the 41st section was not presented to the Court for approval at the time. Counsel (in answer to the Court) said that he did not think it was necessary to order publication of the minute.

Hopley, J., said that the matter appeared to be purely formal, and the Court would approve of the minute as prayed.

*In re* THE EAST LONDON DAILY NEWS PRINTING AND PUBLISHING CO., LTD. (IN LIQUIDATION).

Dr. Greer moved for confirmation of the third report of the official liquidators of the East London Daily News Printing and Publishing Co., Ltd., Counsel said that the report was brief. In the second report reference was made to a large claim which had been made against the company by the landlord for breaking the lease of the premises occupied by the company. The liquidators, while disputing the claim, retained in their hands sufficient funds, after paying out a dividend, to pay the claim in full. They offered to the landlord (Mr. J. Ries) a compromise of £500, and

this had been accepted by the landlord, and a large sum consequently remained in the liquidators' hands for distribution. In their third report they stated that there was now a surplus of £1,039, from which they proposed to pay a further dividend of 3s. 6d. in the £, leaving a balance of £462 16s. The liquidators also reported that they had collected a number of small debts amounting to £155, and they applied for sanction to commission being paid to them at the rate of 5 per cent. Counsel read affidavits by two of the liquidators (Mr. Pope, of East London, and Mr. Close of Cape Town), stating that the report had duly lain for inspection, and that no objection had been lodged.

Report confirmed as prayed.

MCKINNON V. MCKINNON.

This was an application brought by John H. McKinnon, of Woodstock, upon notice to his wife, Elizabeth G. McKinnon, to show cause why applicant should not be granted proper and reasonable access to his minor daughters, why they should not be handed over to his custody, and why respondent should not pay the costs of this application.

From the affidavits, it appeared that on the 25th June last Mr. Justice Buchanan granted a judicial separation to the present respondent, and gave her custody of the minor daughters of the marriage, and custody of the boys to their father, with right of access to the respective parties. (17 C.T.R., 562.) Applicant now alleged that the children had not been properly looked after by the respondent, who had taken an appointment as a nurse on Robben Island. The children were at first left in the care of a lady in Cape Town, and when applicant went to see them trouble took place, and blows were apparently exchanged. Mrs. McKinnon had since removed the children to Robben Island, and the applicant now complained that he was not given reasonable access. Respondent said the object of the application was to harass and annoy her.

Hopley, J., remarked that he was placed in a difficulty in this case, because he was asked to alter an order given by another Judge.

Applicant appeared in person; Dr. Greer was for respondent.

Applicant said he hoped the Court would now deal with the matter. He had already lost about five days' work in consequence of the case.

In the course of his statements, applicant remarked: Judge Buchanan ought to have to live with her for six months, and then try the case again.

Hopley, J.: Do not be impertinent. You must try and restrain yourself. From every word you say, it seems you are a person not to be trust-

ed with these girls at all. You have a hasty temper. You may get nothing at all, except, perhaps, the gaol. The only thing I am trying to do is to see whether I can make some arrangement by which you and your wife may meet the respective children.

Applicant: Supposing she sends her children twice in a month, I will meet them at the boat. If she wants the boys at Robben Island I will send the boys to Robben Island.

[Hopley, J.: She agrees to bring the children to your house once a month.]

Applicant: If she does when I am at work, what good is that?

[Hopley, J.: The only thing I can think of is that you meet your attorney, and see whether you can make an arrangement that will work. If not, come before Mr. Justice Buchanan next week. I think he will probably be sitting, and see whether you can make an arrangement. He knows the parties in this suit. It is better to carry out what he intended than to have my order. Both sides must be reasonable. It does not follow that she has got to drag the girls about. The matter will stand over for the present. Meanwhile, try and arrange it in an amicable fashion, so that there will be no necessity to come here on Monday at all.

Applicant: I tried, but —

Mr. Justice Hopley: Try again; it may come off next time.

Applicant: I thank your lordship very much indeed, from all my heart.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

DONNELLAN V. KOHNE. { 1907.  
July 30th.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £400, with interest from the 1st January, 1907, less £16 paid on account since issue of summons, bond due by reason of non-payment of interest; counsel also applied for the pro-

perty hypothecated to be declared executable.

Order granted.

### THOMPSON V. BUSSE.

Mr. Swift moved for provisional sentence for £205 8s. 6d., being unsatisfied balance of a judgment of Resident Magistrate's Court, King William's Town, for 12s. 6d., costs of certain writ, and for defendant's half-share of certain property in the borough of King William's Town to be declared executable.

Order granted.

### CORDER V. UPTON.

Mr. Bisset moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £209 18s. 2d., being taxed costs of a certain action brought by respondent against applicant.

Defendant said that he had paid away over £350 in connection with the costs of the case. He had paid £150 into court as security for costs. He had had to get the money advanced in order to carry on the action. He was unable to satisfy this debt. Witness put in a statement of his earnings.

Cross-examined: Witness held certain shares, but at present they were of very little value.

By the Court: Witness thought he would be able to pay £4 a quarter towards the discharge of this debt.

Defendant urged that the costs of the present application should be paid by the plaintiff.

De Villiers, C.J.: The defendant in this case has been unsuccessful in the action which he brought against the present plaintiff, and he is liable for the costs. There has been a return of *nulla bona*, and in strictness the plaintiff would now be entitled to have a decree of civil imprisonment against the defendant, but I do not see that he will gain much by imprisoning the man. He is unable at present to pay, and the only chance of his being able to pay is by his being able to continue his ordinary business. That he can only do by being allowed to be free. As to the costs which he asks the Court not to give against him, I am afraid I shall have to give the costs, because there had been no definite offer of £5 a quarter, and some definite offer ought to have been made to the plaintiff. The Court will grant a decree of civil imprisonment, with costs, to be suspended pending payment of £5 per quarter, until the debt and costs have been paid, first payment to be made on the 1st October next, with leave to the plain-

tiff to apply for an increased order, on clear proof that the defendant is able to pay more.

### ILLIQUID ROLL.

LE FLEUR AND ANOTHER ( 1907.  
V. PINTO. ( July 30th.

Mr. Lewis moved, under Rule 330a, for leave to sign judgment against plaintiff (Pinto) for not proceeding with his action within the time stipulated by Rules of Court.

Order granted.

### OTTO V. OTTO.

Mr. J. E. R. de Villiers moved, under Rule 329d, for a decree of judicial separation and division of the joint estate. The parties were married in community of property. Counsel put in a consent paper.

Order granted.

### VAN DER BYL AND CO. V. KLAASEN.

Mr. H. S. van Zyl moved for judgment, under Rule 329d, for £195 6s. 4d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

### REHABILITATIONS.

Mr. De Waal applied, under the 117th section of the Ordinance, for the rehabilitation of Pieter Paulus Siebert.

Granted.

Mr. Swift applied, under the 117th section of the Ordinance, for the rehabilitation of Harris Cohn.

Granted.

Mr. Sutton applied, under the 117th section of the Ordinance, for the rehabilitation of C. R. and P. R. Botha. Counsel mentioned that the necessary six weeks had not been allowed to elapse since the notice was published in the "Gazette," and that it would not elapse until the 6th August.

Ordered to stand over until the 6th August.

### PROVISIONAL TRUSTEES.

#### *In re* INSOLVENT ESTATE SAVAGE.

Mr. Douglas Buchanan moved, as a matter of urgency, for the appointment of Alfred Newton Foot as provisional

trustee in the insolvent estate of Harry Savage, provision dealer, of Sea Point, with power to carry on the business.

Order granted as prayed.

#### *In re* INSOLVENT ESTATE COHEN.

Mr. Douglas Buchanan moved, as a matter of urgency, for the appointment of E. Fitzpatrick as provisional trustee in the insolvent estate of Isaac Cohen, of the Dolphin Arms Hotel, Commercial-street.

Order granted as prayed.

### GENERAL MOTIONS.

*Ex parte* FRIEDLANDER ( 1907.  
BROS. ( July 30th.

Mr. Douglas Buchanan moved for authority to the High Sheriff to attach the rents accrued and accruing from certain property, pending execution by petitioners under a writ which they had taken out.

Order granted as prayed.

#### *Ex parte* McDERMID.

Dr. Greer moved for leave of absence to petitioner from his articles of clerkship with Attorney Theunnisen, of Prince Albert. Petitioner said that he had been advised by his medical attendant to take a six months' vacation in Rhodesia for the benefit of his health. He would be prepared to serve an additional period of six months at the completion of his articles. An affidavit by a local medical man in support of the application was also read. The Law Society had not raised any objection to the petition.

Order granted as prayed.

#### *Ex parte* ESTATE CROES.

Mr. Marais moved, on behalf of the petitioner, for leave to sell a certain farm in the division of Fort Beaufort.

Order granted in terms of Master's report, proceeds of the sale to be paid to such trust company as the Master shall approve.

#### *Ex parte* ESTATE MULLER AND ANOTHER.

Mr. Louwrens moved, on behalf of the petitioner, for leave to raise a loan on mortgage of certain landed property in the division of Oudtshoorn.

Order granted in terms of Master's report.

*Ex parte* ESTATE GROENEWALD.

Mr. Toms moved, on behalf of the surviving spouse and executrix testamentary of the late P. A. Groenewald, for leave to raise a loan of £300 on mortgage of the landed property in the estate to be applied to the education of petitioner's eldest son.

Order granted as prayed.

*Ex parte* ESTATE VAN BOOYEN.

Mr. Sutton moved, on the petition of the executrix testamentary, for leave to mortgage certain property.

Order granted as prayed.

*Ex parte* INSOLVENT ESTATE FULLER.

Mr. H. S. van Zyl moved for leave to the trustees to sue by edictal citation one Richard Jackson, formerly of Sterkstroom, district of Queen's Town, for provisional sentence on a mortgage bond for £200 in favour of insolvent, and for the attachment of certain property *ad fundandam jurisdictionem*. It was stated that respondent had recently been heard of at Fauresmith, Orange River Colony.

Order granted authorising the attachment of the property as prayed, and leave to sue by edict, citation returnable on last day of August term, personal service to be effected.

*Ex parte* ESTATE KEMP.

Mr. W. J. van Zyl moved for an order authorising transfer of certain property in the district of Humansdorp.

Order granted in terms of Master's report.

*In re* SOUTH AFRICAN WIDOWS' FUND (IN LIQUIDATION).

Dr. Rainsford moved for confirmation of the first and final report and liquidation and distribution account. Counsel said that the liquidator asked for leave to pay the sum of £68 into the Guardians' Fund, as the widow entitled to it could not be found, for payment of the dividends awarded, and payment of liquidator's expenses (£30).

De Villiers, C.J.: The Court will generally confirm the report and authorise the liquidator to act under it.

*In re* EAST LONDON DAILY NEWS PRINTING AND PUBLISHING CO., LTD. (IN LIQUIDATION).

This was an application by certain parties, whom the liquidators had recommended in their second report

should be placed on the list of contributories of the company.

Mr. W. Porter Buchanan, K.C., appeared for the receivers of Henry Ries and Co., and the partners in the firm; Dr. Greer appeared for the liquidators of the Daily News Co.

Mr. Buchanan said that in the second report of the liquidators, paragraphs 6 to 24 dealt with the proposal and intention to ask the Court to put the firm of Henry Ries and Co. and the individual partners upon the list of contributories of this company. The report came before the Court for confirmation in due course, and it was confirmed except as to paragraphs 6 to 24, and this section was ordered to stand over pending further proceedings to be taken by the liquidators or the firm of Henry Ries and Co., or the partners therein. The matter stood over from time to time, but on the 24th July the liquidators intimated to the receivers of Ries and Co. that they did not intend to proceed further, and they offered to pay taxed costs incurred by the present applicants. The object of the present application was to obtain judgment, with costs, refusing the application contained in the second report. The liquidators were willing to pay costs, but they did not seem to regard this application as necessary. At present the report stood filed in the Master's Office without record of the withdrawal of any portion thereof. In the 24th paragraph the liquidators said that under the circumstances they would ask the Court to place the firm of H. Ries and Co. and the partners thereof in terms of section 157 of the Companies' Act on the list of contributories for the amount for which the company had suffered loss, viz., £900, that was £1,000, less £100 paid to the company by E. K. Fletcher (the promoter). The applicants now desired that judgment be entered in the matter refusing the application for an order placing the present applicants on the list of contributories, and directing the present respondents to remove their name from the share register, the allotment list, or any other place in which it might appear in the company's books.

Dr. Greer said the liquidators' position was that they had decided not to press these particular paragraphs of the report, and they had intimated their intention not to do so on the 24th inst. They confirmed that by letter, in which they said they withdrew these paragraphs of the report altogether, and offered to pay taxed costs. The liquidators took up the position that they were entitled to withdraw any portion of the report, of course, at the same time admitting their liability for any costs which parties might have been put to by reason of their names appearing in the report.



[De Villiers, C.J.: But did it not go beyond mere appearing in the report? Did it not become an application to the Court? Was there not some discussion in the Court?]

Dr. Greer said that there was some discussion, but he submitted that at that stage it was purely an interlocutory matter.

[De Villiers, C.J.: Would there be anything to prevent you, supposing no order were made, from at any time repeating the application?]

Dr. Greer said that he did not think so, but at the same time it was most improbable, in face of this withdrawal and offer to pay costs, that such an application would be repeated. The paragraphs in question had been withdrawn by the liquidators, and were no longer before the Court, and it seemed an altogether unnecessary piling up of expenses for the applicants to come to Court in this way. There was really nothing before the Court at present.

Mr. Buchanan, in reply, submitted that this was not an interlocutory matter. All that the respondents had done was to write a letter to his clients' attorneys stating that they did not intend to proceed further in the matter. They had not withdrawn paragraphs 6 to 24. The logical result was, he submitted, that judgment should be given refusing the application of the liquidators to place the Ries on the list of contributories.

[De Villiers, C.J.: In what respect are you in a better position after the judgment of the Court?]

Mr. Buchanan said that his clients would then be absolved, whereas under section 86 of the Act the liquidators might, unless such judgment were given, again come upon the Ries. Counsel added that the receivers of the partnership were wishful to liquidate the partnership. The liquidators of the "Daily News" had apparently gone into the matter; they had come to the conclusion evidently that the present applicants' name should not be settled upon the list of contributories, and they had withdrawn the proceedings, but they had not withdrawn the report.

[De Villiers, C.J.: Has there been a notice to the Registrar of the withdrawal?]

Mr. Buchanan said that there had not been such a notice.

De Villiers, C.J.: I think, on the whole, this is a fair claim on the part of Messrs. Ries and Co. that the Court should decide now their position. The liquidators have informed the respondents of their intention to withdraw, but in form they have not withdrawn the application as well before the Court, which has stood over for further affidavits. The respondents are now entitled to have some judgment on the application and

the only judgment that, under the circumstances, can be given is that the application to place Henry Ries and Co. on the list of contributories be refused, and that the liquidators be ordered to pay costs.

Mr. Buchanan asked whether the Court would not be prepared to order the removal of the respondents' name from the share register or other books of the company.

De Villiers, C.J.: All I can do is to refuse the application to place them on the list of contributories. There is no substantive motion beyond that.

#### LAW SOCIETY V. CELLIERS.

This was an application upon notice of motion calling upon the respondent, who is an attorney and notary, to show cause why his name should not be removed from the roll of attorneys and notaries of the Court, why he should not be suspended for such period as the Court might direct from practising the profession of attorney and notary, and why he should not be dealt with in such other manner as the Court might think fit by reason of his having entered into unlawful agreements with one J. J. de Beer, an enrolled law agent, and others, to charge and to allow them to charge in matters heard in the Court of the Resident Magistrate, Somerset West, a fee higher than the amount that would be allowed on taxation between party and party for attendance in the Resident Magistrate's Court in cases in which he and they appeared for the contending parties, without previously advising his clients.

The affidavit of Robert Bruce Sander-son, secretary of the Incorporated Law Society, which annexed extracts of the evidence obtained from the official shorthand writer of the Supreme Court, given on oath by J. P. Celliers, H. A. Fagan, N. Nochamowitz, J. J. de Beer, and C. F. Markotter, in the case of *Celliers v. Fagan* (17 C.T.R., 482), heard on the 6th, 7th, and 8th June, set out that it would appear from the evidence given on oath that the respondent, without previously arranging and informing his clients, agreed, in cases conducted in the Resident Magistrate's Court, to charge and allow the opposite party's legal representative to charge a fee for such appearance in the Resident Magistrate's Court, over and above the fixed fee of 10s. 6d. allowed on taxation between party and party.

The affidavit of the respondent set out that he was an attorney and notary public. He was admitted to practise his profession on the 30th December, 1901, since which time he had carried on business at Somerset West. He considered that his lordship, when giving judgment in the suit, intended to at once

and finally deal with, and did then and finally deal with, the subject matter of the present application. After the judgment he made every endeavour to trace all instances in which a sum had been paid beyond the tariff amount, and he had made good to the clients concerned the excess payment. He did so apart from any request on the part of the clients concerned. It was a matter of profound regret to him that he should have brought upon himself the strictures which his lordship saw fit to pass upon his action in and about the matter of the said fees, and in view of the great injury which the slanderous statements upon which he based his claims in the suit caused him, the withholding from him by the Court—consequent on the matter of the fees—of the substantial damages which would otherwise have been adjudged him had been a severe punishment. Indeed, the passing of the strictures themselves was and is keenly felt by him. He had invariably endeavoured to practise his calling in an honourable manner, and he ventured to think that it was because of his constant and anxious endeavours so to do that he had secured and retained the confidence and respect of a wide circle of friends and clients. The arrangement, if it might be so called, concerning the fees was entered into by him without due thought in the early part of his career, and he regretted it. He was, however, able to say that it was in no sense a secret arrangement, and that no secret was made of it.

Mr. Upington was for the applicants and Mr. Benjamin, K.C., was for the respondent.

Mr. Upington said the Law Society felt it their duty to move in the matter, and to take action, notwithstanding Celliers' reparation. It was not an application, however, he was asked to press very severely. At the same time, it was not a matter which the society could pass over. The society would have been to blame if they had not taken any action in the matter. The circumstances of the trial were well within his lordship's recollection, and counsel would leave the matter in his lordship's hands.

De Villiers, C.J.: I quite agree that the Law Society was quite justified in taking notice of this matter, and bringing it to the attention of the Court. I felt it my duty at the trial to comment in severe terms upon the conduct of the plaintiff in the case. Naturally the damages would have been greater if it had not appeared that there was this secret agreement between the plaintiff and De Beer. I consider that it is not a case now for further punishment. I consider that the respondent has already been severely punished in not only having the damages greatly reduced in that case, but by the strictures which the Court felt in duty bound to make on that occasion. The respon-

dent now says what he did was in the early part of his career, and it was done without much thought, and that there were very few cases in which that arrangement was acted upon. I accept that statement as correct. Under all the circumstances I think there should be no order on this application, but, at all events, the costs of the application should be paid by the respondent. It was the duty of the society to bring the matter to the notice of the Court, and it is only right that the society should be freed from any costs in making this application. It was a wholly improper arrangement on the part of the respondent, and I trust what has now taken place will be a warning to him for the future, and to others to avoid making secret arrangements of this kind. There will be no order upon this application, and the respondent will be ordered to pay the costs.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

BAGNALL V. THE COLONIAL GOVERNMENT. 1907.  
July 30th.  
Aug. 5th.

*Popularis actio*—Statutory duty—  
Illegal remission of customs  
duty—Declaration of rights  
—Interdict—Damage—Ex-  
ception to declaration.

*The plaintiff, after alleging in his declaration that he was a tax-payer, secretary to the manufacturers' association and interested in the due observance of the Customs Act, 1906, and that the defendant, as Treasurer of the Colony, was permitting to be imported into the Colony printed catalogues, in parcels, under a certain weight without payment of the duty by the said Act provided, prayed for a declaration that the defendant was not entitled to give such permission, and for an*

*interdict restraining him from granting such permission.*

*Held, that in the absence of any averment of special damage or of breach of duty owing to the plaintiff or of infringement of any right belonging to the plaintiff, the declaration disclosed no cause of action at the suit of the plaintiff.*

This was an argument on an exception taken by defendant to the plaintiff's declaration.

Plaintiff (Thomas Bagnall), in his declaration, said that he resided in Cape Town, and was a Parliamentary voter, a taxpayer, and the secretary of the South African Manufacturers' Association, and interested in the enforcement of the provisions of Act No. 1, 1906. The defendant was Edgar H. Walton, in his capacity as Treasurer of the Colony. Class II. of the schedule (b), under the heading, "Mixed rates," item 43, provided *inter alia*: "Printed matter: (a) advertising, including catalogues, price lists, almanacks, calendars, labels, posters, and show cards per £100, £25, or 2d. per lb., whichever shall be the greater." Plaintiff went on to say that it was defendant's duty to enforce this provision, but that, in breach of his duty, and acting wrongfully and in violation of the aforesaid provisions of the Act and schedule, defendant had in and since October, 1906, failed and neglected to cause the aforesaid duty to be raised, levied, collected, and paid in respect of large numbers of ordinary printed catalogues imported through the post, and weighing less than 8 oz., and had wrongfully and unlawfully issued instructions to the officers of the Post Office that such ordinary catalogues as aforesaid should be admitted free of duty, save in the case of South African firms sending large quantities of catalogues or advertisements through the post. Plaintiff had protested, but defendant maintained the said wrongful and unlawful instructions. Plaintiff prayed for a declaration that defendant was not entitled to continue this practice, and for an interdict restraining defendant from causing or permitting such catalogues to be admitted without payment of the duty by law provided.

Defendant excepted to the declaration, on the ground that it disclosed no cause of action by the plaintiff against the defendant in his capacity as a Minister of the Colonial Government, or against the said Government.

Mr. Howel Jones, K.C., was for excipient (defendant in the action); Mr. Schreiner, K.C. (with him Mr. Douglas Buchanan), was for respondent (plaintiff in the action).

Mr. Jones said that this was an action of a novel character, so far as this Court was concerned, in which plaintiff claimed a declaration that the Colonial Government was not entitled to admit certain articles into the Colony without payment of the duty imposed by the Customs Amendment Act, 1906. He asked for a declaration to that effect, and an interdict also against allowing this article, viz., catalogues, to be imported without payment of duty. Plaintiff applied to the Court for what was practically a mandamus upon the Government, and he thought it was without precedent that a gentleman who called himself a taxpayer should apply to the Court for an order that practically more taxes should be imposed upon the subject than were really, as he said, imposed. The excipient's first ground of objection was that the declaration nowhere set out that the plaintiff had suffered any injury or damage, or that he was likely to, or apprehended, any damage or injury whatsoever. Plaintiff said that he was a Parliamentary voter, a taxpayer, and secretary of the S.A. Manufacturers' Association, but none of those capacities entitled him to complain about what the Treasurer was doing in this matter. Plaintiff had only shown that he had an academic interest in the collection of this duty. In the *Colonial Government v. Stephan Bros.* (10 C.T.R., 68), it was held that a plaintiff must show that his rights had been infringed by the defendant. Plaintiff in the present case did not really claim a declaration of rights. He asked for a declaration merely that the defendant as Treasurer should perform his statutory duty. If such actions as this were allowed, the Government would be constantly harassed. Then plaintiff asked for an interdict, but he had not alleged any of the three grounds on which an interdict would be granted by the Court. Counsel referred to Act 37, 1888, and cited Maxwell on Statutes (3rd Ed., pp. 575 and 578), *Liquidator, Cape Central Railways v. Nothing* (8 Juta, 25), *Atkinson v. Newcastle Waterworks* (2 Exch. Div., 441), *Clegg, Parkinson and Co. v. Earby Gas Co.* (1896, Q.B.D., vol. 1, p. 592), Kerr on Injunctions (3 Ed., p. 120), *Hardcastle on Statutory Law* (p. 239), *King v. Lords, Commissioners of the Treasury* (4 A. and E., 286). In *Re Nathan* (12 Q.B.D., 461), and *Queen v. Secretary of State for War* (1891, Q.B.D., 326). He submitted that the Customs Act was not specially for the benefit of the plaintiff or the association he represented. The article in question was not introduced for the benefit of manufacturers generally. The tax was put on for the benefit of Colonial printers, and plaintiff did not allege that he had any interest in the printing industry. Again, a mandamus was asked for against a Minister of the Crown, who was only

responsible to Parliament and the Crown. He submitted that the declaration ought to be quashed.

Mr. Schreiner said his learned friend had put forward the alarming doctrine that a Minister of the Crown was absolutely free from the jurisdiction of the Supreme Court in regard to the breach of a statutory duty imposed upon him. The decisions which had been quoted dealt with cases where Parliament had provided a remedy. In this case they had a public statute. Was it to be allowed that such legislation as this should be absolutely at the whim of the Minister? After protest, the Treasurer still maintained that he could continue to suspend the law.

[De Villiers, C.J.: To my mind, the real difficulty is what *locus standi* has your client?]

Mr. Schreiner: On the declaration, he has a *locus standi* which is not denied, that he is interested in the due performance. It is enough to say that he is a taxpayer.

[De Villiers, C.J.: What you should say, and what you should prove is that the particular action of the defendant has caused damage, or will cause damage, to the plaintiff.]

Mr. Schreiner: I submit that that makes it beyond measure clear, but the law requires no special proof. It would be impossible to prove damages except by evidence.

[De Villiers, C.J.: I suppose there is not one inhabitant of this country who is not interested in the Government properly levying its duties, so that any inhabitant here could bring this action.]

Mr. Schreiner: I submit that is so, but plaintiff says he has a particular interest, because he is secretary of the Manufacturers' Association.

[De Villiers, C.J.: What breach of duty towards the plaintiff has the defendant committed?]

Mr. Schreiner: With great submission it is not necessary that a duty should be specially towards the plaintiff. When there is a duty towards the whole community, there is a duty towards each member of the community. Otherwise the *popularis actio* would never be necessary. Counsel went on to contend that the charter gave jurisdiction to the Court over the highest person in the land, who did not perform the duty imposed upon him.

[De Villiers, C.J.: Ought you not to allege that there is injury or contemplated injury of a pecuniary character?]

Mr. Schreiner contended that it was not necessary that the plaintiff must show some direct monetary damage.

[De Villiers, C.J.: In Nothling's case the Court said there should be special damages.]

Mr. Schreiner: That was a case in which a penalty was provided.

Proceeding, Mr. Schreiner said that, on the face of the declaration, there had been a clear breach of duty. The Treasurer-General was in no better position in law than any subordinate officer, or other servant of the Crown. The Court had absolutely got jurisdiction, and upon the interest which the plaintiff said he had he was entitled to come to the proofs of such interest he actually had in the case, and to show the substantial and real interest he had in the remedy sought against the Crown. The plaintiff was entitled to have the law applied under the Charter of Justice, and see that the law was carried out. It was not attempted to deny that item 43 was not being carried out. It was for the public good that the Government should perform its duties which the law imposed, and every member of the public by the popular action could approach the highest Court in the land, which had jurisdiction to determine that the Government should not do wrong. Counsel cited *Collector of Customs v. Cape Central Railways* (6, Juta, 402), *Broom's Maxims* (3rd Ed., p. 183), *Voet* (44, 7, 8), *Sigrau v. the King* (12, S.C., 256), *In Re Willem Kok and Balie* (1879, Buch., 45), *Bowers v. Miller and Hartley* (3, Searle, 195), *Hunter's Roman Law* (1st Ed., 854), and *Fraser v. Sivewright* (3, Juta, 55).

Mr. Jones, in reply, said his learned friend had quoted a number of cases which were not apropos to this case. No remedy was given unless a wrong were shown. The plaintiff must show how he was interested. It did not follow because he was a taxpayer he was necessarily losing money. Counsel submitted that the declaration did not show that the plaintiff was entitled to any remedy at all, and he cited, although he admitted it was not exactly to the point, the case of *the Bishop of Cape Town* (Foord, 26).

*Cur. Adv. Vult.*

*Postea* (August 5th).

De Villiers, C.J.: The question raised in this case is whether the plaintiff is entitled, by reason of his being a taxpayer, secretary to the Manufacturers' Association, and interested as such in the due observance and enforcement of the Customs Act, 1906, to obtain a declaration that the Treasurer-General is not entitled to permit to be imported into this colony any printed catalogues without payment of the duty by law provided, and an interdict restraining him from permitting such catalogues to be so imported. It is not alleged that the plaintiff has sustained any damage or will sustain any damage by reason of the matters complained of, but his counsel has boldly contended that if the Treasurer has illegally failed to collect Customs duty in respect of printed catalogues imported through the post and



weighing less than eight ounces, any taxpayer is entitled to the interposition of the Court to compel the Treasurer to do his duty, or at all events to interdict him from failing to do his duty. In support of this contention, Mr. Schreiner quoted a passage from Voet (44, 7, 8), in which the *actiones populares* of the Roman law are included among the actions proper, but the references made by Voet himself show that he was treating, not of the Dutch but of the Roman law practice. Under the Roman law, no doubt, an action could be brought by a private individual for the people (*pro populo*), and in the Digest (47, 23, 1) the definition of the *popularis actio*, as given by Paulus, is said to be *quae suum jus populi tuetur*. The Digest then proceeds to lay down the conditions on which the action could be brought, one of them being (sec. 5), that while the defendant could appear by attorney the plaintiff could only appear in person, a rule which, if operative here, would have deprived the Court of the benefit of Mr. Schreiner's able and ingenious argument. The truth, however, is that the *popularis actio* became wholly obsolete in the Dutch practice. Groenewegen, in his comment on the title of the Digest just cited, says: "This title is nowhere observed, for no private person prosecutes popular actions so far as the public interest is concerned. For his own interest, however, it is permitted to every one to bring an action either by himself or by attorney." Voet also, in his commentary on the same title (47, 23), after stating that the popular action could be brought by any one *ex populo*, who had the right to proceed by action, added that in his time a private person could not bring the popular action, but could only proceed for his own private interest. As to our own law, I am not aware that any South African Court has ever recognised the right of any individual to vindicate the rights of the public where he himself has not sustained any direct injury or damage from a breach of the law. The nearest approach to such a recognition that I can find is in the case of *Dell v. Town Council of Cape Town* (9 Buch., 2), where it was held that the plaintiff as one of the public who had suffered from a nuisance, created by the defendants, was entitled to take proceedings for the abatement of the nuisance. The plaintiff was the General Manager of Railways, whose daily duties would, of course, require his presence at the railway station, and he, moreover, appeared as the representative of the railway employees. For the Town Council it was strenuously argued that the application should not have been made by any private person, but by the Attorney-General in his official capacity, but the Court held that the plaintiff had a sufficient

*locus standi*. It is clear, however, from the judgment that if the plaintiff had not, as one of the public, suffered material injury from the nuisance, he would not have been allowed to intervene. Even, therefore, if the *actio popularis* had not been obsolete in Voet's time, I would have been prepared to hold that, seeing that such an action is wholly unheard of in any South African Court, and that, so far as criminal cases are concerned, it would be wholly inconsistent with the practice of our Courts, the plaintiff is not entitled to relief as the champion of the public, and not of his own benefit.

It is, in my opinion, a fatal defect in the plaintiff's declaration that it neither states that the Government has failed in any duty which it owes him, nor does it state that he has suffered, or is likely to suffer, any damage by reason of the Treasurer's alleged illegal conduct. Under our law an action can only be brought by or on behalf of a person to whom a debt is owing, or who has sustained damage, or is likely to sustain damage, by reason of an injury done to him or breach of duty owing to him, or whose rights have been otherwise infringed or threatened to be infringed. Where an enactment is for the benefit of the public, it was said by the Court in *Central Railways Company v. Nothling* (8 S.C.R., 28) that, in the absence of an indication to the contrary in the Statute, a person injured in his person or property, by failure to comply with an enactment for the public benefit, has a remedy in damages against the person upon whom the statutory duty is cast. Nothing was said in that case to justify the inference that without proof of damage or of breach of duty, owing to him specially, any one of the public may take up the cause of the public, and apply for an interdict or declaration of rights against the person who fails to perform his statutory duties towards the public. Much reliance was placed upon the maxim that where there is a right, there must be a remedy, but the maxim only applies where the right belongs to the person by or on whose behalf the remedy is sought. In the case of *Ashby v. White* (1 Smith's L.C., 216), it was held by the House of Lords that a man who has a right to vote at an election for members of Parliament may maintain an action against the returning officer for refusing to admit his vote, even though the person for whom he offered to vote were elected. The ground of the judgment was that the plaintiff had a particular right vested in him to vote, and that it was a wrong and an injury to that right to refuse to receive his vote. But what particular right of the plaintiff in the present case has been withheld or infringed by the Treasurer? It is said in the declara-



tion that the plaintiff is interested in the due observance and enforcement of the Customs Act, 1906, but so is everyone else who takes an intelligent interest in the public affairs of the country. It may well be that if the Treasurer has been guilty of remitting duties illegally, the Collector of Customs may at some future time, on the principles laid down in *Collector of Customs v. Central Railways* (6 S.C.R., 402), be entitled to recover the amount from the persons thus illegally benefited, but that would be because the Collector is the official legally authorised to enforce the duty. The plaintiff has no such interest in the due observance of the Act as to give him a *locus standi* to proceed either against the Treasurer or against those who have benefited by the Treasurer's alleged illegality. It is quite consistent with the averments of the declaration that the action of the Treasurer in not charging a duty on printed catalogues in parcels weighing less than 8 ounces may be productive of a saving, instead of a loss of revenue. At all events, the declaration does not allege that the plaintiff, in his capacity as a taxpayer, or in any other capacity, has sustained damage by reason of the Treasurer's alleged illegality. Without now deciding that such an allegation would have cured the defects of the declaration, I am clearly of opinion that the plaintiff is not entitled to succeed upon the declaration as it stands. The exception to the declaration must therefore be allowed, with costs.

Buchanan, J.: I was quite in accord with Mr. Schreiner's preliminary hypothesis as to the power of the Court to enforce the performance of the duty imposed upon any officer of the Government or upon any other individual. The only difficulty I had in this case was with reference to the *actio popularis*, and I wished to ascertain what this action really was before giving judgment. As His Lordship the Chief Justice has pointed out, this action no longer exists, and has become obsolete in Holland, and consequently in this colony, and therefore the only question remaining open was as to the *locus standi* of the plaintiff in this case. I need not add anything to what his lordship has said, for he has clearly pointed out the necessity for some interest in the individual who seeks redress in the Court. I fully concur in the judgment given that this exception to the declaration must be sustained, with costs.

Mr. Douglas Buchanan (for respondent): Would your lordships grant leave to amend the declaration if so advised, in order that the proceedings need not be started *de novo*?

The Chief Justice: I think you may have leave to amend the declaration. Of course, we do not know what the amendment will be. Then leave would

be given, of course, to defendant to except to the amended declaration too.

[Plaintiff's Attorneys: Syfred, God-lonton and Low. Defendant's Attorneys: Reid and Nephew.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

BERMAN V. CASTLE WINE & BRANDY CO., LTD. 1907.  
Aug. 1st.

This was an action brought by Benjamin Berman, a general dealer, of Simon's Town, against the Castle Wine and Brandy Co., Ltd., for the recovery of £60, being wages alleged to be due for supervising a bottle store at Waterford-road, Simon's Town, and £15, being a month's wages in lieu of notice. The plea set forth that there were certain negotiations between plaintiff and the defendant company in reference to the bottle-store, which negotiations had fallen through. An allowance of £20 had been made to the plaintiff for services rendered, and defendants tendered a further sum of £10. Defendants denied that they were liable for a month's salary in lieu of notice.

Mr. Toms was for the plaintiff; Dr. Greer was for the defendant company.

The plaintiff gave evidence relating to his engagement as manager of the store by Mr. R. L. Kramer. In the first instance, the bottle-store was carried on by a firm in which witness's brother was a partner, which firm became insolvent. The defendant company were the first bondholders. Witness was engaged to look after the place at a salary of £15 a month. He was there from February 1 until May 24, when Mr. Kramer said he no longer required witness's services.

In cross-examination, the witness said that after the engagement by Kramer he bought a grocery store at Simon's Town, and looked after it during the whole of this time. His brother worked in connection with the bottle-store, and witness paid him £5 a month extra. There was another man working in the bottle-store as a clerk, who was paid by defendants. Witness's brother travelled for both the bottle-store and witness's shop. He got £15 a month, of which £5 was for the bottle-store work. In proceedings in the Magistrate's Court

drunkenness on the 25th May was admitted. Thereupon the Magistrate sentenced him to two months' imprisonment, with hard labour. Under the Act 27, 1882 (section 9), in case of a first conviction the sentence is a penalty of £2, and in default of payment imprisonment with hard labour for 14 days. In case of a second or subsequent conviction, the penalty is £5, or in default of payment, imprisonment for a period not exceeding 30 days, so that under this Act the utmost the Magistrate could do was to inflict a penalty of £5, or in default of payment, 30 days' imprisonment, with hard labour. Then by the Act 25, 1891 (section 28), the Magistrate has power to inflict a punishment of 12 months' imprisonment for drunkenness, but only in case of four convictions during the 12 months preceding. In the present case there was only one conviction within the 12 months, and therefore the utmost the Magistrate could have done was to inflict a penalty of £5, or, in default of payment, 30 days' imprisonment, with hard labour, so that the sentence of two months' imprisonment with hard labour will be changed into one of a £5 penalty, or in default, imprisonment for 30 days, with hard labour.

*Postea* (August 2nd).

De Villiers, C.J.: In regard to the case of *Rex v. Jacob Jantjes* from the Resident Magistrate's Court at George, the Magistrate has telegraphed that there is some inaccuracy in the record, and that the previous conviction had been under the Master and Servants' Act, and not for drunkenness under Act 22, 1882. There really, therefore, was no previous conviction by virtue of which there could be any aggravated punishment, and in lieu, therefore, of the sentence which the Court imposed yesterday of a fine of £5, or in default 30 days' imprisonment, there will be a fine of £2, or 14 days' imprisonment.

#### PROVISIONAL ROLL.

##### POTGIETER V. POTGIETER.

Mr. Howes moved for the final adjudication of defendant's estate as insolvent.

Order granted.

##### MARSH AND SONS V. GROSS.

Mr. Inghbold moved for the final adjudication of defendant's estate as insolvent.

Order granted.

Mr. Inghbold afterwards moved for the appointment of Alfred Newton Foot as provisional trustee in the estate, with power to carry on the business.

Order granted accordingly.

##### SEELIGER V. HERBERT AND OTHERS

Mr. Sutton moved for provisional sentence against the defendants jointly on a mortgage bond for £1,780 odd, being three-quarters the amount due on the bond, with interest; counsel also applied for the defendants' three-quarter shares in the property hypothecated to be declared executable. Plaintiff had been a party to the bond, but had taken cession of it from the bank, in whose favour the bond was originally passed, plaintiff having paid up the capital amount.

De Villiers, C.J.: It is a question whether it would not be in the defendants' interest that the whole of the property should be sold instead of three-quarters merely. I will declare the property executable, but not the three-quarters merely.

Provisional sentence granted for three-quarters of the amount due on the bond, and the property declared executable.

##### BURMEISTER V. EXECUTORS ESTATE VAN RENSBERG.

Mr. W. J. van Zyl moved for an order directing the defendants to file an account in the estate.

Order granted.

#### ILLIQUID ROLL.

##### GAUSS V. HARVEY.

Mr. Bisset moved for judgment under Rule 319 in default of plea for £97 6s. 4d., medicines supplied, medical attendance, and cash lent and advanced between September, 1904, and January, 1906, with interest *a tempore morae* and costs of suit. Defendant was sued edictally.

Order granted.

#### GENERAL MOTIONS.

##### HOSKING V. HOSKING. { 1907. Aug. 1st.

Mr. Rowson moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree granted.

##### ANDREWS V. ANDREWS.

Mr. Gutsche moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights. The rule called upon defendant to show cause why a decree should not be granted, why he should not be ordered to pay plaintiff £500 in

terms of an ante-nuptial contract, and cede an insurance policy of £1,000 in terms of the contract, why he should not deliver certain wedding presents, why plaintiff should not be declared entitled to custody of the child, and why defendant should not pay a certain sum for maintenance of the child. Counsel stated that in a letter of the 1st July, 1907, defendant offered in lieu of £500 to pay a sum of £8 per month until the child was married or attained the age of 21 years. This offer the plaintiff's attorney had accepted, defendant agreeing that the amount to be paid should be not less than £500.

Rule absolute, the amount of maintenance to be fixed at £8 per month, until the child attain the age of 21, or shall marry, with interest from date of contract, the amount so paid to be not less than £500, and to be in lieu of the payment of £500 directed by the rule, defendant to have access to the child at all reasonable times and places maintenance to be paid from date of order.

*Ex parte* WESLEYAN METHODIST CHURCH, CLARKEBURY.

Mr. Douglas Buchanan moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* PETRUSVILLE PROSPECTING SYNDICATE, LTD.

Mr. Wallach moved for the provisional order for the winding up of the company to be made absolute, and for power to the liquidator to appoint S. J. Mostert and Son, of Cape Town, as his attorneys, to assist in the winding up, and D. J. Wege, of Petrusville, as his law agent. Counsel explained that there was no attorney in Petrusville.

De Villiers, C.J., said that he could not appoint both.

Mr. Wallach said that he would ask the Court to appoint Messrs. Mostert as attorneys.

Rule absolute, liquidator authorised to appoint Messrs. S. J. Mostert and Son, of Cape Town, as his attorneys.

*Ex parte* INSOLVENT ESTATE MEYERS

Mr. Bisset moved for a certain rule nisi to be made absolute for recognition in this colony of the appointment of petitioner as trustee by order of the Transvaal Supreme Court.

[De Villiers, C.J.: Unfortunately, the Bill has not quite passed in both Houses which would facilitate these matters. Probably it will be passed before this estate is liquidated.]

Rule absolute.

STANDARD BANK V. PHILLIPS.

Mr. Watermeyer moved for a certain rule nisi to be made absolute calling upon respondent to show cause why he should not be ordered to pay costs of a certain action instituted against him by applicants on the 12th June, 1907.

Rule absolute.

*Ex parte* ESTATE SNODGRASS.

Mr. Watermeyer moved, on the petition of Mary Blanche Snodgrass, as executrix testamentary of the estate of the late David William Snodgrass, and natural guardian of her minor son, Herbert William Snodgrass, for leave to exchange a certain erf in the township of Elliot for certain two cows and one riding horse. It appeared that a major son had built upon the minor's erf, that the minor was not prepared to buy the building, and that the exchange was an equitable one. The value of the building was estimated at £250, and of the erf at £35.

Order granted as prayed.

*Ex parte* ESTATE NEL AND ANOTHER.

Mr. P. S. T. Jones moved for an order authorising registration of a certain transfer of property in the division of Aliwal North.

Order granted.

*Ex parte* BROWN AND WIFE.

Mr. Joubert moved, on the petition of husband and wife, for registration of a certain notarial contract, excluding community of property between the spouses. It appeared that the first-named petitioner was born in the Colony, and that he went to England in 1902, and was married to the second-named petitioner at Croydon on the 25th September. It was the intention of the parties to keep their estates separate, and before the marriage advice was taken from a solicitor in England, who said that the wife's estate would be protected. They had, however, since discovered that by the law of the Colony they were married in community of property.

Order granted as prayed.

PALMER AND ANOTHER V. LIQUIDATOR, GRAND JUNCTION RAILWAYS, LTD.

This was an application upon notice to the liquidator of the respondent company to show cause why an order should not be granted directing amendment of the liquidation account.

The petition of George Morrison Palmer, of Cranmere, Pearston, and his wife, Francis Susanna Palmer, stated that a copy of the order of the Court of the 9th April last, in connection with the third report of the official liquidator of the Grand Junction Railways, had been served upon petitioners. The first-named petitioner was the holder of three debenture bonds of the face value of £300 in the company, forming part of the legal issue of 1707 debentures referred to in the liquidators' third report. In March, 1902, he was seized with a paralytic stroke, and continued to be ill until November of that year. He took a voyage as soon as the state of his health permitted, and travelled about for some twelve months. He returned to England about the end of 1903, having heard nothing of the liquidation of the Grand Junction Railways or the appointment of receivers of the partnership estate, nor did he learn anything relating thereto until some time subsequent to the acquisition by him of the debentures. During December, 1903, or January, 1904, Mr. John Walker, sen., approached him, and offered to sell him the debentures. Mr. Walker said he required the money, and as petitioner was glad to oblige him, and at the same time was satisfied that the purchase would be a good investment, he agreed and paid the cash within a few days. Petitioner had never recovered his health, and was still seriously ailing. With regard to the claim on the detached coupons, which the liquidator had brought up in his account as disputed, the second-named petitioner said these were delivered to the first-named petitioner on her account in part payment of the balance due to her in respect of an undertaking by John Walker, sen., to give her £15,000 debentures shares, and 10,000 ordinary shares in the Grand Junction Railways, in consideration of valuable services rendered by first-named petitioner to the said Walker in connection with the working of the company. Subsequent to first-named petitioner's return to England at the end of 1903, he approached John Walker, sen., for delivery of the scrip, or, rather, the balance to be delivered after allowance made for the payment of £2,000 by the said Walker some time previously. Walker, having no debentures or share at the time, said he would send first-named petitioner a parcel of coupons worth about £8,000 in reduction of his liability to second-named petitioner. This was in February, 1904, within a day or two of petitioners sailing for the Cape. The said Walker sent the coupons in question by the following mail. Until petitioners arrived at the Cape, they knew nothing of the liquidation of the company, and the coupons were taken in all good faith. Petition-

ers prayed for an amendment of the liquidator's account, admitting and including first-named petitioner as a creditor entitled to prove concurrently with the other creditors upon the debentures, and bringing up second-named petitioner as a creditor entitled to rank likewise in respect of the coupons brought up in the annexure to the third report as disputed of the face value of £8,097 1s. 11d.

Gerald E. D'Arcy Orpen, in a replying affidavit, said he was the general agent of Edward R. Syfret, the official liquidator of the Grand Junction Railways, and had been concerned in the liquidation of the company. He drew the Court's attention to the fact that the petition was not signed by the second-named petitioner, nor did she make any verification of the allegations contained in the petition. The first-named petitioner was one of the persons associated with John Walker in founding the joint stock company, styled the Grand Junction Railways, Ltd. He was one of the directors from the inception, and had always been, jointly with the said Walker, trustee for the holders of the debentures issued by the company. The said Palmer must have been fully cognisant of the cession of the 20th July, 1898, from the company to the Thames Ironworks and Shipbuilding Co. He also said that when he purchased the debentures he had no knowledge of the liquidation of the company, but in a letter addressed by him to the liquidator on the 21st September, 1905, he stated that the first intimation he had as to what was going on in connection with the company was when he saw the liquidator's notice calling for claims late in 1903, or early in 1904. In reference to the claim by the second-named petitioner upon the coupons, deponent called attention to a discrepancy between the allegations in the petition, and a letter addressed by the first-named applicant to the liquidator on the 10th December, 1904. Having regard to the intimate relations between the first-named applicant and John Walker, to the fact that the debentures in question were obtained by the applicant from John Walker, who would not be entitled to claim upon them, to the further fact that the said John Walker was attempting to claim upon them, to the further fact that the said John Walker was attempting to claim through third parties upon other debentures, and to the unsatisfactory nature of the explanation offered by the applicants of the circumstances under which they became possessed of the debentures and coupons, the liquidator strongly urged that the applicants should not be permitted to proceed on motion, but should be compelled to institute an action in order that he may be afforded an opportunity of thoroughly investigating their claim.

Mr. Benjamin, K.C., for applicants; Mr. Schreiner, K.C. (with him Mr. Close), for respondent.

Mr. Benjamin submitted that as regards the debentures, the Court might well dispose of this matter on motion. It was perfectly immaterial whether Mr. Palmer did or did not know at the time of purchasing the debentures whether the company was in liquidation. He purchased the debentures at par, and in ignorance of the fact that the company was in liquidation. In the case of the *African Banking Corporation v. Liquidator, Grand Junction Railways* (17 C.T.R. 377), it was held that the documents were negotiable securities. The liquidator had already obtained judgment against the receiver in respect of these three debentures. As to the coupons, Mr. Benjamin admitted that he could not press for judgment on motion.

Mr. Schreiner said that the claim was of a vague and uncertain character. This was a case in which it was absolutely necessary that the rights of the parties should be determined by action. The transaction was in itself of so suspicious a nature that the parties should be before the Court, so that the Court could determine whether this was or was not a *bona fide* transaction. These debentures had been put on the disputed list since 1903, and now for the first time a claim was put forward in respect of three of them.

Mr. Benjamin, having been heard in reply,

De Villiers, C.J.: The debentures stand on a different footing from the coupons, but it is quite clear that as to the coupons it would be quite impossible for the Court to give judgment in favour of the petitioner. Seeing that the coupons would have to be decided upon by action, I think it would be better also to postpone any decision in regard to these debentures. I think there is further information required as to the circumstances under which the sale from Walker to Palmer took place, and as to the knowledge of all the circumstances then existing and of the disputes which had arisen between Walker and the liquidator. I do not wish to say more than that at present. I do not wish to prejudge the case, but I consider that, on the whole, it would be better if both claims should stand over, and that the petitioner should bring his action in respect of both. The Court will, therefore, order that the petitioner proceed by action, to be brought to trial before the 14th November next, petition to stand in lieu of summons, costs of this application to be costs in the cause.

[Applicant's attorney: G. Trollip.  
Respondent's: W. E. Moore and Son.]

# MASTER. SUPREME COURT V. TRUSTEE, INSOLVENT ESTATE TUCKER.

Mr. Howel Jones, K.C., moved for an order upon respondent, Wm. Hope Simpson, in his capacity as trustee of the insolvent estate of William Tucker, to file a liquidation account and plan of distribution, and pay costs of this application.

Usual order granted.

## Ex parte OFFICIAL LIQUIDATORS, BUFFALO SUPPLY AND COLD STORAGE CO., LTD.

Mr. Burton, K.C., moved, on the petition of Messrs. Fleming and Powell, as liquidators of the Buffalo Supply and Cold Storage Co., Ltd., for a period of six weeks to be fixed within which claims must be filed against the company. Petitioners also applied for payment to them from the funds of a sum of not less than £500, on account of remuneration and disbursements. The liquidators also presented two reports on the liquidation. Counsel said that the liquidation had now been proceeding for a period of about two and a half years, and the liquidators had received no payment whatever. They had got in about £33,000, and the expenditure was about £22,000, leaving over £11,000 in the bank.

De Villiers, C.J.: An order will be granted in terms of the petition, and the Court will make the usual order as to publication of notice in regard to the filing of the reports.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

ESTATE STEPHAN V. ESTATE STEPHAN. { 1907.  
Aug. 2nd.  
" 9th.

Will—Interpretation—Distribution of estate—Assets realized after the death of the testator's surviving partner.

*J. C. S. carried on business with his brother H. R. S. By his last will, J. C. S., after*



leaving sundry legacies to relations (the present defendants), instituted as heirs these relatives and H. R. S. H. R. S. was to receive  $\frac{1}{4}$  and the other heirs, each an equal share of  $\frac{3}{4}$  of the residue of the estate. Should H. R. S. continue to carry on the business for his own profit (or at his own loss) he was to remain in full possession of the entire residue of the estate so long as he should continue to carry on the business. In the event of his ceasing to do so either of his own free will or on account of his death, the other heirs could at once claim their inheritance of  $\frac{3}{4}$  of the estate. Should, however, H. R. S. sell any of the immovable property or receive payment of any outstanding bonds; if such property or bonds belonged to the partnership estate, H. R. S. was at once to pay over to the other heirs  $\frac{1}{4}$  of the amount received; if the said property, &c., belonged to the private estate of the testator, H. R. S. was to pay over  $\frac{3}{4}$  of the amount received. H. R. S. continued to carry on the business until his death. There was other property in the estate in addition to immovables and mortgage bonds. Subsequent to the death of H. R. S., a bond due to the partnership estate for £2,000 had been paid off. Plaintiffs contended that the estate of the late H. R. S. was entitled to  $\frac{3}{4}$  of this £2,000, and the other heirs to  $\frac{1}{4}$ . Defendants contended that the estate of H. R. S. was entitled to only  $\frac{1}{2}$  of the £2,000 in virtue of the partnership, together with  $\frac{1}{4}$  of the remaining half under the will.

The Court gave judgment in accordance with the defendants' contention.

This was a special case stated in the following terms:

The plaintiffs are Henry John Charles Stephan in his capacity as executor testamentary and James Cecil Bateman

representing Graaff's Trust, Limited, in his capacity as assumed executor in the estate of the late Hendrik Rudolph Stephan.

The defendants are: (1) Johan Henoch Neethling Roos, in his capacity as secretary for the time being of the Board of Executors, Cape Town, who is sued in his capacity as the surviving executor testamentary in the estate of the late Johan Carel Stephan, otherwise known as Johan Carel Jacobus Stephan herein-after called the testator. (2) Casper Hendrik van Zyl, William Templer Buissinne, Gideon Brand van Zyl, and John Bennie Keyser, practising in co-partnership under the style of Van Zyl and Buissinne, in their capacity as representing by power of attorney for the purposes of this suit, the following, being the heirs or representatives of heirs of the testator, namely: (a) The secretary of the Board of Executors, Cape Town, together with Lachlan Charles McLachlan, in their capacity as the surviving executors of the estate of the late Johan Hendrik Lawrence Stephan, generally styled Lawrence Stephan; (b) William James Stephan, of Berg River Mouth; (c) the secretary of the Colonial Orphan Chamber and Trust Company, as the surviving executor testamentary of the estate of the late Dorothea Florentina Susannah Hinsbeeck (born Stephan), and, together with Johan Carel Hinsbeeck, the executors testamentary of the estate of the late Francois Jan Hinsbeeck, married in community of property to her; (d) the secretary of the Colonial Orphan Chamber and Trust Company, as the surviving executor of the estate of the late Elizabeth Johanna Novella; and (e) the secretary of the Board of Executors, Cape Town, being the curator nominate, and Elizabeth Petersen (born van Geems), now married in community of property to August Petersen, and by him assisted as far as need be, being the mother of the minors; (f) John Daniel van Geems (alias Van Gerns); (g) Abraham Benjamin van Geems (alias Van Gerns); and (h) William Charles van Geems (alias Van Gerns). (3) The said secretary of the Board of Executors, Cape Town, as *curator ad litem* of the said minors, John Daniel van Geems (alias Van Gerns), Abraham Benjamin van Geems (alias Van Gerns), and William Charles van Geems (alias Van Gerns), appointed by this Honourable Court. All the parties interested in the testator's will are before this Honourable Court. On or about November 9, 1898, the testator executed his last will and testament, and on January 17, 1899, he executed a codicil thereto. On February 6, 1900, he died leaving the said will and codicil of full force and effect. The said H. R. Stephan and the testator, for many years prior to the death of the testator and up to the date of his death carried on business together in

partnership under the style or firm of Stephan Brothers, each having a half share in the said business and after the testator's death the said H. R. Stephan continued to carry on the said business as provided in paragraph 21 of the said will, and did so carry it on under the terms of the said will until the time of his death, to wit on the 4th July, 1906; and whilst carrying on the said business the said H. R. Stephan did not liquidate the business of Stephan Brothers or discontinue the same or take a partner into the firm of Stephan Brothers or float the same into a company or otherwise change the personnel or status of the firm. In paragraph 19 of the said will the testator instituted as his heirs the said H. R. Stephan and certain other eight persons named therein, subject to the conditions set forth in paragraphs 20 to 23 and by the codicil he revoked the institution in so far as one of the said persons, Samuel Novella, who predeceased him was concerned. In paragraph 20 of the said will the testator bequeathed one-fourth of the residue of his estate after payment and satisfaction of his liabilities and of certain legacies and charges none of which are necessary to specify to the said H. R. Stephan, and the other three fourths to the other said heirs in equal shares. The said legacies and charges have been duly paid, but none of them were paid out of the partnership assets. In paragraph 21 he directed that being desirous and anxious not in any way to put any obstacle in the way of nor to embarrass the present business carried on in co-partnership by him and the said H. R. Stephan, that the said H. R. Stephan would be entitled to remain in full free and unencumbered possession of the residue of his (the testator's) estate during his (the said H. R. Stephan's) lifetime, and to carry on the partnership business for his own account and profit during such lifetime. In paragraph 22 he directed that, if the said H. R. Stephan whilst so carrying on the said business should sell immovable property or receive payment of mortgage bonds belonging to the said partnership business, or to the testator personally and privately he should, if the property was a partnership property, pay over to the other heirs one-fourth of the proceeds of such sale or receipt, he (the said H. R. Stephan) being entitled to one-fourth as testator's heir and one-half as testator's partner in the said firm of Stephan Brothers, and that if the property belonged to the testator personally and privately the said H. R. Stephan should, as heir of the testator, be entitled to retain one-fourth of the proceeds and pay over the remaining three-fourths to the testator's other heirs, and the said H. R. Stephan while carrying on the said business did in terms of the said will sell certain land, part of the immovable property belonging to the

said business and the amount of the valuation thereof according to the inventory in paragraph 10 of this case mentioned was in accordance with the judgment of this Honourable Court, dated 12th March, 1902, divided between the said H. R. Stephan and the said other heirs in the proportion of three-fourths and one-fourth respectively, and after the date of the aforementioned sale the said H. R. Stephan did dispose of other assets of the said business in terms of the said will, and the amount received therefor was divided in like manner between him and the said other heirs. In paragraph 23 he directed that in order to avoid all disputes and differences a full and true inventory both of his private estate and of the partnership business should be taken no longer than six months after his death, and that his said other heirs should be paid out their three-fourths share in his private estate and one-fourth share of the firm of Stephan Bros. on the valuations and accounts in the said inventory whenever such payments should in terms of the said will be made to them. On or about July 27, 1900, the defendant and the said H. R. Stephan (in his capacity as joint executor testamentary in the testator's estate) in accordance with the terms of the said will, framed the said inventory and valuation and the same has been accepted by the said heirs who are majors, and acted upon by the first defendants. The testator left at his death property belonging to the said business and also property in his private estate which did not belong to the said business. The parties are all willing to accept the inventory values as representing the basis upon which the defendant heirs shall be paid out in terms of clause 23 of the said will. The parties are desirous of having it determined upon what basis the testator's estate should be distributed as between the estate of the late H. R. Stephan and the other heirs of the estate. Among the assets in the partnership estate at the date of the death of the said H. R. Stephan was a bond passed by one Barnes in favour of the partnership for the sum of £2,000 which said Bond is valued in the inventory at the sum of £2,000, and has been paid off in the full amount since the death of H. R. Stephan. The plaintiffs contend: That the estate of the late H. R. Stephan is entitled to one half of the testator's share in the value of the said bond, that is to say, that the said estate is entitled in all to £1,500 of the said sum of £2,000, the other heirs being entitled to £500. The defendants contend: That out of the said sum of £2,000, the plaintiffs are entitled only to the sum of £1,250, and they, the defendants, to the sum of £750. Wherefore, the parties pray for judgment in terms of their respective contentions, and for an order regarding costs.

Mr. Burton, K.C. (with him Mr. Van Zyl), for the plaintiffs. Mr. Schreiner, K.C., for the Board of Executors. Mr. Benjamin, K.C., for the major heirs; Mr. Louwrens for the *curator ad litem* of the minors.

Mr. Burton referred to the case of *H. K. Stephan v. Estate J. C. Stephan* (12 C.T., 242), where the same facts were set forth. His Lordship there held that clause 22 was too clear to be got over, and it was clear the testator intended to draw a distinction between his partnership and his private property. If clause 22 was too clear to get over, then clause 23 was clearer still. In order to encourage his brother to continue the business, the testator made provisions very much in his favour. Counsel submitted that the three-fourths mentioned in clause 21 were three-fourths of the private estate. The words left it open but upon reading clauses 22 and 23, it was clear they were private assets. If they were not, the testator would have been removing the inducement from H. R. Stephan to carry on the business. There was another case, that of *Stephan v. Colonial Government* (13 C.T., 852, and S.C.R., 533), in which the will to some extent came under discussion, and there the Chief Justice referred to the clear distinction the testator intended to draw between his partnership property and the rest of his assets. The burden, he submitted, rested upon his learned friends to show where the distinction came in.

Mr. Schreiner said his learned friend's argument was that the words in clause 20: "The residue of the appearer's estate then remaining over," must be confined to the residue of the appearer's private estate. If he was sound in that argument, his contention should prevail. If he was unsound, his contention must fail. Now, was there any justification for the contention that in clauses 20 and 21, the words which repeatedly appear: "the residue of the appearer's estate," were to be treated exclusively as the residue of the private estate? There was no distinction whatever between the private estate and that share of the partnership estate which upon the moment of death and the dissolution of the partnership became just as much portion of the estate of the deceased as any of his private assets. If the words: "and one-fourth share of the estate of the firm of Stephan Brothers" had not been in clause 23, his learned friend could not have put forward the contention that he then put forward. The contention for the plaintiff had been based on the somewhat general language of the Chief Justice in the previous case, but his lordship had not indicated such an astounding contention that the whole of the earlier clause 20 was to be construed so as to refer only to the private estate, and the three-fourths of the residue which it was specifically stated was to

go to certain heirs, was not to go to these heirs.

Mr. Benjamin said the 22nd clause of the will made a particular provision dealing with a particular contingency. If the 23rd clause had not been added the plaintiff would have had no argument at all. The previous case simply touched upon what the estate realised, while the business was carried on by H. R. Stephan. The plaintiffs, to support their case, were forced to read into the will that the 20th and 21st clauses applied solely to property belonging to the private estate. In order to make their contention good, they had to read private estate into these express clauses. There was no reference to private estate. In these provisions how could words like that be read into the will. If the contention was correct that these refer to private estate and private estate only, then they were driven to this: that there was no provision made for the distribution of the partnership of the estate in certain contingencies. That matter was really not touched upon in the previous case. The previous case only touched upon assets realised during the lifetime. He submitted that the true construction of the will was the contention set up by the defendants.

Mr. Burton, in reply, contended that even if the Court held that clauses 20 and 21 did refer to the whole estate, then his contention was a perfectly sound one. In the 20th clause, there was provision for payment of legacies and bequests, and the parties were agreed that these legacies and bequests were to be paid out of the private estate.

*Cur. Adv. Vult.*

*Postea* (August 9th).

Buchanan, J.: The late Johan Carel Stephan for many years prior to his death carried on business in partnership with Henry Stephan, under the style or firm of Stephan Brothers. Johan Carel Stephan died on February 6, 1900, leaving a will, by which he bequeathed in the first place sundry substantial legacies to relatives and others, represented in this case by the defendants. After giving directions as to these legacies, and making other gifts, the testator, in paragraph 19 of his will, instituted as his heirs his brother Henry Stephan, and the afore-said legatees, subject to the conditions contained in paragraphs 20 to 23 of the will. Henry Stephan has now died, and the plaintiffs represent his estate. The conditions, subject to which the heirs were instituted, are comprised under three heads. The first of these is contained in paragraph 20, and provides that after the payment of the legacies and other charges, the residue of the testator's estate shall devolve one-fourth upon his brother Henry Ste-

phan, and the other three-fourths upon the other heirs, share and share alike. The second of the conditions is contained in paragraphs 21 and 22 of the will. In paragraph 21 the testator states it to be his desire that his brother Henry should have every opportunity afforded him to continue the business of Stephan Brothers as heretofore, for Henry's own account and profit and loss during his lifetime; and being desirous and anxious not to put any obstacle in the way, or to embarrass the said business, the testator entitled and allowed Henry Stephan to remain in free and unencumbered possession of the residue of the estate, the claims of the other heirs to their shares therein being postponed until after the death of Henry Stephan. Then came two alternatives, the one in paragraph 21 and the other in paragraph 22. The first alternative was to the effect that should Henry Stephan liquidate the business, or discontinue it, or change the personnel or status of the firm, then in such event the other heirs should be entitled to claim "their three-fourths of the testator's estate accruing to them as aforesaid." These words in quotation marks can only have reference to the proportions provided for in paragraph 20. The second alternative is to be found in paragraph 22, and provides for the contingency should Henry Stephan decide to continue the business of Stephan Brothers. In such event it was provided that if, whilst so carrying on the business, Henry Stephan should sell any of the immovable property, or receive payment of any outstanding mortgage bonds, then, if the property sold or bond paid off belonged to the partnership business, he was required to pay over at once to the heirs one-fourth of the amount received, he being entitled "to one-fourth as heir of the testator and one-half as partner in the firm," but in case the property realised belonged to the testator's private estate, then he was to be entitled to retain one-fourth and pay over the remaining three-fourths to the other heirs. The paragraph also provided that should Henry Stephan alienate all the landed property belonging to the firm, he was to be considered as having discontinued the business, and the heirs would in that event be entitled to their inheritance. As a fact, Henry did elect to continue the partnership business. Whilst so doing he sold a portion of the landed property belonging to the firm, and the distribution of the money received therefor gave rise to a suit between the parties, which was heard in this court in March, 1902 (*Stephan v. Executors of Stephan*, 12 C.T. Rep., 242). In that action Henry Stephan claimed to be entitled to three-fourths of the proceeds of this landed property under the provisions of

paragraph 22, while the other heirs contended that he was entitled to one-half as partner, one-eighth as heir, and another one-eighth as usufructuary, which latter one-eighth would have to be accounted for at the termination of his life interest therein, and that the remaining one-quarter should at once be distributed among the other heirs. The Court sustained the claim of Henry Stephan as to three-fourths being his absolute property under the terms of this 22nd paragraph. No appeal was taken against that decision, and it must be held still to bind the parties. It is important to note, however, that paragraph 22 does not apply to the whole of the estate which the testator had in the partnership assets, but only to such parts of it as were represented by immovable property or outstanding mortgage bonds. It appears from the report of the previous action, though it is not so expressly stated in the special case now under decision, that there were assets of the partnership besides land and mortgage bonds, and the distribution of such other assets was not dealt with by the former judgment of the Court. Moreover, the concluding part of paragraph 22, which directs that, should Henry Stephan alienate all the landed property belonging to the firm, he shall be considered to have discontinued the business, seems to imply that in such event the testator intended the heirs to be entitled to their inheritances of three fourths of the testator's estate in the same way as they would have been entitled to such a share if Henry Stephan voluntarily discontinued the business, or it was discontinued from any other cause specified in this condition. Since the death of Henry Stephan a mortgage bond for £2,000, which had formed part of the partnership assets, has been paid off, and this action is instituted to determine the rights of the parties to these proceeds, though by consent of parties duly entered on the record, it is agreed that this should be considered a test case, and that the decision thereof should regulate the distribution of the remaining assets found in the partnership estate belonging to the testator. The plaintiffs contend that of the £2,000 which has been so realised, three-fourths, or £1,500 of the amount, should be awarded to the estate of Henry Stephan, and one-fourth to the other heirs. The defendants' contention, on the other hand, is that Henry Stephan's estate is entitled to only £1,250 of the amount, that is, to one-half of the £2,000, by virtue of his right as partner, and one-fourth of the remainder as heir under the will. The previous judgment of the Court settled how the proceeds of partnership land, which had been realised during the lifetime of Henry Stephan, and whilst he was carrying on the business of the



firm, were to be distributed; and the question now is, whether or not the proceeds of bonds realised after the death of Henry Stephan, and after the business of the firm had been discontinued, are to be distributed in the same proportions, or whether they come under the earlier provisions of the will. The third condition contained in paragraph 23 must, however, be considered before a decision on this point can be given. The testator therein states his desire to avoid all disputes and differences, but the paragraph has the effect of obscuring the testator's intention rather than to make it more clear. In this third condition the testator "declares it to be his will and desire that not longer than six months after his death a full and true inventory and account shall be taken of appearer's private estate, and also that of Stephan Brothers, and that appearer's other heirs shall be paid out their three-fourths' share in his private estate, and one-fourth share of the firm on the valuations and accounts, as set forth and contained in the said inventory, whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the said Henry Rudolph Stephan should he continue and carry on the business, nor, on the other hand, shall such heirs be responsible for any losses." The plaintiffs rely strongly on this condition as limiting the rights of the defendants to take only one-fourth of the partnership assets "whenever such payment may be made to them." Such a construction is directly in conflict with the first condition in paragraph 20, and also with the second condition contained in paragraph 21, which provides for a distribution in the proportion of one-fourth and three-fourths, should the business be discontinued by Henry Stephan. It may, however, be construed consistently with these clauses if this third condition be read in connection with and applied to the circumstances dealt with in section 22, which immediately precedes it; and if it be considered as referring to any payments which might be made by Henry Stephan during his lifetime, whilst carrying on the business of the firm. The inventory and the account which the testator here directed to be made, is evidently something more than the inventory which the law, under ordinary circumstances, requires every executor to make for the purpose of specifying the assets of the estate. The object of the testator here is, to ascertain by this inventory and account the true value of the estate at the time. The necessity for determining the value by inventory of the testator's estate after his death would only arise if Henry Stephan was to remain in possession of the residue and carry on the partnership business. If he

did not carry on the business the assets would be at once distributed, and there would be no object in taking the inventory and account provided for in this 23rd paragraph of the will. If the business was continued for the benefit of Henry Stephan, the value of the partnership estate would in all probability alter between the date of the inventory and the date of the subsequent liquidation, and it was, I think, the testator's desire by this clause to avoid any dispute arising from such probable alteration in value. The testator had already stipulated that any profits made or losses suffered by Henry Stephan in carrying on the business were to be for his benefit or at his risk. The Court should construe the will as a whole, and should accept a construction which would give effect to every part of the testator's expressed intention rather than adopt a construction which would make one part of the will conflict with another part. The one-fourth share in the assets of the partnership property mentioned in section 23, was, therefore, I think, intended by the testator to refer to the one-fourth mentioned in section 22. If this be correct, I think all the provisions of the will can be construed so as to make a consistent whole. In the first place, we have the testator instituting Henry Stephan in one-fourth and the other heirs in three-fourths of his estate, left after the payment of the legacies. Then the testator gave his brother Henry Stephan the option of continuing the partnership business during his life, and to enable him to do so he left the residuary estate in his hands whilst he so carried on the business. Next, we have the provision that if Henry Stephan decided to continue the partnership then out of the proceeds of any landed property sold by him or mortgage bonds paid to him, whilst so continuing the business, which were assets of the firm, a proportion of one-half instead of one quarter of the testator's share was to be retained by Henry Stephan. Lastly, that should Henry Stephan discontinue the business, his interest in the residue was to cease, and the assets belonging to the testator were to be distributed in the proportion of one-fourth and three-fourths. The partnership business was not discontinued by Henry Stephan during his life, but it has now come to a stop through his death, which event has also terminated his life interest in the residue. In the absence of any direction to the contrary as to what is to be done under these circumstances, it appears to me to follow that the institution of heirs in the proportion of one-fourth and three-fourths is the only direction of the will which it remains for the executors to observe. If this be so, then judgment must be given in favour of the



contention of the defendants. As the executors were justified in coming to the Court owing to the obscurity of the will, costs of suit will, as usual in such cases, be paid out of the estate of the testator.

Hopley, J.: During his lifetime Johan Carel Stephan and his brother Hendrik Rudolph Stephan carried on a large and flourishing business under the style of "Stephan Brothers." In such business were involved assets of two kinds, viz., those belonging to the business, which I shall call partnership assets, and others which were the personal property of Johan Carel Stephan, which I shall call the private assets. In November, 1898, Johan Carel Stephan made a will, and he is hereinafter called the testator. He died in February, 1900, and his brother, H. R. Stephan, carried on the business of Stephan Brothers, in accordance with the testator's testamentary wishes and intentions, until July 4, 1906, when he died. While so carrying on the said business, H. R. Stephan realised certain of the partnership assets, and the proceeds were distributed in terms of the will, after an interpretation thereof had on that point been obtained by a case stated to the Supreme Court. An asset of a similar nature has since H. R. Stephan's death been realised by his executors, and the object of this action is to obtain a decision of the Court as to the proper distribution of the proceeds thereof, and of similar assets to be realised in the future. The will is set forth in full as an annexure to the case, cut up into sections 1 to 26 for convenience of reference, such numbering not appearing in the original document, and it appears to me to have been a mistake to separate the clauses now numbered 21 and 22, since in the original will they together form condition II., subject to which the institution of heirs was made. I shall presently consider them together as the constituent portions of the said condition, and as to the rest, I, for convenience, adopt the numbering of the paragraphs, which have been agreed upon by the parties. By the first 18 clauses of the will a number of legacies and bequests were made, and then section 19 proceeds to the institution of the testator's heirs, of whom he appointed nine in all; to wit, his brother, Hendrik Rudolph Stephan and eight others, subject to conditions immediately following in the original will numbered I., II., III., and in the annexure numbered section 20 (which is condition I), sections 21 and 22 (which together are condition II.), and section 23 (which is condition III). Section 19, which must be looked upon as the governing or disposing clause of the will, is, in so far as the mention of the property is concerned, in the widest terms, the heirs being instituted as such to all the

testator's estate of whatever kind the same may be, and whether in possession, reversion remainder of expectancy. The first condition to be observed (sec. 20) is that after payment and satisfaction of all testator's liabilities and of all legacies and gifts, payments and charges under the will, one-fourth of the residue of testator's estate then remaining over shall devolve upon and go to Henry Rudolph Stephan, and the other three-quarters of such residue to the other heirs. This seems clearly to embrace all the assets of the estate, both the private effects of the testator and his share of the partnership assets. The next condition, however (sections 21 and 22), proceeds to make provision for the continuance of the business of Stephan Bros. by Rudolph Stephan during his life time, to give him usufructuary rights over the assets, both the personal assets of the testator and the partnership assets of the testator, and to lay down a mode of division between the heirs of such assets if realised by the said H. R. Stephan. Henry Rudolph Stephan was to have the right to remain in full, free, and unencumbered possession of the testator's estate (such as remained after payment of liabilities and bequests) during his lifetime, and the other heirs were not to have any of their rights as heirs until after his death, the object being to enable Henry R. Stephan to carry on the business of Stephan Bros. for his own account and profit and loss during his lifetime. But if Henry Rudolph Stephan were to liquidate or discontinue the business, or take a partner therein, or float it into a company, or otherwise change its status or personnel, then the other heirs were to be entitled forthwith to claim their three-quarters of the testator's entire estate. Nothing of that sort happened, and H. R. Stephan did carry on the said business unchanged as to status or personnel, during the remainder of his lifetime. We accordingly come to the further provisions of this, the second, condition, which are set forth in section 22 of the will, as annexed. In that paragraph the words, "Should none of the contingencies happen as set forth in this clause, and the clause preceding this," occur.

(One of the contingencies seems to be the death of Henry R. Stephan, but that may be passed over, as it is clear that the whole of the section refers to acts to be done by the said Henry R. Stephan whilst carrying on the said business. The clause, therefore, may be taken to mean that, should Henry Stephan not liquidate the said business, or discontinue it, or take a partner in it, or float it into a company, or otherwise change its personnel or status, or sell or alienate all the landed property belonging to the firm, and should he decide to carry it on for his own account, then if he should realise any of the im-

movable property of the business, or receive payment of mortgage bonds belonging to the said business, or if he should realise any immovable property, or receive payment of any mortgages belonging to testator's private estate, the proceeds are to be divided in different ways according to the nature of the asset whence such proceeds are derived. If the asset were immovable property or mortgages belonging to the partnership, then Henry Stephan was to pay over one-fourth of such proceeds at once to the other heirs, and retain three-fourths for himself, viz., one-half as his own by right as partner, and one-fourth as heir thereof by direction of the testator. But if the property producing such proceeds were the personal asset of the testator, then Henry R. Stephan should retain one-fourth as testator's heir, and hand over three-fourths of such proceeds to the other heirs. It is perfectly clear that the testator meant the partnership assets to be distributed in a different way from the private assets during Henry Stephan's lifetime, and his object may have been to give Henry Stephan every inducement to manage the partnership assets prudently, and to realise them to the best advantage. Without however speculating as to the testator's motives, it is clear that of the proceeds of testator's personal assets, Henry Stephan was to get only a quarter, whereas of testator's assets in the business he was entitled to one-half upon their realisation. Did such a state of things as regards the partnership assets last beyond the lifetime of Henry Stephan? It was argued that Condition III. (section 23) had the effect of protracting the basis of division beyond the lifetime of Henry Stephan, because of the words "whenever such payment may be made to them." I am, however, of opinion that that condition should be read as having immediate reference to the preceding one, and to mean that while Henry Stephan was alive and carrying on the business the other heirs were not to be entitled to claim more, nor need they receive, less than their proportion of the values, according to the inventory, at whatever price Henry Stephan may have realised them, whether above or below the prices fixed in such inventory. If this meaning be given to the paragraph there is nothing obscure or contradictory in the will, and it seems to me to be the only natural way of construing it; for it can hardly have been the intention of the testator to extend the benefits which he meant for Henry Stephan, on account of his keeping the business going, to a period beyond the lifetime of the mind and hand to which he was ready to entrust the interests of his estate after his death. My view, then, of the present question before the Court

is that, during Henry Stephan's lifetime, and while he was managing the business, special terms and privileges were accorded to him as to the partnership assets under his control, but that upon his death there was a severance of the common interests belonging to the respective estates of the testator and himself, and that all of such partnership assets as were then unsold were to be equally divided between his estate and that of the testator, that the testator's half share then fell into his private estate, and that the division was to be made as of the rest of his private assets. I am of opinion, therefore, that the contention of the defendants should be upheld, and that costs should come out of the estate of the testator.

[Attorneys for Plaintiff: Van der Byl and De Villiers; attorneys for the Heirs and the Board of Executors: Van Zyl and Buissinné.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { 1907.  
Aug. 2nd.

Mr. De Waal moved for the admission of Pieter Eduard Kriel as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Piquetberg.

### PROVISIONAL ROLL.

#### EGERTON PARK ESTATE V. LAND.

Mr. Lewis moved for provisional sentence on a dishonoured cheque for £40, with interest from the 16th May, 1906, and costs, and for judgment on certain conditions of sale for £32, with interest from the 1st May, 1907.

Order granted.

#### MARSH V. BLAKE.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £1,000, with interest from the 1st August, 1906, at 6 per cent., and for £2 15s. 6d., premiums of insurance paid by plaintiff; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

ILLIQUID ROLL.

MORAVIAN MISSIONARY SOCIETY V.  
ADONIS.

Mr. Lewis moved, under Rule 330a, for judgment against plaintiff (Adonis) for not proceeding with his action within the time fixed by the Rules of Court. Plaintiff had instituted an action relating to certain rights in a farm adjoining the mission at Mamre, division of Malmesbury.

Order granted.

ENSLIN AND DUVEEN V. LOUW.

Mr. Wallach moved for judgment for costs. Defendant, he said, was sued for return of a promissory note for £15 10s., signed by one Mostert, or the amount thereof, and costs. The note had been returned by defendant a considerable time after service of summons, but he had not paid the costs.

Order granted for costs.

WOLSTENHOLME V. WOL- } 1907.  
STENHOLME. { Aug. 2nd.

This was an action brought by Maria Petronella Wolstenholme, of Cape Town, against her husband, Edward Wolstenholme, described as of Springbokfontein, Namaqualand, for a decree of divorce and custody of the child, or, in the alternative, a judicial separation.

At the outset a question was raised as to whether there had been proper notice to defendant of set-down of the case.

The Chief Justice said that he would hear the evidence.

The declaration set out that the parties were married at O'okiep on February 14, 1894. Plaintiff alleged that, owing to defendant's misconduct, she had had communicated to her a certain disease. She prayed for a decree of divorce on the ground of the defendant's adultery with some person or persons unknown; or, in the alternative, a judicial separation on the ground of cruelty.

Mr. Rowson was for plaintiff; defendant did not appear.

Wm. T. Birch, clerk in charge of the marriage register, Colonial Secretary's Office, gave formal evidence of registration of the marriage.

Maria Petronella Wolstenholme (the plaintiff) gave evidence, from which it appeared that she had been shamefully abused by the defendant while they were residing in Namaqualand. He had made most improper overtures, and when she refused he assaulted her.

By the Court: Her husband had been a miner under the Cape Copper Co. He knew that this case would be heard

to-day. Mr. Shaw had told her that he had sent a summons to defendant.

Dr. McMullen also gave evidence as to having prescribed both for the plaintiff and defendant.

W. B. Shaw, jun., a clerk in the employ of his father, said that in 1905 defendant called at his father's office, and admitted having committed adultery.

De Villiers, C.J.: The chief evidence in this case is the evidence of Mr. Shaw as to the confession made by the defendant. That, taken in connection with the other evidence given in this case, I think justifies the Court in coming to the conclusion that there has been adultery. But there is not satisfactory proof that the defendant had notice of this case being set down for trial to-day, and the Court will grant a decree of divorce, with costs, and a declaration that the plaintiff is entitled to the custody of the child, subject to the Registrar of the Court being satisfied that due notice has been given to the defendant of the case being set down for to-day. If it cannot be shown that notice was given there will be no decree.

*Ex parte* VAN DER WESTHUIZEN.

Mr. Douglas Buchanan moved, as a matter of urgency, for an order restraining the Sheriff, or his deputy, from parting with, or paying over, the proceeds of a certain sale. Petitioner said that Jacob Levin, of Moorreesburg, Malmesbury division, was indebted to him in the sum of £50, balance of a bond. On June 28 last Levin gave notice in the "Gazette" of his intention to surrender his estate as insolvent. That notice was not acted upon, and the creditors accepted a compromise of 5s. in the £. Respondent's goods had since been attached under a writ of execution, and these goods had been advertised for sale by public auction this (Friday) morning. A fresh notice of intention to surrender appeared in the "Gazette." Unless the proceeds were interdicted, the judgment creditors, Messrs. Zeederburg and Duncan, would be preferred over the general body of creditors.

Order granted as prayed, with leave to telegraph same.

GENERAL MOTIONS.

*Ex parte* DIVISIONAL COUN- } 1907.  
CIL OF MOSSEL BAY. { Aug. 2nd.

Mr. Toms moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* BREGENZER.

Dr. Greer moved for leave to petitioner to sue her husband, Ernest Raymond Bregenzer, in *forma pauperis* and by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Respondent was now believed to be residing at Livingstone, Rhodesia. Counsel said he was prepared to certify *probabilis causa*.

Petitioner appeared in person, and, in answer to the Court, said that she was without means with which to institute an action.

Rule nisi granted, calling upon respondent to show cause why petitioner should not be admitted to sue him in *forma pauperis*, and leave granted to sue by edict, rule and citation to be returnable on the 17th September, personal service to be effected.

*Ex parte* COX.

Mr. Sutton moved for leave to petitioner to sue her husband in *forma pauperis* for a judicial separation.

Subject to counsel's certificate, a rule was granted, returnable on the 9th August.

## WILKINSON V. WILKINSON.

Mr. Sutton moved, on the petition of Catrina Hendrina Wilkinson, of the farm Engelwood, district Maclear, East Griqualand, for an order against her husband, Petrus Wilhelm Josephus Wilkinson, of the farm Stonedale, district Maclear, for payment of funds to enable her to institute an action against defendant for divorce, on the ground of his alleged adultery, and for alimony pending the action.

De Villiers, C.J. asked if notice had been given respondent of this application?

Mr. Sutton said that notice had not been given, and that he should have to apply for a rule.

Rule granted, calling upon defendant to show cause on the last day of term why a sum of £50 should not be paid by him to plaintiff's Cape Town attorneys, for the purpose of enabling her to institute an action against him.

*Ex parte* ABRAHAMSE.

Restitution of conjugal rights—  
Insane spouse—*Curator ad litem*—Divorce.

*On an application for the appointment of a curator ad litem to an insane woman, kept in confinement at a lunatic*

*asylum, in an action instituted against her for restitution of conjugal rights and failing compliance for divorce on the ground of malicious desertion.*

*Held, that as her conduct under the circumstances could not be held to be wilful or malicious, the appointment of a curator ad litem was uncalled for.*

Mr. Toms moved, on behalf of petitioner, for the appointment of a *curator ad litem* to represent his wife, who is a patient at the Valkenberg Asylum, in an action petitioner proposes to institute against her for restitution of conjugal rights, failing which, a decree of divorce and forfeiture of her half-share of the joint estate.

[De Villiers, C.J.: Is that a ground for divorce?]

Mr. Toms: It is not a ground in our law at present.

[Well, the Legislature should be appealed to.]

Mr. Toms said that the petition was of a tentative character.

De Villiers, C.J.: I am clearly of opinion that this is not a mode of obtaining a divorce. The petitioner now desires to sue his wife for restitution of conjugal rights by reason of her permanent and total insanity, and, failing her compliance, then for a divorce. But, if the woman is insane, how can she be expected to comply with an order of Court? How can the Court make an order upon an insane woman to return to her husband, and how can it be held that there is malicious desertion on the part of the wife if she refuses to return? If the woman is insane there can be no malice. In the present case, so far from her desertion being intentional or malicious, she is detained, without her own consent at a lunatic asylum. Of course, another and wider question may be raised as to whether insanity is a ground of divorce, but it should not be by the roundabout process of a restitution of conjugal rights. It has never yet been decided that insanity is a ground of divorce, but if the applicant wishes to raise that point, he can do so by directly suing her for divorce on the ground of insanity, but that is not asked for in the petition.

Mr. Toms asked if the Court would allow the matter to be mentioned again on an application for a divorce on the ground of insanity.

De Villiers, C.J.: If you wish to have a *curator ad litem* appointed for the purpose of a direct action for divorce, then there must be a fresh petition. That is not the present petition, but I do not wish to hold out hopes that such a petition would be successful.

*Ex parte* McBEAN.

Mr. Sutton moved for leave to presume the death of Robert Moncton McBean, formerly of the B.S.A. Police, who was supposed to have met with his death through starvation, or to have been killed by wild animals while on his way to Tuli in October, 1899. Mr. R. M. McBean had insured his life for £250, and had ceded the policy to petitioner.

Rule granted calling upon all persons concerned to show cause on the last day of term why the death of the said McBean should not be presumed, rule to be published once in a Kimberley newspaper.

CHASE AND ANOTHER V. RIGGE.

This was an action in which the plaintiffs sought to have Lucy Mary Rigge, widow, of Cape Town, at present a patient at the Valkenberg Asylum, declared of unsound mind, and a curator appointed of her property.

Mr. Bisset was for plaintiffs; Mr. Sutton appeared as *curator ad litem* of the alleged lunatic.

Mr. Sutton informed the Court that he had interviewed the defendant on four occasions, and was unable to satisfy himself that she was of unsound mind. The defendant had come from the asylum, and was in the precincts of the Court.

De Villiers, C.J., said that the defendant had better come into the Court while the question of her state of mind was inquired into.

Mrs. Rigge, a well-dressed lady, then came into Court, and sat behind her curator during the hearing of the case, in which she manifested the keenest interest.

Mr. Sutton said that Mrs. Rigge had property of the value of about £15,000, and she seemed to have a good knowledge of her own affairs.

Mr. Bisset led evidence in support of the application.

Dr. J. B. Lester said that he practised in Cape Town, and had been attending Mrs. Rigge since December, 1905. He had had occasion to observe her conduct closely, and along with Dr. Thompson he signed the certificate upon which she was removed to Valkenberg. He came to the conclusion that it was absolutely necessary that she should be placed under control. Mrs. Rigge was in an excited state. She kept her carriage horses and servants up at all hours of the day and night, and generally behaved like a person of unsound mind. Witness used to attend Mrs. Rigge's late husband, and found that he had considerable anxiety about the state of her mind. She recently visited Johannesburg, and on the way down she invited people who

were absolute strangers to come and stay with her. Nurses were appointed to look after her, but she treated them in such a manner that they would not stay. Mrs. Rigge went away to Hankey, and while she was in Port Elizabeth she sent witness an invitation to a dance that she was to hold at the Town Hall, Cape Town. He discovered that about 25 invitations were sent out, amongst others to the Governor and Lady Hely-Hutchinson. Mrs. Rigge discussed the arrangements with witness for the dance, and at 8 o'clock on the very evening when the dance was to be held, she was still discussing the arrangements, but had made no actual arrangements. At 9 o'clock, she settled down again, and dismissed the subject from her mind. Just before she left for Hankey, she was preparing pickled fish and jams instead of making ready for the journey. Mrs. Rigge had frequently sent for him at all hours of the day and night without any apparent reason. On one occasion she took a hot bath about half-past three in the morning, and remained in the bath for about three or four hours, shouting and yelling.

By the Court: Witness considered that Mrs. Rigge was of unsound mind. He last saw her about four weeks ago, when he accompanied her to the asylum.

Witness, in further evidence, said that Mrs. Rigge had spent money extravagantly.

By Mr. Sutton: Witness was aware that Mrs. Rigge during the past 18 months had lost her husband, and some time previously she lost her only daughter. He had heard that Mrs. Rigge had taken a certain water treatment upon advice given her in Johannesburg. Mrs. Rigge was not suffering from delusions. She had a clear memory. She went for drives in her own carriage.

Mr. Sutton: I put it to you that this is not more than eccentricity?

Witness: I think it is more.

How do you draw the line?—It is very difficult to draw the line.

Witness, in answer to further questions, said that he thought Mrs. Rigge ought to be under restraint. He did not think it proper that Mrs. Rigge should go to her own house and be placed under observation. Mrs. Rigge had not been lonely when she was at her own home. Her house was always swarming with relatives. Witness had had the ordinary medical practitioner's experience of lunacy cases.

Dr. E. Thomson said that he practised in Cape Town, and had seen Mrs. Rigge on two occasions. On these occasions he came to the conclusion that she was of unsound mind. He formed this opinion upon the history of the case, conversation with Mrs. Rigge, and her general appearance.



By Mr. Sutton: Witness was of opinion that Mrs. Rigge should have been treated in a home or a private asylum, rather than a public asylum.

Dr. A. Cowper, of the Valkenberg Asylum, said that he had been in charge of the asylum since Mrs. Rigge was admitted. He was of opinion that Mrs. Rigge had been and was still passing through an attack of mania. He thought it was still necessary that she should be kept under control and supervision. He considered that it was much more desirable that she should be in a private asylum. As an experiment, he thought that she could be put in her own house under the care of nurses, but he was not very sanguine of the success of the experiment.

By Mr. Sutton: The case was just on the border line. He thought the experiment of putting Mrs. Rigge into her own house, under the charge of nurses, might be tried. Mrs. Rigge attended the Hollins's organ recital under the care of two nurses, and he believed she was anxious to hear Mark Hambourg's recitals. Mrs. Rigge's mental faculties were probably more acute now than when she was well. She was continually excited.

By the Court: She was continually excitable and talkative. She was always busy, and did nothing. She had at times what he would call acute emotional storms. On Sunday morning last she said that she wanted to make her will, and if not allowed, said she would cut her throat. She dressed in the most grotesque fashion. The attire in which she now appeared was her own.

De Villiers, C.J.: She is not at all grotesquely dressed to-day. She is very well dressed.

Mrs. Margaret M. Hutton (sister of Mrs. Rigge) said that Mrs. Rigge and her husband came out to the Colony in 1905 for the benefit of Mr. Rigge's health. He, however, died. Mrs. Rigge inherited his property, to the value of about £15,000. Before her daughter's death Mrs. Rigge suffered from melancholia, and had to be removed to a home in England. Mrs. Rigge recently went to England for about six months, and spent about £2,000 on the trip. She was generous to the point of recklessness.

Mr. Sutton said that Mrs. Rigge was accompanied by other relatives on the trip.

Witness, in further evidence, said that if anyone admired anything in Mrs. Rigge's presence she insisted on giving it to them.

By Mr. Sutton: Mrs. Rigge had a very nice little property in the Gardens called Bolingbroke. For many years Mr. and Mrs. Rigge had only about £200 a year to live on. Then Mr. Rigge inherited about £19,000. On the recent trip to England Mrs. Rigge was ac-

companied by three relatives, whom she was treating. Witness had been a little troubled about the ball Mrs. Rigge proposed to give. They were very much opposed to the ball. It was nine years since Mrs. Rigge was confined in a lunatic asylum at Northampton.

Horace W. D. Hutton (nephew of Mrs. Rigge) said that on her recent trip to Port Elizabeth respondent caused a good deal of trouble on board. Witness accompanied Mrs. Rigge. She was constantly shopping. She took £50, cashed a cheque for £30, and borrowed £18. At her home Mrs. Rigge used to keep a gramophone going until late at night, and to start it again at 5 o'clock in the morning. Mrs. Rigge kept the servants in the house constantly on the move. She was always sending for the doctor.

By Mr. Sutton: Witness was Mrs. Rigge's godson. Mrs. Rigge liked to have people at her beck and call, and make them feel that she was "somebody."

Wm. T. Dowsing, Mrs. Rigge's coachman, also gave evidence, stating that on one occasion Mrs. Rigge was in her bath in the early morning, and called out to witness and the milkman to help her out.

By Mr. Sutton: Witness was aware that Mrs. Rigge was subject to fainting fits. He understood that she was in a fainting fit when she was calling out from the bath.

Tom A. Smith, who is married to respondent's niece, also spoke of certain things which he had observed in regard to Mrs. Rigge's conduct while he had been living at her house.

A nurse at the asylum said that Mrs. Rigge's moods varied a good deal. At times she was quite reasonable. She was very excitable, but not violent. Mrs. Rigge often read magazines. She complained about being kept in the asylum. Witness had previously attended the insane, and Mrs. Rigge's general conduct was such that she considered her to be of unsound mind.

This concluded the evidence for plaintiffs.

Lucy Mary Rigge (the respondent) then gave evidence. She said that she objected to being declared of unsound mind. She did not like being at Valkenberg. The sights depressed her. Witness bought Bolingbroke in June, 1906, for £2,200, and had spent £1,400 on alterations. She had been expecting that her mother and sister would share the house with her. Her husband died about 12 months ago, leaving her about £19,000 or £20,000. She had her husband's remains removed to England, so as to be interred in the family grave. Witness had not given riotous bridge parties. As to the dance, she was carrying out a promise by her husband to her niece, Miss Hutton. Witness's mother resided near Port Elizabeth, and was 79 years of age. Witness was in St. Andrew's Hospital,

Northampton, about nine years ago. She remained there about four months. She had then got very depressed through having been frightened in a lunatic asylum. Witness went on to complain that she had been treated with indifference by the night staff at the asylum, and that she had been kicked when she had been writhing in pain. Witness's property was being looked after by Mr. Coulter. She was quite satisfied with his work. As to the incident of the bath, she cried out because she was in a fainting fit. She had no intention of committing suicide when she made the threat at the asylum.

Mr. Bisset mentioned that the relatives of the respondent had nothing to do with the removal of Mrs. Rigge to the asylum, but that she was sent there on the certificate of the doctors.

De Villiers, C.J.: I am not prepared to make an order that the defendant is actually insane, because that would be a permanent order, and it would have a permanent effect. But, at the same time, I am not prepared to order her discharge from the asylum. She has been committed to the asylum under the Act, and under the Act, as soon as the superintendent of the asylum is satisfied that she has regained her reason, he will do his duty at once by discharging her.

Respondent requested that she should be examined by a private practitioner, and suggested Sir Edmond Stevenson.

Mr. Sutton (in answer to the Court) said that no private asylums had been opened under the Act.

De Villiers, C.J.: Before giving a final order upon this application, I should like to have a report from another doctor, and I think from Sir Edmond Stevenson, as she wishes it herself. The Court will appoint Sir Edmond Stevenson to examine into the mental condition of the defendant, and to report to the Court as to the advisability of removing her to a private house in case she should be found to be insane, and in the meantime the Court will appoint Mr. Charles W. A. Coulter as *curator bonis* for the temporary care of the defendant, with power to receive rents and other income on her behalf, and to pay for the maintenance of the defendant at the asylum, the costs of this application, and such other costs as may have to be paid.

Dr. Cowper (at the request of the Court) then came forward.

De Villiers, C.J.: I take it that if she is left at the asylum, as soon as you are satisfied that she may safely be discharged, you will release her?

Dr. Cowper: Certainly.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

FITZGERALD V. ARGUS } 1907.  
PRINTING AND PUBLISH- } Aug. 5th.  
ING CO., LTD. } , 12th.

Surety — Guarantee — Principal debtor—Benefit of excussion —Denial by surety of suretyship.

*One Flynn having ordered some goods from the plaintiff, requested delivery, but the plaintiff refused to deliver without payment; whereupon the defendant telegraphed to the plaintiff as follows: "Kindly forward Flynn's goods. Will hold myself responsible his paying your account within fortnight."*

Held, reversing the judgment of the Eastern Districts Court, that the defendant was a surety for the payment by Flynn of the price within the fortnight, that he was not liable as principal debtor, and that as he had, before pleading, claimed the benefit of excussion by way of exception to the summons, the exception ought to have been allowed.

This was an appeal from a judgment of Justices Sheil and Graham, sitting in appeal in the Eastern Districts Court, from a judgment of the Resident Magistrate of Aliwal North.

It appeared from the record that one T. D. Flynn, of Queen's Town, had placed a printing order with the Argus Co., in Cape Town, for 500 plans, but that the company had refused to deliver same without first receiving payment. Flynn appears afterwards to have gone to Aliwal North, and on the 25th January, 1906, Patrick Michael Fitzgerald, an attorney practising there, despatched a telegram to the plaintiffs in the following terms: "From Attorney Fitzgerald, to Argus, Cape Town.—Kindly forward Flynn's maps; will hold myself responsible his paying your account within fortnight. Reply." Thereafter the maps were forwarded, but the account was not paid,

and the Argus Co. sued Fitzgerald in the Magistrate's Court, Aliwal North, for the amount of their account, viz., £21 10s., reduced to £20 so as to bring the claim within the Court's jurisdiction. Defendant raised two exceptions: (1) that the summons disclosed no cause of action against him, and (2) that, if anything, it merely disclosed a suretyship by defendant for Flynn, and that plaintiffs had not alleged non-payment by Flynn to them, and defendant claimed the benefit of excussion. Otherwise, he pleaded that it was arranged between plaintiffs and defendant and Flynn that the plans should be sent by plaintiffs to defendant to enable him to collect certain moneys due by various parties for advertisements on the plans, and that the said plans were wrongly sent to Flynn's address, whereby defendant was unable to protect himself. The Magistrate overruled the exceptions, and found for plaintiff. The case was then carried on appeal to Eastern Districts Court, and Justices Sheil and Graham upheld the Magistrate's judgment, and dismissed the appeal with costs.

Mr. Bisset was for appellant, Fitzgerald; Mr. Upington was for respondent, the Argus Co.

Mr. Bisset quoted Pothier on Obligations, 1, section 372, and *Klopper v. Van Stauden* (11 Juta, 94). He submitted that the exception that the principal debtor had not been excused should have been sustained in the Court below. He urged that there never was such delivery, as the parties contracted for, and as the parties contemplated, and that that being so, Fitzgerald, at all events, could not be held liable, because he only came into this obligation on the implied understanding in the contract that the maps were to be forwarded to him at Aliwal North.

Mr. Upington said that the first question for decision was, what was the nature of the contract, if any, between plaintiff and defendant? It was perfectly clear, from the admissions made by defendant himself in the correspondence, that he regarded himself as liable.

[De Villiers, C.J.: Yes, assuming that the plans were sent to him.]

Mr. Upington submitted that defendant could not then logically say that, because the plans were not sent to him, he was only liable as surety. The respondents were justified in looking upon this telegram in the light of an undertaking by Fitzgerald to be liable for this account, at any rate as a co-principal debtor. It was clear that he had regarded himself as a principal debtor.

[De Villiers, C.J.: I quite agree that the defence is not a sound one, but then the exception remains.]

Mr. Upington said that, seeing that defendant had throughout taken up the position that he was not liable because

the plans were not sent to him, was he now entitled to claim the benefit of excussion? He cited *Klopper v. Van Stauden* (11 S.C., 98), and *Hurley v. Marais* (2 Juta, 156). Defendant could not, by his conduct, mislead his creditor into the belief that he contended that he was a principal debtor, and then afterwards avail himself of the benefit of excussion as a surety. Counsel submitted that defendant was now estopped from setting up the exception, for that he had waived the benefit of excussion.

[De Villiers, C.J.: My impression is that there is authority for saying that, even after denying the suretyship, the defendant is entitled to avail himself of the exception. If he has pleaded as against the plaintiff's claim, then he is debarred from raising it.]

Mr. Upington: That would seem to be a little inequitable.

Mr. Bisset, in reply, submitted that there was no inconsistency between the two defences. The fact that Fitzgerald said that the maps were to be sent to him at Aliwal North, so as to secure himself, in no way made him a principal debtor or the purchaser of the goods. Defendant had throughout taken up the position that he was a surety. There was no due delivery in terms of the contract in this case. The delivery was prejudicial to the surety, and he was entitled to take the exception.

*Cur. Adr. Vult.*

*Postea* (August 12).

De Villiers, C.J.: The questions arising on the appeal are whether the defendant, in sending a certain telegram to the plaintiff company, incurred the liability of a surety for one Flynn, and, if so, whether, on being sued as such surety, he was entitled to claim the benefit of excussion. The action was originally brought in the Resident Magistrate's Court of Aliwal North. It appeared from the evidence there given that Flynn had ordered certain plans of Aliwal North from the plaintiff company, for which payment had to be made before delivery. When the plans were ready, Flynn, by telegram, endeavoured to obtain delivery without immediate payment, but the plaintiff insisted upon the terms originally arranged. Ultimately the defendant sent the following telegram to the plaintiff company (Aliwal North, January 25, 1906): "Kindly forward Flynn's maps. Will hold myself responsible his paying your account within fortnight. Reply." Thereupon the plaintiff company forwarded the plans to the address of Flynn at Queen's Town, and on March 2, through the Standard Bank, drew upon the defendant for the amount of the account. The defendant refused to

honour the draft, with the result that he was sued by the plaintiff for the amount, less £1 10s., in order to bring the case within the jurisdiction of the Resident Magistrate's Court. The Magistrate held that as Flynn had failed to pay within the fortnight, the defendant became liable, not as a surety, but as principal debtor. On appeal to the Eastern Districts Court this view was upheld. It was held by Sheil and Graham, J.J., that the telegram was neither a guarantee nor a suretyship, strictly speaking, but an unconditional undertaking to pay the company's account if it were not settled within a fortnight. They further held that, even if the telegram did amount to a guarantee or suretyship, the defendant was in the position of a surety who had been accepted by the creditor as principal debtor, and therefore not entitled to the ordinary benefit of excussion.

I regret to say that this Court is unable to agree with the learned Judges in the Court below from either point of view. The essential requisites of the contract of suretyship are that the surety should incur only an accessory obligation, whilst the principal obligation of the debtor remains in full force (see *inter alia*, *Cens. For.*, 1, 4, 17, 3), and both these requisites are present in this case. The obligation incurred by the defendant by means of his telegram was purely accessory or collateral to the principal obligation of Flynn, which remained intact, notwithstanding the telegram. The defendant undertook to be responsible for Flynn's paying the company's account within a fortnight, and there was no contract of any kind by which Flynn was released from his liability as the debtor principally liable. If, by agreement between the parties, the defendant had been accepted by the plaintiff company as its debtor in lieu of Flynn, it would have been a case of novation, and the defendant would have become the only principal debtor. But the defendant only undertook responsibility for Flynn's paying within a fortnight. The Judges in the E.D. Court held that there was an unconditional undertaking on the defendant's part to pay the company's account if it were not settled by Flynn within a fortnight, but they did not say that Flynn's liability ceased at the end of the fortnight. If Flynn's liability continued after the fortnight, as it certainly did, then it is the ordinary case of a suretyship for a debt payable within a definite time. It is not alleged in the present case that Flynn was insolvent or absent from the Colony, or that any other special circumstance existed, independently of waiver, which deprived the defendant of the right to claim an excussion of the principal debtor before he could be compelled to pay. At the trial he took the exception before pleading to the

summons, and if he was entitled to the benefit of excussion the exception ought to have been allowed. The learned Judges, however, held that the defendant was in the same position as if he had undertaken by his contract to be principal debtor as well as surety. The passage cited by them from Van Leeuwen's *Censura Forensis* (1, 4, 17, 23) makes it clear that a surety may renounce the benefit of excussion, and that where a person binds himself as principal debtor as well as surety, he is understood to have undertaken payment of the debt as if it were his own, and as though he were the principal debtor. The reason given by Van Leeuwen, Voet, Pothier, and others for this rule is that unless the words whereby the surety binds himself as principal debtor are held to import a renunciation of the benefits they would be wholly meaningless. If, therefore, the defendant had said in his telegram that he would hold himself responsible as principal debtor (or had used words of like effect), for Flynn's paying the account, no fault could have been found with the Magistrate's decision. But there is nothing in the telegram or, indeed, in any part of the correspondence from which it can be inferred that the defendant took upon himself the liability of a principal debtor or which would be inconsistent with his being only a surety. The Judges say that the defendant practically admitted that he had undertaken unconditionally to pay the account in his evidence, where he said that if the plans had been forwarded to him he considered he would have been liable. This admission, subsequently made, cannot affect the meaning of the telegram, but it is clear that what he meant by his evidence was that if the plans had been forwarded to him at Aliwal, in accordance with what he understood to be the agreement, he would have been in the position of a surety who had obtained a counter security from the principal debtor. Such an admission does not imply that the defendant intended by his telegram to undertake the responsibility of a principal debtor even if the goods were never delivered to him. The requirement that the goods should be delivered to him would be quite consistent with his being a mere surety. The evidence on this point was given by the defendant in support of the defence pleaded by him in the event of his exceptions being allowed, and his defence is perfectly intelligible. He says that the correspondence had led him to the conclusion that the plans would be forwarded to him at Aliwal North, instead of which they were forwarded to Flynn at Queen's Town. Some of the telegrams produced in evidence lend some colour to the defendant's plea. For instance, Flynn's telegram of 24th January, which was sent before the guarantee



was given, requested the company to send the plans to the defendant, and after the guarantee had been given the company telegraphed to him as follows: "Will forward Flynn's sheets to your order, Tuesday." The company's manager said, in his evidence, that the word "order" should have been "guarantee," but the defendant was justified in construing the telegram according to the terms actually employed by the sender. It is unnecessary, however, for the Court to decide upon the validity of the plea. It was not pleaded until after the exception had been taken, and as the exception ought to have been allowed in the Magistrate's Court, no decision could properly be given upon the validity of the plea.

The question was raised in this Court whether the defendant, after having wholly denied his liability, was entitled to claim the benefit of excussion. In the Roman law, it was laid down by Ulpian (Dig. 46, 1, 10, sec. 1), that the benefit of excussion should not be allowed to a surety who has falsely denied his suretyship, but Voet (46, 1, 18) says, in regard to this passage, that it can hardly hold good under the modern practice whereby legal penalties depriving people of their rights had been abrogated. But even if the rule of the Civil law still obtained in this country, it could not be held that the defendant had falsely denied his suretyship. He admitted the telegram, but, rightly or wrongly, he construed it to mean that on the goods being forwarded to him he would be responsible for Flynn's paying for them within a definite time. The goods were not forwarded to him, and his opinion as to his responsibility in case they had been so forwarded cannot affect his legal position in the event which has actually happened. In his letter of 29th May, 1906, he admitted that he had guaranteed payment of the account provided the plans were sent to him, and when the case came to trial, so far from denying his suretyship, he took the exception *in initio litis* that he was a surety, and that the principal debtor should be first excused. His previous extra-judicial denial of liability cannot, therefore, deprive him of the benefits conferred by law on sureties. In the opinion of the Court, the defendant was merely a surety for the prompt payment of the debt by Flynn within a fortnight after the date of the telegram, and, as the defendant neither expressly nor tacitly renounced the benefit of excussion, he was entitled to claim that Flynn, the principal debtor, should first be excused. The appeal will, therefore, be allowed, with costs in this court and in the courts below, and the judgment amended by allowing the second exception.

Mr. Bisset (for appellant) asked whether the costs would include costs of the

application made by Fitzgerald, for leave to appeal rendered necessary by the delay in forwarding the record from the Eastern Districts Court?

The Chief Justice: Your client might have saved those costs if the appeal had been in time. In any case, respondent should not suffer. There will be no order as to costs of the application.

Maasdorp and Hopley, J.J., concurred.

[Appellant's Attorneys: Reid and Nephew; Respondent's Attorneys: Van Zyl and Buissinné.]

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

VAN RHYN V. BURGER. { 1907.  
Aug. 5th.

Owner of land—Destruction of vermin by poison—Negligence.

*It was agreed between two owners of land that each should occupy his garden as his own property, that each should properly fence in his garden and that in case of trespass by cattle he should not impound them or claim damages for such trespass. The defendant placed some poisoned wheat in his garden for the purpose of killing baboons, which were in the habit of doing damage there; and some of the plaintiff's goats broke through the fence erected by the defendant, which was somewhat faulty, ate some of the poisoned wheat and died from the effects. It was proved that the plaintiff had notice of the placing of the poison, and that with ordinary care he could have prevented the goats from trespassing in the garden.*

*Held, that the defendant was not liable in damages at the suit of the plaintiff, who was lessee of one of the co-owners.*

This was an appeal from a decision of the R.M. of Clanwilliam, in a suit brought by the plaintiff, Daniel van Rhyu, for breach of contract, or alternatively for £6 damages, for loss sustained through the careless handling of



certain goats by the defendant, Petrus Lusias Burgher. The judgment of the Magistrate was absolution from the instance. The plaintiff was the lessee of one Van Zyl, with whom the defendant was a partner in the farm Duikersfontein, and while the goats were in the garden it was alleged they were poisoned through the negligence of the defendant.

Exceptions were taken in the Court below to the summons by the attorney for the defendant on the grounds of vagueness, and of no law preventing the laying of poison in a garden, and that therefore no action for damages could arise. Both exceptions were overruled.

The Magistrate, in his reasons for judgment, said the plaintiff sued the defendant for damages for breach of contract, or, alternatively, for loss sustained by careless handling of goats while being impounded. The amount of the damage claimed was arrived at by calculating the value of the goats lost by being poisoned. The farm Duikersfontein was owned by Van Zyl and Burgher, and the plaintiff was lessee of Van Zyl. One Du Plessis alleged that he was troubled by baboons, and so he laid poison down on certain portions of the garden. Some goats strayed into the garden, and the plaintiff alleged that the defendant did not keep the written agreement, which made it necessary to enclose the garden with four wires. The loss resulted from the delay in chasing out the goats. For the defendant it was admitted three wires were put round the garden, but if four wires had been used, the goats could have got through easily; in fact, in one witness's opinion, if the terms of the agreement had been carried out the goats could not be kept out. With regard to the contract between Burgher and Van Zyl, the Magistrate believed in the insufficiency of the four wire fence to keep out the goats. It was a reasonable contention by the defendant's witnesses that goats could climb up and get in where other animals could not pass. As to the allegation that the goats were not driven out quickly enough in the first instance, there was a want of care on the plaintiff's part. It was his duty, knowing there was poison, to safeguard the goats. He did not think the poisoning of the goats was a wilful act on the part of Du Plessis. There was no spite, malice, or other feeling of any kind proved. The damage could have been prevented by ordinary care on the part of the plaintiff. He was negligent in January and March. The judgment would be absolution from the instance.

Mr. H. S. van Zyl was for the appellant; Dr. Greer was for respondent.

Mr. Van Zyl said that the Magistrate did not quite correctly state the plaintiff's case. The general complaint against

the defendant was that the plaintiff had suffered damage through the negligence and default, and at the instance of defendant.

[De Villiers, C.J.: On what ground do you put it that defendant is liable?]

Mr. Van Zyl said that the defendant put poison in a garden of which he had but limited ownership or limited use, and, through the garden not being properly fenced in, the plaintiff's goats got in, and, in consequence, were poisoned, and died.

[De Villiers, C.J.: What duty do you say he owed to plaintiff?]

Mr. Van Zyl said that defendant's duty to plaintiff was either that he should put no poison there at all, or that he should fence the garden in, so that the goats could not easily get in.

De Villiers, C.J., said it was a recognised thing that jackals were to be exterminated by poisoning. Supposing a man's dog went on to land where poison was set, and trespassed there, could the owner of the dog say that the owner of the land was liable if the dog were poisoned?

Mr. Van Zyl submitted that the cases were not parallel. The garden which defendant in this case had was not altogether his own property under the contract. This was joint property, of which under the contract portions had been set apart for gardens. The rest of the ground remained in common use. Counsel cited *Bird v. Holbrook* (4 Bingham, 628), Pollock (6th Ed., pp. 174 and 468), *Rylands v. Fletcher* (1 L.R., 1 Ex., p. 278), *Eastern and South African Telegraph Co. v. Cape Town Tramways* (17 S.C., 95), Digest (9, 2, 39), and Pharmacy Act, No. 34, 1891 (section 49).

Dr. Greer referred to section 54 of the Pharmacy Act. Burgher, he contended, had a right to use poison on his land, provided it were properly laid in such a manner that persons making proper use of his farm were not injured by it. In the case of *Bird v. Holbrook*, notice had not been given of the fact that a spring-gun had been set. Defendant in this case had given notice that he had set the poison. The Magistrate found that there was contributory negligence. From the terms of the contract, it was clear that Burgher had not a limited ownership in the garden. He was given a right to have the ground as his own. He had a right to lay this poison on the land, and he took all reasonable precautions, so that the poison should not be deleterious to the animals of other persons. Defendant had exercised all reasonable precautions. Counsel cited *Clingen v. Ross* (16 S.C., 152), *Doig v. Forbes* (7 S.C., 119), and Clark and Lindsell on Torts (4th Ed., pp. 15 and 154).

The Chief Justice mentioned *Drummond v. Scarle* (1897, Buchanan).

Mr. Greer said that there was contributory negligence on the part of the plaintiff in this case, or his agent, which directly led to the loss that he had sustained.

Mr. Van Zyl, in reply, submitted that the goats were not unlawfully upon the property where they were poisoned. Defendant had actually contracted himself out of the rights which he otherwise would have had to a claim for trespass.

The Chief Justice asked why, if Du Plessis laid the poison, the action was brought against Burgher?

Mr. Van Zyl said that Burgher permitted the poison to be placed on his land.

De Villiers, C.J.: The plaintiff in this case claims, as being the sub-lessee under Van Zyl, and as having all the rights which Van Zyl had under his contract with Burger, the defendant. I am quite prepared to treat this case as if it were an action between Van Zyl and Burger, and as if this contract were binding upon both of them. What happened was this. The defendant, who is tenant of Burger, being anxious to kill baboons, which did mischief in his garden, placed some poisoned wheat in his garden, and the plaintiff's goats, having broken through the fence which had been put up by the defendant, ate some of this wheat, and died in consequence. The clause in the contract upon which plaintiff relies is to this effect: Van Zyl and Burgher were each to retain the rights of ownership over the respective gardens occupied by them, but they were obliged within three months to fence in their respective gardens, and it was further provided that neither of them should have the right to impound the cattle of the other or to claim damages in respect of trespass. To that extent no doubt there was a limitation upon their rights, but because there was such a limitation the Court would not be justified in finding that there was a further limitation, and that neither of them would be entitled to use his garden in the way in which any lawful owner of land might use it, and to protect himself, for instance, against the ravages of vermin. It may well be that if the plaintiff had not had notice that the poison had been placed there, he might have had an action for damages against the defendant for not giving due notice to those whose cattle might accidentally trespass upon the land. This question, however, does not arise, for the plaintiff had due notice of the placing of the poison in the defendant's garden. The plaintiff after such notice should have taken special care to prevent his cattle from breaking through the defendant's fence, faulty though it was. The Magistrate has found—and I think the evidence supports the finding—that there was considerable negligence on the part of plaintiff's servants

in not keeping out the goats from this garden. It is said that the servant of plaintiff had been prohibited by Du Plessis from entering upon this garden. If, in consequence of that prohibition, the goats had eaten the poisoned wheat, that might have been a good argument; but that was not the occasion when the poisoned wheat was eaten, it was on another occasion, whether before or after does not appear. It was not in consequence of the prohibition that the poisoned wheat was eaten. It appears to me that the plaintiff had notice that this poison was placed on the defendant's land, and had himself been careless in the tending of his goats, and preventing them from entering upon the defendant's land, and from eating the poison, and that the Magistrate properly held that the plaintiff was not entitled to recover. The appeal must, therefore, be dismissed, with costs.

Maasdorp, J.: I concur.

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## SUPREME COURT

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### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

VAN VUREN V. VAN VUREN. } 1907.  
( Aug. 6th.

This was an action brought by Maria Caroline van Vuren (born De Wet), of De Doorns, against her husband, Henry Lourens de Wet, for a decree of judicial separation on the ground of his habitual cruelty.

The declaration set out that the plaintiff was married to the defendant on November 1, 1904, at Worcester, in community of property. After the marriage the parties lived together in Middelbunt, in the district of Vryheid, in the Colony of Natal, until November, 1905, when they returned to De Doorns and took up their permanent abode. There were two children of the marriage, aged two years and eight months respectively. Defendant had, during the continuance of the marriage, habitually illtreated the plaintiff, and used cruelty towards her, and in particular did about February or March, 1905, June or July, 1905, July, 1906, and December, 1906, assault and strike the plaintiff; and on the first occasion he turned the plaintiff out of his house at night into the rain. By reason of the premises, continued living together with

the defendant had become insupportable to the plaintiff, and she claimed: (a) A decree of separation from bed, board, and community of property; (b) division of the joint estate of the plaintiff and defendant; (c) custody of the two minor children of the marriage; and (d) maintenance for the said children at the rate of £6 per month, and costs of suit.

The defendant, before pleading to the declaration, took exception to the jurisdiction of the Court on the ground that he is, and has been since the marriage, domiciled at Vryheid, in the Colony of Natal, outside the jurisdiction of the Court; and that he is not, and has not, since the marriage been domiciled within the jurisdiction of this Court. For a plea, in case the exception be overruled, he admitted the first paragraph of the declaration, save that he did not live at De Doorns, and that he was not domiciled in this colony. He lived, and was domiciled, at Vryheid, in Natal. He admitted that the parties lived together at Middel-punt, in the division of Vryheid, Natal, until the month of November, 1905, and in that month, by reason of the disturbances in Natal, they came to reside with plaintiff's father at De Doorns, but such residence was only intended to be temporary, and in April, 1907, it was arranged between plaintiff and defendant that they should return to Natal. Thereafter plaintiff refused to accompany defendant back to Natal, though requested by him to do so. The ill-treatment set forth in the declaration was denied, and he prayed that the plaintiff's claim be dismissed, with costs. For a claim in reconvention, he said the plaintiff wrongfully and unlawfully refused to return or cohabit with him, and he prayed for an order compelling the plaintiff to restore to him his conjugal rights, with costs of suit.

For a plea and exception to defendant's exception, the plaintiff said as to the defendant's exception to the jurisdiction of the Court, she excepted to the exception as being bad in law and embarrassing, in that the said exception set forth matters as of fact in contradiction of the allegation in the declaration contained. Wherefore she prayed that the exception be quashed, with costs. And in case the exception to defendant's exception was overruled, but not otherwise, plaintiff denied the allegation of fact in the exception, and said that for the past 18 months both plaintiff and defendant had resided in the district of Worcester as a permanent abode, and did still continue to reside there. For a replication to defendant's plea, plaintiff said that, save for admissions, she denied the allegations of fact and conclusions of law therein obtained, joined issue thereon, and prayed for judgment in terms of her declaration,

X 1

For a plea to the claim in reconvention, plaintiff admitted that she refused to return to or cohabit with defendant, but denied that such refusal was wrongful or unlawful, and said she was justified in so refusing by reason of the facts in the declaration and replication.

The defendant was barred from rejoining.

Mr. Bisset for plaintiff; defendant in person.

Maria Caroline van Vuren, the plaintiff, stated she met her husband in the district of Vryheid, in Natal. On November 1 she was married in community of property to the defendant at Worcester by special licence. She was under age at the time, but her parents consented to the marriage. She went with her husband to Natal, and resided there for about a year. In November, 1905, she returned with her husband to De Doorns. At the time of the marriage, it was agreed they should live at De Doorns. The farm in Natal was near the border, and was in the neighbourhood of the disturbance. She thought if they returned to De Doorns they would live more happily. The defendant, before leaving Natal, made over his share in the farm to one of his brothers. When they left Natal they had definitely made up their minds to settle at De Doorns. Almost since the commencement of the marriage she had been unhappy. The defendant's ill-treatment, which commenced about a fortnight after the marriage, consisted of "strikes, blows, curses, and swears." About a month before the birth of her first child he turned her out in the rain. The commencement of the trouble was that the defendant charged her with unfaithfulness, for which there was no ground. The defendant, without any reason, was very jealous. Several times before the birth of her second child the defendant ill-treated her. While she was living in her father's house, the defendant again charged witness with unfaithfulness, and alleged she had flirted with friends who were staying in the house. The only cause she could assign for the defendant's conduct was that he was extremely jealous. Ultimately, about May this year her father refused to allow the defendant to remain in the house any longer. In Natal the defendant had on several occasions been intoxicated, but she had not noticed him under the influence of drink at De Doorns. It was impossible for her to live with the defendant any longer. During the whole time she had been at De Doorns she had been supported by her parents. For the first year of the marriage she had supported, by teaching, the defendant and herself. While she was suffering from fever, the defendant used to curse and swear at her.

Sophia de Wet, sister of the plaintiff, who resided with her father at De

**Doorns, gave corroborative evidence of the unhappy relations that existed between the plaintiff and defendant.**

The mother of the plaintiff also gave evidence of the ill-treatment.

Cornelius de Wet, father of the plaintiff, said he went to Natal, and advised the plaintiff and the defendant to come to the Colony, in view of the possibility of a Kafir rising in Natal. It was settled in Natal that the parties should definitely reside in the Cape Colony. The defendant was to live with witness until there was a chance of purchasing a piece of land at Worcester, but he was not used to the farming operations here, and as a result of ill-treatment witness decided not to purchase the ground for the defendant. The defendant was desirous of the change to Cape Colony, as he dreaded an attack by the Kafirs. He would be glad to see the defendant back in Natal, and his daughter in her own home.

**Mr. Bisset closed his case.**

The defendant, in his evidence, said that on account of the trouble with the Kafirs he came to live in the Cape Colony. The understanding was that if his father-in-law procured land for him he was to remain, but as the property was not secured he made a plan to return to Natal. The plaintiff refused to accompany him, and gave as a reason that she was afraid of the Kafirs. The plaintiff finally admitted that she had never loved him, and did not wish to accompany him to Natal. He admitted that he had ill-treated her, but he promised her it would not occur again.

Maasdoorp, J.: Upon the evidence that has been given in this case, it seems to me quite clear that the defendant and his wife left Natal only upon the understanding that they should fix their domicile in this colony. He seemed to have next to no property in Natal, and no prospects for the future, and Mr. De Wet held out some hopes if he were to come and reside here he might be able to do something for him by assisting him in obtaining land. With that in view, the plaintiff and the defendant left Natal for the purpose of taking up their residence here permanently. The exception taken by the defendant to the plaintiff's declaration must, therefore, be disallowed, the exception being to the jurisdiction of the Court, on the ground that the defendant has domicile in Natal. There is sufficient proof that the domicile of the defendant and the plaintiff at present is in this colony. It seems also to be perfectly clear that it would be impossible for these unfortunate young people to live together. The defendant seems to be influenced by an inordinate jealousy. He has suspicions of his wife, and when he is troubled with these suspicions he is

carried away by the violence of his temper, and he has at times, as appears from the evidence, assaulted her, and this conduct has been of some considerable duration. Plaintiff has come to the conclusion it is impossible for such a life to continue, that it has become absolutely intolerable, and I think sufficient evidence has been given to prove it. There is nothing actually proved against the character of the defendant which proves him to be an unfit husband for the plaintiff, but his temper during jealousy is of such a nature that it is impossible for her to continue to live with him while he gives way to that temper. Under the circumstances, the Court must give judgment for the plaintiff, and give judgment in terms of prayers (a), (b), and (c) of the declaration, in that a decree of division of the joint estate is granted. The children are very young, the eldest being about two years of age, and for the present, certainly their custody should remain with the mother. It appears that at one time she was their sole support, that through her work she supported, not only the children, but the husband. Under all the circumstances, I am inclined to think he does not even possess the necessary means to support these children. For the present the custody of the children shall remain with the mother. There is also a prayer for maintenance, but upon the evidence that has been given, I come to the conclusion that he is wholly unable to comply with any order the Court might make as to maintenance. Consequently, no order will be made in that respect. It will always be open to the plaintiff, if she discovers hereafter that the defendant has become possessed of means, to apply to the Court that he should then assist her in maintaining the children, and she might also be entitled to maintenance for herself. The defendant will be ordered to pay the costs.

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. ) 1907.  
( Aug. 6th.

Mr. Douglas Buchanan moved for the admission of Herbert Sextus Harris as an advocate. Counsel said that Mr. Harris was an advocate of the High Court of Griqualand, and he asked for leave to applicant to take the oath before the Registrar of the High Court at Kimberley.

Buchanan, J., said that there was no necessity for applicant to take



the oath again. Mr. Harris would be admitted.

Mr. W. Porter Buchanan, K.C., moved for the admission of James Wood Elsworth as an attorney and notary.

Application granted and oaths administered.

Mr. W. Porter Buchanan, K.C., moved for the admission of Johannes Hendrik Cloete as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Robertson.

### PROVISIONAL ROLL.

#### MCLEOD V. CAMPHAUSEN.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £150, with interest from the 1st June, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### NETHERLANDS BANK V. BARRY.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,000, with interest from the 1st July, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### MCLEOD V. FEBRUARY.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £55, with interest from the 1st July, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted

### ILLIQUID ROLL

#### C. AND A. FRIEDLANDER V. HADJE BADROODIEN AND TEN OTHERS.

Mr. P. S. T. Jones moved for judgment against all except the second defendant (Hadj E. Saad) for £86 ls. 6d., being amount due for professional services and moneys disbursed, a sum of £25 having been paid off the original amount. There was no service upon the second defendant. The matter arose out of proceedings which recently came before the Court in connection with the Moslem Cemetery Board.

Judgment granted against all the defendants, except Hadje E. Saad.

### REHABILITATIONS.

Mr. Sutton applied, under section 117 of the Ordinance, for the rehabilitation of C. R. and P. R. Botha.  
Granted.

### GENERAL MOTIONS.

OLIVER V. OLIVER. } 1907.  
Aug. 6th.

Mr. Pohl moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights. Counsel read a letter written by defendant while in gaol, stating that he would comply with the order of Court, and would be in Cape Town by the 24th July at the latest. Affidavits were put in showing that defendant had not returned to his wife.

Rule absolute.

#### *Ex parte* DE KORTE.

Mr. De Waal moved for a rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

#### *Ex parte* CARR.

Mr. Marais mentioned this matter, which was an application for leave to petitioner to sue her husband *in forma pauperis* and by edictal citation for restitution of conjugal rights. Efforts to find the respondent had failed, and counsel now applied for leave to give substituted service, and for an extension of the return day.

Return day extended until the 15th October, and substituted service authorised by means of one publication in "Cape Times Weekly" and a registered letter posted to respondent's last known address in German South-west Africa.

#### *Ex parte* CAPE TOWN STOCK EXCHANGE, LTD.

Mr. Benjamin, K.C., moved for a certain rule nisi to be made absolute authorising the reduction of the company's capital from £725 to £475, and for leave to dispense with the words "and reduced" in the company's title.

Buchanan, J., asked whether the latter part appeared in the rule?

Mr. Benjamin said that the rule called upon all persons concerned to show cause why an order should not be granted as prayed. The matter of dispensing with the words in question was entirely in the discretion of the Court.

Rule absolute, and leave given to dispense with the words "and reduced."



*Ex parte KELLY.*

Mr. P. S. T. Jones (with him Mr. Watermeyer) moved for a certain rule to be made absolute, admitting petitioner to sue R. P. Houston and Co. *in forma pauperis* for £500 damages for alleged negligence on board ship, whereby he had been injured.

Buchanan, J., observed that it was very unusual for two counsel to be engaged in a paper suit.

Mr. Jones said that in the recent case of *Ottostrom v. Estate Stephan*, two counsel were allowed.

[Buchanan, J.: If the Court allows two counsel now, the Taxing Officer would have very little discretion. I will appoint you as counsel, if you like, and Mr. Watermeyer may be briefed if they think fit.]

Mr. Jones said that they had no desire to get two counsel appointed by the Court, so as to bind the hands of the Taxing Officer.

Rule absolute, Messrs. Jones and Watermeyer to be counsel, and Mr. E. J. Schultz to be attorney to the petitioner.

[Buchanan, J.: It is clearly understood that the Taxing Officer has discretion in the matter.]

*Ex parte ATTWELL.*

Mr. W. Porter Buchanan, K.C., moved on the petition of George Brooke Attwell, of East London, for leave to sue W. M. Cuthbert and Co., Ltd. (East London branch), *in forma pauperis* for £1,000 damages. Petitioner stated that he had owed respondents a certain amount for boots and shoes supplied. On the 4th February, a summons was issued against him. He called upon the manager (Mr. McMillan) on that day, and gave him a cheque dated the 1st March for £2 17s. 1d., being £1 18s. 6d. amount of account, and 18s. 7d., legal charges. He obtained a receipt for the payment. Subsequently, however, the respondents took judgment against him in the Magistrate's Court, and his case was published among several other judgments in the "East London Dispatch" and other newspapers. He saw Mr. McMillan, who expressed his regret, and said that instructions had been given to the company's attorney, Mr. Drake, to have the summons withdrawn from the Magistrate's Court. Mr. Drake's clerk, however, said that they had not received any such instructions. Deponent demanded £20 and an apology. Respondents denied liability. As a direct result of publication of the judgment, petitioner had received notice from Messrs. Griffiths and Co., in whose employ he had been for 10 years, to leave their service. From the correspondence annexed to the petition, it appeared

that Mr. Attwell had demanded £1,000 damages, that respondents disclaimed liability, and that their attorney seemed to think that petitioner should have informed him that he had settled the account. Not having been advised by Mr. Attwell, he took judgment against him in the ordinary course.

Upon counsel certifying *probabilis causa*, a rule was ordered to issue calling upon respondents to show cause why leave should not be granted, rule returnable on the 20th August.

Buchanan, J.: I would suggest that if they make a reasonable tender it should be accepted, and this action *in forma pauperis* will be saved.

*Ex parte SLACK.*

Mr. Louwrens moved for leave to sue one John B. McGregor by edictal situation, and to attach a certain lease *ad fundandam jurisdictionem*. The lease had already been attached so far as another respondent was concerned, and petitioner desired to sue Mr. McGregor in the same action.

Order granted authorising Mr. McGregor's name to be inserted in the previous orders, and extending return day of citation until the 12th September.

*Ex parte ESTATE BOTHA.*

Mr. Marais moved on the petition of the surviving spouse and executor testamentary for leave to mortgage half share of certain property in the division of Fort Beaufort, in which a minor is interested.

Order in terms of Master's report.

*Ex parte WILLIAMS.*

Mr. De Waal moved for leave to the petitioner to consent, on behalf of his minor son, to the partition of certain property, and to sign the necessary documents.

Order granted as prayed.

*In re CAPE MINERALS, LTD.*

Mr. Douglas Buchanan presented the report of the liquidator, and applied for an order upon certain prayers. The estate, he said, was small, the assets amounting to £67. The liquidator asked that the list of contributories should be taken as settled, should no objection be raised, after it had lain for fourteen days, without a further application to the Court.

Buchanan, J.: You had better follow the usual procedure. The report should first lie for inspection, and publication must be given, and then you can come

back to the Court. The usual order will be granted, one publication in the "Cape Times."

*Ex parte* BLACK AND WIFE.

Mr. Louwrens moved, on the petition of Wm. H. P. Black and his wife, who reside at Green Point, for leave to the second-named petitioner to take transfer of certain property settled upon her by the first-named petitioner, in terms of a certain ante-nuptial contract, and to assume a mortgage liability of £1,800 on the premises. It appeared that the property was mortgaged for the sum of £1,800, at the time the ante-nuptial contract was entered into, and that it was their intention that the second-named petitioner should take it over, with the mortgage. The ante-nuptial contract, while describing the property settled upon Mrs. Black, was silent as to the mortgage registered against it. She was ready and willing to assume the mortgage liability upon receiving transfer.

Order granted as prayed.

LEVINY V. LEVINY.

Mr. Philipson Stow moved for an extension of the return day of a certain citation.

Return day extended until the 12th November.

# SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

REX V. NAUDE AND ( 1907.  
ANOTHER. ) Aug. 7th.

This was an appeal from a judgment of the Resident Magistrate of Aberdeen, who had convicted appellants of a contravention of section 21 of the Scab Act, No. 20, 1894, and sentenced each of them to pay a fine of 10s.

The charge against appellants was that on the 13th May, 1907, at or near Aberdeen, being the joint owners of 231 sheep and 117 goats, and having become aware or had reasonable

grounds to suspect that the sheep had become infected with scab, they neglected within seven days to give notice to the district scab inspector, and failed to make forthwith proper and diligent efforts to cleanse such sheep.

The Magistrate, in his reasons for judgment, said it appeared to him that, if accused at the time they were informed by the inspector (Van der Merwe) that their stock were infected with scab, they would have insisted on clear proof of the existence of scab, as they did on a previous occasion. He had no reason to doubt the statements of the inspectors.

Mr. P. S. T. Jones was for appellants, Francois Johannes Naude and Francois du Preez, European farmers, of Aberdeen; Mr. Howel Jones, K.C., appeared for the Crown.

Mr. P. Jones said that the ground of appeal was that appellants had no knowledge of the existence of scab. He submitted that the charge had not been proved.

Mr. Howel Jones said he could not press the conviction, and he must leave the matter entirely in the hands of the Court.

Maasdorp, J.: It seems that not only is the evidence to some extent inconclusive in this case, but also the charge itself is defective, and it must to some extent have been embarrassing to the defendants. They are charged with being the owners of a certain number of sheep and goats on the 13th May, sheep which were scabby, and having those sheep, failing to give notice within seven days that the sheep were infected with scab. Now, it appears upon the record itself that the trial took place on the 17th May, and, consequently, the necessary time had not elapsed from the 13th May, when, as I take it, upon the charge they are alleged to have become aware as owners of these sheep that they were infected. It is said that the charge might bear the meaning that they were owners of the sheep on the 13th May, and were aware seven days before the 13th May that the sheep were infected with scab, but then there is no allegation that they were the owners of these sheep seven days before the 13th May. No exception was taken to this charge, and if the evidence had been perfectly clear as to the guilt of the accused, perhaps the Court might not have allowed the appellants now to take advantage of the defective form of the summons, but it seems to me that the defective form of the summons has some bearing upon the evidence which was subsequently given in the case. The inspectors arrived upon the farm on the 13th May, they inspected the sheep, and found them infected with scab. The Magistrate accepts the evidence of the inspectors upon that point. He himself, upon that evidence, comes

to the conclusion that the sheep must have been infected seven days before; but I think that the Magistrate required the evidence of inspectors and experts upon that point before he made any finding upon it. There is no evidence that the sheep were actually infected seven days before the 13th May. Under these circumstances, considering the defective state of the charge and the inconclusive character of the evidence, I think that the conviction and sentence must be quashed. I omitted to say that the inspectors, on arriving at the farm, gave no intimation to the defendants that they intended to institute any prosecution. They gave certain instructions in respect of the cleansing of the sheep, and from the evidence, which is uncontradicted, it appears that the defendants thereupon diligently set to work for the purpose of cleansing the sheep. It must have been taken by the defendants then that there was no further charge standing open against them, when they seem to have done their best to carry out the inspectors' directions.

*In re AUERBACH V. SCHWERS.*

This was an application by J. M. P. Muirhead, as receiver in the business of Aron Auerbach, of Hamburg, Germany, for an order authorising realisation of the assets and restraining anyone from interfering with the business.

The receiver reported that there were no funds belonging to the business, and that the assets of the South African business principally consisted of a small stock in Cape Town and some samples at Simon's Town, and that the outstandings did not appear to be of much or any value. For the above reasons, it was impossible to carry on the business. He asked the Court for instructions as to what course he should pursue. He suggested that the assets should be realised, that the business should be closed, and that the proceeds of the sale should be paid into court pending settlement of the case between Auerbach and Schwerts now pending. From the second report of the receiver it appeared that certain disputes had arisen between him and one Max Otzen, who said that he held Auerbach's power of attorney.

Mr. Benjamin, K.C., was for applicant; Mr. Schreiner, K.C. (with him Dr. Greer), was for respondents, Auerbach and Co.

Affidavits having been read, and counsel heard in argument on the facts:

Maasdorp, J.: When this dispute first arose between the parties, Schwerts claimed that he had an interest as a partner in the business of Auerbach, and the disputes between the parties assumed such a character that it was considered

necessary that, pending the settlement of those disputes, a receiver should be appointed to have control of the business and carry it on if necessary. Mr. Muirhead was appointed under those circumstances as receiver. After his appointment, he discovered that there were not means in his possession for carrying on this business, and that it could not, consequently, be conducted by him as an actively going business. While performing his duties as receiver, he obtained possession of certain assets belonging to this business of Auerbach's, and, not being able now to use them, for the purpose of the business, he suggests that these assets should be sold, and the proceeds placed in the hands of the Registrar of this Court. After some correspondence had taken place between him and the representatives of Auerbach, the parties seemed to agree that that was the best thing that could be done, and ultimately there was a consent arrived at between them that the assets should be disposed of, and the moneys paid to the Registrar of the Court. If that were the only difference between the parties, the matter would now be settled between them, but there was another matter of difference which I would not now go into except that it affects the question of costs between the parties in the present motion. If it were not that it affected the question of costs, I would leave it, together with the other matters in dispute, to be hereafter the subject of litigation between Schwerts and Auerbach, but it appears that Mr. Muirhead also claimed that no one should be allowed to interfere with this business of Auerbach's, of which he had been appointed receiver. Now, it seems to me Mr. Muirhead took up quite a proper position in asking that no one should be allowed to meddle with this business, and the ground for his request was his feeling that Mr. Otzen had from time to time done acts which seemed to amount to interference. Upon that he makes this part of his petition that no one should be allowed to interfere with this business of Auerbach's. Under the impression that this application had a wider scope than I think. Mr. Muirhead intended, the respondents quite properly came before the Court to protect the interests of Auerbach. They seemed to feel that this application would go to the extent of preventing Auerbach from carrying on any business that he might wish in the future to carry on here by his agents, and if the applicant had had that object in view he would have failed, because the Court cannot prevent Auerbach from carrying on hereafter any business he might please. If anything Auerbach should do should have the effect of damaging Schwerts in the position he occupied under the original contract, he must protect himself by taking proceedings

against Auerbach to recover such damages, but it is impossible for the Court to give a general order against Auerbach now to prevent him from carrying on business. Such an interdict could not be granted, and if Auerbach does anything wrong which will cause Schwes damage, Schwes will be in the position to assert his rights. This dispute between the parties has not necessarily caused all the costs in the matter, because Mr. Muirhead had necessarily to appear here to lay the report before the Court, and so to incur some costs. Now, I do not think that the receiver is to be blamed for the misunderstanding; it may be that, on the other hand, it was quite right for the respondents to see that their rights were in no way injured by an order that this Court might make. The Court will, therefore, make no order as to costs in this application. The receiver would, of course, take his costs out of the proceeds of the assets, but the title of the receiver to his costs must not affect the position of Schwes and Auerbach, and I think it should be left open to them, if hereafter it could be proved that the receiver's costs had been incurred through the default of one party or the other, that the party who is in the wrong might be responsible to the other party for the costs so incurred, but in the meanwhile Mr. Muirhead will be entitled to his costs as receiver, and his appearance here to lay the report before the Court will be part of such costs.

Mr. Schreiner urged that all the costs should be ordered to come out of the estate.

Maasdorp, J.: I do not think that the Court should give any order now that will affect Schwes in a manner which he could not have anticipated, and without his having had an opportunity of appearing here. The Court will grant an order in terms of the first prayer of the receiver's petition of the 3rd July, money to be retained pending further order of Court, no order as to costs, and the receiver declared to be entitled to his costs out of the fund.

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

LOMAS V. LOMAS AND ( 1907.  
ARUNDALE. } Aug. 7th.

This was an action for divorce brought by Robert Lomas, a police constable, of Robben Island, again his wife, Emily Lomas (born Hefer), by reason of her adultery with the co-defendant, Francis Robert Arundale.

The declaration set out that the parties were married on December 12, 1905. They lived together for a few days. The marriage took place in Cape Town, and the wife was to have followed her husband to Robben Island after the honeymoon, but it appeared she did not do so. Subsequently he discovered she was living in adultery with the co-defendant at Kimberley.

Mr. Wallach was for the plaintiff, and the defendant was in default.

Robert Lomas, the plaintiff, stated he married the first defendant on December 12, 1905, before the Resident Magistrate of Cape Town. They lived together for four days in Cape Town while on the honeymoon. His wife had been at Robben Island before the marriage. Witness left her on Friday, and she was to follow him to the island on Monday, but failed to do so. He subsequently got a letter from his wife, who was then living at Observatory-road, as follows: "Dear Bob,—I am gone from Long-street, but I don't think I shall be here long. I don't think you can keep a decent woman for a wife. I cannot well live on what you sent me, which is nothing at all. If you treat me like what you did the first week, how will it be when we are married years? I am going to my brother. Good-bye.—Emily."

[Buchanan, J.: What does this refer to: "If you treat me like what you did the first week?"]

I cannot say.

[Had you any quarrel during the first week? What do you think she means?]

I cannot say.

[Why didn't she go with you to Robben Island?]

She had her boxes at 50, Long-street, and she had arranged to go down to Observatory and take a room.

Mr. Wallach: Do you think this reference to money means that you did not give her enough?—If I had given her more she would have cleared all the same.

Where does this brother live?—I fancy this brother is a myth.

[Buchanan, J.: How long had you known her before marriage?]

About nine months.

[At Robben Island?]

No, at Cape Town.

Mr. Wallach: Did she know Arundale before?—She told me he persecuted her and followed her about, and she was afraid of him.

[Buchanan, J.: Before or after the marriage?]

Before.

The plaintiff, proceeding under examination, said about three months after he received the letter he found out she was living in Kimberley. He went to Kimberley, and there saw her walking about arm in arm with Arundale. The pair went shopping together. Witness had written to her to the effect that if

she could "float" around Kimberley making trips to different places, she could find the money, so that he could get free from her. Subsequently he received a letter from his wife saying she had told Arundale that he (plaintiff) was writing to know how far Arundale was willing to help in the business. She wanted the affair settled on the quiet, and would like to know how it could be done without any scandal, and the cost.

[Buchanan, J.: You asked how much Arundale would give towards the expenses of the divorce?]

I have not mentioned Arundale to her.

[Buchanan, J.: It seems that you have.]

Mr. Wallach: I believe you made a claim for damages in your declaration, but you do not press that?—No.

A witness from Kimberley deposed to the defendants living in Sydney-street as husband and wife. They passed by the names of Mr. and Mrs. Arundale.

Buchanan, J.: You can take a decree of divorce. Of course, there will be no costs given against the first defendant, as they are married in community of property; any costs incurred the plaintiff would be answerable for. You can take costs against the second defendant.

#### *Ex parte GROBBELAAR.*

Mr. M. Bisset, on behalf of the applicant, moved for an order winding up the South African Co-operative Dairy Company, Limited, of Adelaide. The petitioner was managing director of the company, and the company was indebted to him in the sum of £443 15s. At an extraordinary meeting of the shareholders in Adelaide the following resolution was passed: "The meeting resolves, in terms of sub-section 3 of section 178 of Act 25, of 1892, that as it has been proved satisfactorily that this company, by reason of its liabilities, cannot any longer continue its business, it is advisable to voluntarily liquidate, and that such be done forthwith." Subsequently two writs of execution were taken out against the company at the suits of Jan Johannes Vosloo and Johannes A. Vosloo for £46 6s. 2d. and £17 19s. 3d. respectively, and the messenger of the Resident Magistrate's Court attached six mules and two cream carts, which he sold to satisfy the judgment. Petitioner had ascertained that the liabilities of the company were about £18,000, and the assets were approximately valued at £7,000. It would be detrimental to the petitioner and the creditors if the proceeds of the sale by the messenger of the Court were paid to the Vosloos in satisfaction of their judgment. Petitioner prayed for an order in terms of sections 135 and 136

of Act 25 of 1892 for the official winding up and liquidation of the company, and suggested the names of Peter Davidson and Reginald Barker as official liquidators, and for an order restraining the messenger of the Court of the R.M. of Adelaide from paying over the proceeds or any part thereof of the said writs now in his hands to any other than the official liquidators.

An order was granted placing the company in liquidation in terms of the 135th and 136th sections of the Act 25 of 1892, Messrs. Peter Davidson and Reginald Barker appointed provisional liquidators, and a rule nisi to issue calling on all interested to show cause on the 30th August why these provisional liquidators should not be appointed official liquidators, with all the powers conferred by section 149 of the Act, the rule to be published once in the "Government Gazette" and once in a newspaper circulating in the district of Adelaide, and the messenger of the Court interdicted from parting with the proceeds of any assets of the company pending a further order of Court.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

WHITEHEAD V. ESTATE ( 1907  
WHITEHEAD. ( Aug. 8th.

Plea in abatement—Will—Insolvency of legatee—Trustee—Parties to action.

*To a declaration whereby the plaintiff sought to have his right under the mutual will of his parents declared, the defendant pleaded in abatement on the ground that at the time when the plaintiff's alleged rights under the will accrued the plaintiff was an insolvent, and to this plea the plaintiff excepted.*

*Held, that the action should not be allowed to proceed*



*without the trustee of the insolvent estate being joined either as co-plaintiff or co-defendant.*

This was an argument on the plaintiff's exception to the defendant's plea in abatement.

The declaration was as follows:

1. The plaintiff, who resides at Steynsburg, in the division of Steynsburg, is a son of the late Joseph Whitehead and his subsequently deceased spouse Wilhelmina Hendrina Fredrika Whitehead, born Coetzer, hereinafter respectively termed the testator and testatrix.

2. The defendant, also a son of the testator and testatrix, is sued in his capacity as executor testamentary in the estate of his mother, the testatrix.

3. The testator and testatrix were married in community of property, and on the 3rd April, 1877, duly executed a joint and mutual testamentary writing.

4. By the said testamentary writing the testating parties, *inter alia*: (a) appointed the survivor of them, together with the child or children of the marriage, to be the sole and universal heirs of the first dying; (b) provided that the survivor should be allowed to keep the whole joint estate under his or her sole direction and administration and remain in the full possession, and in the enjoyment of the usufruct thereof, in order to support the children until majority or marriage, when the survivor should be obliged to pay over to each the sum due to such child from the estate of the father or the mother; (c) provided that within six months after the decease of the survivor the whole estate should be sold by public auction, realised, and distributed among the said heirs.

5. The said testamentary writing constitutes the last will of the testator and testatrix, and thereby by mutual consent effected a massing of the joint estate with a disposition thereof after the death of such survivor and massing by such disposition all property of the joint estate of the testator and testatrix, including movables and certain landed property or farms hereinafter referred to, upon the conditions and stipulations set forth in such last will.

6. (a) The testator died on the 1st April, 1879, leaving him surviving the testatrix and 11 children, of whom plaintiff is one; (b) the said will thereupon became of full force and effect, and the testatrix adiated and accepted benefits thereunder, and enjoyed the usufruct of the whole joint estate, and under such will was, and administered the said estate as, the executrix testamentary; (c) after acceptance of benefits under the said joint will as afore-

said, the survivor (testatrix) was no longer entitled in law to revoke the said joint will or to make any disposition of the property of the said joint estate inconsistent with the provisions of the joint will.

7. The testatrix framed a liquidation account as such executrix wherein she brought up the landed property at the valuation expressed in an inventory annexed to the said account, awarded herself a half and child's portion of the total value of the joint estate, and in the account awarded the balance to the children of the marriage aforesaid. She subsequently paid to each child the portion of the balance so brought up in the account.

8. At the date of the testator's death the farms Palmietfontein, Kalkoenkrantz, and Vaalkrantz stood registered in the testator's name and were assets in the joint estate, and thereafter on the 27th August, 1881, the testatrix in her capacity as executrix transferred to herself individually the said Palmietfontein and part of Vaalkrantz, and sold the said Kalkoenkrantz and part of Vaalkrantz and received the purchase price.

9. The testatrix subsequently on 26th July, 1906, executed a separate will, to which at the trial plaintiff craves leave to refer, whereby she wrongfully and unlawfully purported to revoke all her previous testamentary dispositions, and wherein she purported to make a fresh disposition of her property and excluded the plaintiff from any share in the inheritance thereby sought to be disposed of.

10. (a) The property so disposed of constituted or included the said joint estate (including the portions paid out as aforesaid, but including the said landed properties or its proceeds), and the provisions of the said separate will were inconsistent with the provisions of the said joint will, and the said separate will accordingly is null and void and of no effect; and the said joint estate and the assets thereof have in law now to be administered and distributed under the said joint will only, but the defendant refuses so to do, and claims to distribute the same under the said separate will. (b) It is necessary that an executor dative should be duly appointed to carry out the provisions of the said joint will.

Wherefore plaintiff claims: (a) An order declaring the separate will of the late Wilhelmina Hendrina Fredrika Whitehead, born Coetzer, dated July 25, 1906, to be null and void and of no effect in so far as it concerns the joint estate of herself and the predeceased spouse Joseph Whitehead; (b) an order declaring that the said joint estate is to be administered and the assets therein distributed in terms of the joint will of the testator and testatrix dated April 3, 1877; (c) a declaration pursuant to the

preceding prayer that an executor dative be hereafter duly appointed to administer the said joint estate under the said joint will; (d) alternative relief; (e) costs of suit.

For a plea in abatement before pleading to the merits the defendant says:

1. He admits paragraphs 1, 2, and 3 of the declaration.

2. On or about the 1st April, 1879, the testator died.

3. On or about the 20th May, 1890, the plaintiff surrendered his estate as insolvent and Edward James Stanley, of Tarkastad, was appointed trustee in his estate.

4. The defendant contends that such rights (if any) as the plaintiff would now have had in respect of the estate of the survivor (to wit, the testatrix) became vested in the plaintiff on the death of the testator on the 1st April, 1879, as aforesaid, and (if any) passed to the trustee in his estate on plaintiff's insolvency as aforesaid.

5. The plaintiff is divested of all rights under the said will, and is not entitled to sue in this action which can be brought by the trustee only (if at all).

Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

The plaintiff's exception to the plea in abatement, answer to plea in abatement, and replication were as follows:

For an exception to the plea in abatement, plaintiff says that he excepts to the same as being bad in law, in that it is not alleged in the said plea that the said trustee, therein referred to, heretofore at any time claimed or now claims any right to or share in the right of inheritance referred to in the declaration and the said plea; nor does it appear that the said trustee has any claim in the premises; nor is it alleged that the plaintiff is still an undischarged insolvent; nor generally does it show that plaintiff is not competent to sue in respect of the said right of inheritance.

Wherefore he prays that the said plea be set aside, with costs. And in case the above exception be disallowed (and not otherwise), plaintiff says for an answer to the plea in abatement:

1. He admits paragraphs 2 and 3, but denies paragraphs 4 and 5 thereof.

2. After his said insolvency he duly received his discharge under section 117 of the Insolvent Ordinance No. 6 of 1843, on the 12th January, 1891.

3. In respect of the share of the joint estate accruing to the survivor under the aforesaid mutual will of herself and her deceased husband (to wit, the half and a child's portion) the said survivor was fiduciary owner thereof, and no right or title therein, or in any part thereof, vested in the plaintiff till the date of her death.

4. At the death of the said survivor, the plaintiff's right vested in him for the first time, and not before, and at

the said date he had already received his said discharge, the said survivor having only died in or after July, 1906.

5. The said trustee in plaintiff's then insolvent estate at no time claimed or sought to dispose of any right, title, or expectancy in or to the plaintiff's right to share as fidei-commissary heir or otherwise in the said share of the joint estate—the said trustee has knowledge of the fact relating to the rehabilitation of the plaintiff, of the action herein being instituted by him, and of the terms of the will under which he claims.

Wherefore plaintiff prays that the plea in abatement be set aside, with costs.

Mr. McGregor, K.C. (with him Mr. De Villiers) for excipient (plaintiff); Mr. Schreiner, K.C. (with him Mr. Close), for respondent.

[De Villiers, C.J.: Is your case that there was no vesting?]

Mr. McGregor: Yes. Continuing, counsel said the two cases which he relied upon were *Hiddingh v. De Roubaix* (Buchanan, 1878, p. 36) and *Lucas v. Hool* (Buchanan, 1879, p. 132). In this case the will was such that at the death of the first dying, there was no vesting in the heirs in respect of the property belonging to the survivor, and the survivor was not a fidei-commissary, but there was not in respect of the survivor's half-share any definite vesting. If it were so that the several children at the death of the first dying did not at that moment *instantly* get a right which they could dispose of, sell, or otherwise, then the case was one in which the case of *Jones v. Matthew* applied. This was not a case of the ordinary bequest of the farm. It was a case where the survivors themselves had appointed two periods for paying out, the first period of distribution being the death of the first dying and then had to be paid out everything to each child, in terms of the will. If the testatrix had the *dominium* subject to a trust, then the *dominium* could not be in two places. Here the children's portion of the joint estate was subject to a *fidei-commissum*, but it was not a case like that of *Ruhl and De Jager* (1 Juta, p. 38), where they appointed all the children as heirs, and they made the farm over to the children after the death of the survivor. That was a wholly different case from the case before the Court.

Mr. Schreiner said with regard to the joining of the trustee, there was the case of *Pratt and Pitman* (4 Juta, p. 189), which would be sufficient to show the validity of the plea in abatement. The exception admitted there was an insolvency and the appointment of Mr. Stanley as trustee. The trustee must be a party to the proceedings before the rights of the parties could be decided.

The case of *Strydom v. Strydom* (11 S.C.R., p. 425) was very much in point. There the action was one in which the person who had been an insolvent (Strydom) sued his trustee, and the trustee was sought by the insolvent to be interdicted from selling or interfering with a certain share in a certain property. The decision was that the trustee was entitled to do what he was proposing to do: to sell that share. That share was the second half-share in the farm then in question. Every word of his learned friend's argument had been to show that the trustee had no right because his client had no right until his mother's death, and his insolvency terminated during his mother's lifetime, and that he obtained rehabilitation during his mother's lifetime. If the Court decided in favour of the plaintiff on the exception it would be inferentially deciding upon the construction of the will. In the case of *Hiddingh and De Roubaix* the will was entirely different, and the circumstances were entirely different. In the other cases cited by his learned friend there was a life usufruct, but it was not attempted to show that in this case there was a life usufruct.

Mr. McGregor, in reply, said all this would have been very neatly indicated to the plaintiff if there had been a plea of non-joinder. The plea in abatement evoked the question of vesting.

De Villiers, C.J.: This action was brought by the plaintiff for the purpose of having his rights under a certain mutual will declared. The mutual will was made by the plaintiff's parents in 1877. According to the declaration the father died in 1879, leaving surviving him the mother and 11 children, of whom the plaintiff is one. Then in 1890, according to the declaration, the plaintiff became insolvent, and one Stanley was appointed as trustee of his estate. The objection was taken to the declaration that inasmuch as the trustee is interested in this estate as creditor, that the plaintiff was not entitled to bring this action, and if any action could be brought at all the action should be brought by the trustee. The counsel for the plaintiff contended that under the will no right were vested in the plaintiff during his insolvency which could be claimed by the trustee. Now, that is a claim which is in direct opposition to the rights of the trustee, if he has any, and if the Court were now to decide this point in favour of the plaintiff it would be practically deciding the point against the trustee, who is not before the Court, and on that ground I consider it is of the utmost importance that the trustee should be brought into Court either as co-plaintiff or as co-defendant. It is quite true that the plea in abatement does not raise this point specifically. The plea in abatement objects to the plaintiff being the

plaintiff at all. I do not see that it can object to that, because if the trustee joins there is no reason why the plaintiff should not join with him. But there is this defect in the declaration, that the trustee, who has a very important interest in the decision of this case, is no party, and the Court will therefore allow the plea in abatement to this extent, that the action be not allowed to proceed without the trustee of the plaintiff's insolvent estate being joined either as co-plaintiff or as co-defendant, and to that extent the exception overruled, the costs to stand over.

Hopley, J., concurred.

[Plaintiff's Attorneys: Dempers and Van Ryneveld. Defendant's Attorneys: Fairbridge, Arderne, and Lawton.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

MCKINNON V. MCKINNON. { 1907.  
Aug. 8th.

This was an application brought by John Hutton McKinnon, of Cape Town, upon notice upon his wife to show cause why he should not be allowed proper and reasonable access to the younger children of the marriage, or why the said children should not be handed over to his custody.

The case was before the Court a little while ago, when Mr. Justice Buchanan granted Mrs. McKinnon a judicial separation, with custody to her of the younger children, and custody to her husband of the other children, and reasonable access to both parties ((17 C.T.R., 582). McKinnon now complained that he was not given reasonable access to the children placed in his wife's custody. Mrs. McKinnon, it appeared, has accepted a nursing appointment on Robben Island, and has had the children removed thither. Recently the present application came before the Court, but Mr. Justice Hopley, who was then sitting, declined to make any order, and suggested that the parties should endeavour to arrive at a settlement, and directed, otherwise, that the application should stand over in order that it might be heard before Mr. Justice Buchanan. No settlement has been reached in the interval, and the matter was therefore set down for hearing before Mr. Justice Buchanan.

Applicant appeared in person; Dr. Greer was for respondent.

Dr. Greer again read the affidavits which had been filed by the parties, and certain correspondence which had passed since the matter was mentioned before Mr. Justice Hopley.

Applicant said that the respondent was throwing serious obstacles in the way of his access to the children in her custody.

Dr. Greer said that applicant was trying to make his wife's life intolerable because she had been given custody of the younger children. Applicant seemed to have formed an altogether erroneous view of the order given by the Court when granting custody of these children to the respondent.

Applicant said that the children were living with coloured people, and were receiving no education.

[Buchanan, J.: Those statements should be put on affidavit.]

Applicant: They are facts. I had no money to put them on affidavit.

Buchanan, J.: The action was originally brought by the wife against the husband for a judicial separation, and the Court granted an order for judicial separation, giving the custody of the two boys, the elder children of the marriage, to the father, and the custody of the two girls, the two younger children of the marriage, to the mother for the present. No misconduct was alleged or shown against the present applicant, the father, and in law he is entitled to custody of the children of the marriage. The Court, however, has the power, as upper guardian of all minors, to act in these matters as it seems to the Court best in the interests of the children, and, considering that these two girls were aged seven and six years respectively, I considered that the interests of the children would be best served by giving the custody of the girls for the present to the mother. The dispositions of the husband and wife seem to be such that it was utterly impossible for the two to get on together, and a judicial separation was granted. Both parties are parents of the children, and entitled to have the children in their custody from time to time, so as to keep up and continue the parental affection which both parties have for their children. For this reason, the Court ordered that either party was to have access at all reasonable times and places to the children, the custody of whom had been given to the other party. The applicant now applies to the Court for a further order to enable him to have access to the two girls in the custody of the respondent. The applicant's temper, it seems to me, is a bad temper, and I think for the present it is better, in the interests of the children, that the applicant should not be where the respondent is, and that the respondent should not come to where the applicant is, but both parents are entitled to have access to the children, notwithstanding. At present the respondent is not able to have the two boys sent over to her on Robben Island, and she does not ask

for that to be done. She says she can get away once a month, and when she comes to Cape Town she can go and have access to the sons at a time probably when applicant is at work. But the respondent, having taken these girls over to Robben Island, where they are under her control, though not exactly in her care, I think that the Court should see that the applicant has a right to see the children. I think it is most undesirable that he should go over to the Island to see the children. For the present, it appears to me, the respondent should be ordered to allow the girls in her custody to come over from Robben Island on the first Saturday in each month, and remain with applicant until the following Monday morning, when the applicant is to have the children sent back to respondent. If she wishes to apply to the Court for the boys to be sent to her, she may do so, but at present she says that would be inconvenient to her. There will be no order as to costs. This order will continue until a further order of Court is made. If there is any ill-treatment or any further quarrelling, the Court will then have to consider whether it is not desirable to make a further order. I will give this word of caution to applicant, that he will have to behave well to the children and not cause any more quarrels.

#### *Ex parte* ESTATE BOOSE.

This was an application upon notice calling upon respondents to show cause why Gother Mann, of the South African Association, should not be appointed provisional trustee in the insolvent estate of Frederick Henry Boose, of Cape Town, with full power to finally liquidate the estate, and distribute the assets.

The petitioners were the South African Association of Cape Town, and certain others representing claims amounting to £22,000, with interest thereon, and the respondents represented claims amounting to £3,794 17s. 3d. Petitioners were in favour of the appointment of Mr. Mann as trustee of the estate; respondents were in favour of the election of Mr. Mann, Mr. Alfred Newton Foot, and Mr. John Andrew, as joint trustees. Petitioners held three votes, and respondents five, and at the second meeting of the creditors a deadlock consequently occurred, seeing that a majority in value favoured one course and a majority in number favoured another. In the affidavits it was contended for respondents that it was not desirable for Mr. Mann to be sole trustee, as other matters were involved in which the interests of the South African Association might conflict with those of the insolvent estate, more particularly in relation to the claim which insolvent said he had against the Muizenberg Estate



Syndicate, and in respect of which he some time ago instituted an action. Mr. Mann filed a replying affidavit in which he denied that there was likely to be any such conflict of interests as alleged.

Dr. Greer was for applicants; Mr. W. Porter Buchanan, K.C., was for respondents.

Dr. Greer said that Mr. Gother Mann was, apparently, acceptable to all the creditors, and the creditors who petitioned for his appointment represented by far the greater amount of the claims. Counsel referred to section 43 of the Ordinance, and *In re Lyons Bros.* (2 Juta, 136). In practice, the Court had always set itself against the appointment of three trustees, where assets were all local.

Mr. Buchanan said it was perfectly competent for the Court to appoint three trustees. The Court would bear in mind the wish expressed by the minority of the creditors that three trustees should be appointed. Mr. Gother Mann would have to represent certain interests which might very possibly conflict with the interests of Boose's creditors. It would not be any prejudice to the estate if three trustees were appointed. Just the same amount of commission would have to be borne by the estate, the only difference being that it would be shared by three trustees instead of being taken entirely by one.

Dr. Greer, in his reply, quoted Buchanan on Insolvency (p. 65), and urged that if the Court thought two trustees were required, Mr. Mann and Mr. Foot should be appointed.

Buchanan, J.: This is an application for the appointment of a provisional trustee. Meetings of creditors have been held, and the creditors cannot, by majority in number as well as by value, determine who the trustees should be. The policy of the law is that the creditors themselves should have the say and have the right to elect the trustees. There are two sets of trustees in this case. The first, as represented by the applicants, are the preferent bonded creditors, who are secured. The respondents represent the second bondholder and unsecured creditors, and it may well be that the interests of the secured may conflict with the interests of the unsecured. The secured creditors wish Mr. Gother Mann appointed trustee. All the other creditors were in favour of Gother Mann, A. N. Foot, and J. Andrew being appointed. Well, the estate seems to be rather a large one, and under these circumstances, there is no objection to appointing more than one trustee. At the same time, the interests are not so diverse that it will be necessary to appoint three trustees. I think, under the circumstances, two trustees should be appointed, and Messrs. Gother Mann and Alfred Newton Foot will be appointed

joint provisional trustees, with full power to administer and liquidate the estate. I think the costs of the application, as costs of trustees, must come out of the estate.

Mr. Buchanan asked whether that would include respondents' costs.

Buchanan, J., acquiesced.

#### AFRICAN BANKING CORPORATION, LTD. V. COURTENAY AND OTHERS.

This was an application brought by the African Banking Corporation, Ltd., upon notice calling upon William Harrington Courtenay and executors of estate Bailey to show cause why the set-down of the action brought by applicants against respondents for trial on 20th August should not be discharged, costs to be costs in the cause.

From the affidavits, it appeared that summons was issued on the 11th March last, and that subsequently the plaintiff's manager at East London, William A. S. Fairbairn, left for Europe. Mr. Fairbairn was a material witness in the suit. The case had been set down by plaintiffs a little while ago, their impression being that Mr. Fairbairn would be shortly returning to the Colony, in time for the trial. He, however, did not return, and he was not expected until early in October. The set-down was then withdrawn. In the meantime defendants, contending that there had been unreasonable delay by plaintiffs, set the case down for trial on the 20th August. To this plaintiffs objected, as they would not be ready for the hearing, and now applied for the set-down to be discharged.

Mr. Benjamin, K.C., for applicants; Mr. Burton, K.C. (with him Mr. Payne), for respondents.

Mr. Benjamin said he did not see how the defendants could be prejudiced by the case standing over until October. Mr. Fairbairn was a material witness, and if the case came on on the 20th, defendants could only get a judgment of absolution, and the proceedings would then have to be commenced *de novo*. It was not possible for plaintiffs to go to trial without Mr. Fairbairn's evidence. It was now said that the executors wanted to close off the estate of Bailey. The executors had only intervened as defendants. Plaintiffs cared nothing about the intervening defendants. The person who was responsible to the plaintiffs was Courtenay; he was the party whom they sought to make liable.

Mr. Burton submitted that plaintiffs had been guilty of considerable negligence. Although summons was issued in March, and the pleadings were closed in April, they took no steps either to secure Mr. Fairbairn's return in time for the trial or to obtain his evidence on commission. They had simply let



the matter drift along. He could not oppose the withdrawal of the set-down under the circumstances, but he submitted that plaintiffs should pay wasted costs.

Buchanan, J.: The respondents in this matter are quite within their rights in setting the case down for trial on the 20th inst., but the plaintiffs (the applicants) say that, in consequence of the absence of a material witness, they are unable to go to trial on that date. Well, under these circumstances, a postponement of the case must be had, but any wasted costs must be paid by the applicants. The notice of set down of this case for trial on the 20th August will be discharged, applicants to pay costs of set down and of this application.

Mr. Benjamin (interposing) submitted that costs should abide the action.

Mr. Burton said that applicants were entirely to blame for the position in which they were placed.

Buchanan, J.: The lesser evil to the plaintiffs will be to pay the costs of this application, than let the case come on on the 20th August. I think the order I made will stand, and wasted costs will be paid by applicants, that is, costs of the set down and of the application. I think it ought to be a condition also that the plaintiffs go to trial next term.

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*In re* GOOD HOPE FUNERAL ASSOCIATION, LTD.

Mr. P. S. T. Jones presented the first and final report of the official liquidators, and applied for the usual order.

Usual order granted, one publication in the "Gazette" and "Cape Times."

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## SUPREME COURT

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### FIRST DIVISION.

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[Before the Hon. Mr. Justice HOPLEY.]

PHILLIPS V. COLONIAL  
GOVERNMENT.

1907.  
Aug. 9th.  
" 23rd.

Agency—Guarantor—Public servant—Scope of authority.

*The police officer in command of a certain sub-division of*

*Police District No. 2 was authorized by instructions from Head Quarters to enter into a contract for the erection of certain stables, &c., for £140. One M. undertook the contract, but could not obtain the necessary building material without a guarantee for payment from some responsible person. The officer promised to see plaintiff paid on receipt of the money which would be due to M. on completion of the contract, and plaintiff thereupon supplied the material, charging it to M. M. left the work incomplete, leaving the unused materials on the ground, and the buildings were afterwards completed by the police themselves at a cost of £55. Plaintiff, after fruitless attempts to excuss M., sued the Colonial Government as M.'s guarantors, and eventually the Government offered to pay plaintiff £69 14s., being the sum alleged to be due to M., on condition of plaintiff withdrawing his action and paying costs to date of tender. This offer plaintiff refused to accept.*

*Held, that even if the officer had absolutely guaranteed payment to plaintiff, he had in so doing exceeded the scope of his authority, and that the Government were not bound by any guarantee he might have given, but that the plaintiff was entitled to have his claim satisfied, as far as possible, out of such moneys due to M. as defendants might have in hand.*

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This was an action brought by Morris Phillips, a general dealer, of Kenhardt, to recover from the Colonial Government the sum of £119 4s. 7d. for material supplied in connection with the erection of police barracks in the division of Kenhardt, and £47 11s., taxed costs incurred in a previous action to recover the former amount.

The declaration set out that the plaintiff was a general dealer carrying on business at Kenhardt. In February, 1904, one Henvin MacDonald entered into a contract with the defendant whereby MacDonald was to erect certain barracks or buildings for the Cape Mounted Police at Schuit Drift and

Poffadder, both in the division of Kenhardt. Thereafter the plaintiff, at the request of MacDonald and upon the guarantee by the defendant, through his duly authorised representative and agent, Inspector White, of the said police, then stationed at Kenhardt, to stand good for and secure to the plaintiff the payment for any goods or materials supplied by him to the said MacDonald for the purposes of the said contract, did at divers times between February 5, 1904, and April 30, 1904, sell and supply building material and other goods to MacDonald for the purposes of the said contract, to the total value of £119 4s. 7d. MacDonald, before completing the contract with the defendant, left this colony and proceeded to German West Africa without paying any part of his indebtedness to the plaintiff in respect of the goods sold and supplied. Before leaving the Colony, MacDonald had partially constructed the buildings, using therefor portion of the materials supplied to him by the plaintiff, and after his departure the defendant, by his servants or agents acting under his authority, proceeded with the construction of the buildings, using the remainder or part of the remainder of the said materials delivered, and the defendant had had all the benefit of the materials and other goods supplied. Thereafter the plaintiff made application to the defendant for payment of the amount due in respect of the supplies, which application was refused, and after due notice to the defendant he sued the said MacDonald by edictal citation for the sum of £119 4s. 7d., and on June 14 he obtained judgment against him for that sum and costs, and an order declaring that certain material still lying at Poffadder should be executable for the said claim. On the 25th June, 1906, a writ of execution was issued against MacDonald in pursuance of the judgment, and there was realised in satisfaction of the writ £7 2s. 6d. The taxed costs of the proceedings against MacDonald amounted to £54 13s. 6d., and after deduction of the sum of £7 2s. 6d. left £47 11s. still due in respect of costs. The plaintiff was entitled to payment of £119 4s. 7d. and the balance of costs incurred by the excussion of MacDonald, but the defendant refused to pay either of the sums or part. Plaintiff claimed £119 4s. 7d. and £47 11s., with costs of suit.

The defendant, in his plea, admitted that the plaintiff supplied certain material and goods to MacDonald. Inspector White had not at any time any authority from the Government to enter into any guarantee as alleged. He denied that notice was given to him of the proceedings referred to, and said that prior to issue of summons in this action he received no notice that the plaintiff held the Colonial Government liable upon the guarantee alleged.

Mr. Burton, K.C. (with him Dr. Greer), was for the plaintiff, and Mr. Howel Jones, K.C. (with him Mr. Nightingale), was for the Government.

Morris Phillips, plaintiff in the case, stated he was a storekeeper carrying on business at Kenhardt. He knew Inspector White, of the Cape Police. In 1904 he was the officer commanding the Cape Police in the Kenhardt division, and so far as witness was aware there was no one to whom he was subordinate in that division.

At this stage Mr. Jones objected to the witness giving evidence as to what took place between him and Inspector White until the agency was proved, and the witness was ordered to stand down.

James Thomas White, sub-inspector of the police stationed at Beaufort West, stated when he was at Kenhardt he had no superior in that division. In 1903, mainly owing to the heat, he found it necessary to have certain buildings constructed at Schuit Drift and Poffadder for the convenience of the police. In the ordinary course he would communicate with his commissioner, and take the orders from him. Witness communicated with the Commissioner at Kimberley, and there was a considerable amount of correspondence about the contract. He received authority from the Commissioner of Police at Kimberley to spend £140 on the work at Schuit Drift and £75 at Poffadder. He reported he had made arrangements with MacDonald and the Commissioner of Police signified his approval, and witness made a contract with MacDonald, who was to supply everything except transport. MacDonald was a gentleman of "straw," and could not supply the material, and witness then went with him to the store and informed plaintiff that MacDonald had got the contract.

[Hopley, J.: You told the plaintiff that MacDonald had the contract?]

Yes.

[Had you at that moment any authority from the Government or the Commissioner at Kimberley to contract on behalf of the Government in the way of a guarantee?]

None whatever.

[Is it part of your duty, as inspector of police, to bind the Government in contracts without express orders?]

No.

[You had no authority to go and make any guarantee on behalf of the Government.]

Not with Phillips. I had authority to spend £140 with MacDonald.

[Did you bind the Government?]

Not in any way.

Mr. Burton: You went to see Phillips in order to tell him that MacDonald had the contract?—I did.

Continuing, under the examination, the witness said he went to Phillips because Phillips would not give Mac-

Donald the wood and iron unless he saw a Government official. The plaintiff said: "Who is going to pay me?" and witness said: "When the work is finished and the money comes to me, I will see that you are paid." As officer commanding the division, the money would naturally come to him, and he would pay it out. The arrangement with Phillips was the most convenient one.

Cross-examined by Jones: The arrangement with Phillips merely was that when the contract was completed and the money came to him, he would see that Phillips got his money. What he meant was that Phillips would be present when MacDonald got paid. The contract was never completed. Witness did not order the children's hose, lace, and aprons which appeared in the plaintiff's account.

The plaintiff (resuming) stated that White asked him to make out the quantities and the cost, and these estimates were sent to White, but he said the cost was too much for the stables and the forage house. White then asked for an estimate for the stables only. Macdonald came first and wanted material, but witness would not give him credit for anything. Then he brought White to the store, and White said Macdonald had the contract, and if the goods were supplied he would see that witness got paid. Witness made it clear that he would have nothing to do with Macdonald at all. If White told him to supply the goods, he would do so in the name of the Government. White said "All right, you supply the goods, and I will see that you get paid from the Government." Witness sold to the Government, and entered the sale in the book in the name of the Government. Upon receiving a circular from Inspector White, as police officer, he supplied Macdonald with goods.

Cross-examined by Mr. Jones: He had a note in writing from Inspector White to supply Macdonald with the provisions. He was positive that he received the circular from Inspector White.

The bookkeeper of the plaintiff said the goods were supplied to Macdonald upon an order to all storekeepers signed by J. T. White, inspector, C.P.2. As far as he could remember, the circular was to the effect to supply goods to the value of £25, but no more. Any goods supplied to be endorsed on the back of the order, and returned to the Police Office.

Nathaniel Milling, of the C.M.P., stated that in 1905, he completed the stables at Skuit Drift. When Macdonald left the barracks were practically finished. Witness completed the building with the material he found on the spot. The material was valued at £33 3s. Witness was to receive £55 for the completion of the building, but he had got

nothing yet from the Government. Witness had spent £50 of his own money, but had not yet been paid. The officer commanding, Lt. Murdoch, gave witness his instructions.

Cross-examined by Mr. Jones: He had no complaint about his account except that there was a little more delay than he expected.

Mr. Burton closed his case.

Mr. Jones submitted that there was no case for him to answer. To begin with, Mr. White said he was not authorised to offer any guarantee on the part of the Government, and, secondly, he said that he did not do so. The plaintiff made the case of a direct sale to the Government, but there was nothing in the declaration which claimed the payment of this amount as upon a sale by Phillips to the Government. He submitted that he had no case to meet.

Mr. Burton said the case was still as it stood on the pleadings, that these were goods supplied to Macdonald upon the guarantee of White representing the Government. The note that was sent round to supply the goods might fairly be taken to mean to supply this man with goods. Supposing Macdonald were not a man of straw they would have been quite entitled to charge him and recover from him. Here was a man whom they knew no one would supply on his own account, and they went in and stood good for him. It was true as the declaration was worded it was stated as being a claim against them as sureties, and it was a pure technicality now to say that the whole claim should be thrown out. It was simply a question of error on somebody's part in the way these instructions were applied. If he had made a case of sale to the Government direct, he would have made a much stronger case. Counsel did not think the Government would be prejudiced in any way if the declaration was amended so as to make it a case of liability direct to Phillips. By their conduct they held out to the public that their chief local officer was authorised to take the necessary steps for seeing that this work was done. On the moral grounds, he could not conceive a meaner attitude on the part of a defendant than that of the Government in this case. They had taken these materials, which did not belong to them, and they deprived the plaintiff of the opportunity of executing upon these materials, as they put them into the buildings, and the Government admitted they had the benefit of all these materials, which they knew were supplied upon the recommendation and suggestion of their own officer. On the question of authority, counsel referred the Court to Blackwood Wright's Principal and Agent.

Inspector White (recalled by his lordship) said he had no recollection of

having sent such a circular as that described by the plaintiffs' bookkeeper. It was quite possible that it might have been sent during his absence by the Acting Officer Commanding.

[Hopley, J.: Supposing the view of the evidence I take is that the real contract between him and the Government, represented by White, was one of limited guarantee, that is, when this man has completed his work and the payment is to be made, I will see that you are paid for these materials?]

Mr. Jones said he would then argue there was no breach of contract, because he had not completed the work. Proceeding, counsel said the work had only recently been completed. It took the department some time to find out what was actually due to Macdonald, and when they found out that £69 14s. was due by the Government to Macdonald, they had no objection to paying over the sum to the plaintiff, provided he was authorised to receive it by Macdonald, or he obtained an order of Court to protect the Government. As early as April, 1905, the plaintiff set up a claim against the Government, not on a guarantee, but as having supplied direct to the Government. Then, on the 12th January, 1906, a letter of demand was suddenly sent to the Commissioner of Public Works, but he knew nothing about the matter. It was the plaintiff's own fault that the matter came into court. The law was quite clear in regard to the position of Government officers, and it was laid down in the case of *Morgenrood v. Colonial Government* (9 C.T.R., 132). The authority of White was to enter into a contract with Macdonald, and no one else.

Mr. Burton having been heard in reply,

Hopley, J., said the application for absolution from the instance would be refused.

For the defence, Mr. Jones called Major Elliott, who was Commissioner of Police at Kimberley in April, 1904. He said he had authority from headquarters to have these buildings erected. He authorised White to enter into the contract with Macdonald. White had no other authority but to enter into that contract.

*Cur. Adv. Vult.*

*Postea* (August 23).

Hopley, J.: The plaintiff, a general dealer at Kenhardt, sues the Colonial Government for the sum of £119 4s. 7d. upon a certain guarantee alleged to have been made on behalf of the defendant by Inspector White, the officer in charge of the police in the district of Kenhardt, in February, 1904, that the defendant would stand good for and secure to the plaintiff payment for any goods or materials

supplied to one Macdonald, who at that time had contracted to erect certain police barracks and stables for the Government at Scuitdrift and Poffadder, two outlying police stations, each about 150 miles from the town of Kenhardt. The plaintiff also sues for a further sum of £47 11s., being the unsatisfied costs of excussing the said Macdonald. The defendant denies that any such undertaking was given by Inspector White, and specially denies that he had any authority at any time to enter into any guarantee binding on defendant. At the date in question, the district of Kenhardt was for public purposes controlled from Kimberley, where there was a Resident Commissioner of Police in command of a wide area known as Cape Police District No. 2, or, more briefly, C.P. 2, of which district the detachment at Kenhardt policed the "K" division. Of the K division, the commanding officer was Captain White, and he was directly responsible to the Commissioner at Kimberley, who in turn was controlled from headquarters in Cape Town. There was telegraphic and postal communication between Kenhardt and the rest of the country. During the year 1903 there were communications between the offices at Kenhardt and Kimberley about the necessity of erecting stables and barracks at Scuitdrift and Poffadder, and these, though apparently dropped for a time, were resumed in November of that year, with the result that on January 30, 1904, Captain White, as O.C. of C.P. at Kenhardt, was authorised to conclude a contract with Macdonald, a local contractor, to build the necessary barracks and stabling at Scuitdrift for £140, and at Poffadder for £75, the understanding being that the Government would convey the material to, and do the necessary cartage at, the respective places. On February 2, 1904, accordingly, the contracts were entered into; or, at all events, the contract relating to Scuitdrift, the only one which has been produced, was executed upon that date. That contract stipulated that Macdonald was to erect the necessary buildings for the sum of £140; and the contractor seems then to have set about arranging to obtain the necessary material for the work, as well as a certain amount of the necessaries of life for the maintenance of himself and his family at the remote post where the work was to be performed. Macdonald, however, was known to be a man of straw, and none of the local shopkeepers were inclined to let him have any goods on credit. Yet he was, so Captain White says, the only man who would undertake the work at the price authorised by the Commissioner of Police. Failing Macdonald, the only probable way to get the work done would have been to detail certain mem-



bers of the police force for such service, and that course, though feasible as a last resource, would have had the effect of depriving the district of proper police assistance and protection. Such course had not been authorized, and it is quite probable that it would not have been sanctioned by the Commissioner. Captain White, however, anxious to get the necessary accommodation, went with Macdonald to the plaintiff's place of business, and informed him that the contracts for Scuit Drift and Poffadder had been given to Macdonald, and that the material, etc., required was for the purpose of enabling him to carry out his undertaking. The plaintiff, not quite satisfied, then asked who would be responsible for the payment, whereupon White said that when the work was finished by Macdonald, and the money in payment therefor reached him, he would see that Macdonald paid the plaintiff. This satisfied the plaintiff, and he agreed to let Macdonald have the building materials. Those appear to me to be the facts so far as the building materials are concerned; but I may pause for a moment to comment upon a somewhat different complexion which the plaintiff endeavoured to give to the transaction. He maintains that he said at the interview in question that he would have nothing to do with Macdonald, but that he would only sell directly to the Government. He does not say that White agreed to this; but his evidence is to the effect that the goods were supplied on that understanding, and it will be seen (from annexures A and B to the declaration, that the accounts for the building materials are made out directly to the Government. Captain White denies that he purchased directly for the Government, and it is somewhat unlikely that he would have taken such a step, seeing that he had no direct authority to do so. Now the interview at which the supplying of the material was arranged took place early in February, and it is admitted that there was only one interview dealing with that matter, but the material had to be ordered from Port Elizabeth, and was not actually supplied until the month of April, with the exception, that is, of five windows and frames, which were immediately required for Scuitdrift, and which were found in the plaintiff's local stock. These were supplied on February 8, and the entry in the plaintiff's books as regards them is significant. Had the contract been as alleged by plaintiff, the entry should have been made forthwith in an account with the Colonial Government; but the entry made at that time was against Macdonald, being in the counter-book as follows: "H. Macdonald, care of Captain White, five windows and frames, 52s. 6d., £10 12s. 6d., and the item was transferred in the same way to

the ledger, in which the whole entry (see fol. 202) is as follows: "1904, care of Captain White, C.P.2, Kenhardt, H. Macdonald (material account).—February 8: To five windows and frames (52s. 6d.), £10 12s. 6d.: April 30: By Colonial Government, £10 12s. 6d. It will thus be seen that the item was transferred in the ledger at the end of April to an account against the Colonial Government, and it now figures as the seventh item in Annexure A to the declaration; but the windows and frames really were supplied on February 8, and conveyed to Scuitdrift on that date. Macdonald was unequivocally and duly debited with them, and it was not until the month of April that the Government was charged in the books with them. I think that the plaintiff's books corroborate Captain White's evidence that there was no sale to the Government, and I may remark that if the plaintiff's evidence had been accepted on this point, the greater portion of his claim upon the alleged guarantee must have failed in the form in which it was presented. I am, however, of opinion that the form of action was correct, in spite of the ultimate appearance of the ledger, in that, if the plaintiff had any cause of action against the Government at all, a point which I shall presently discuss, it was upon a guarantee by them, and not upon a sale to them. It is true that when the bulk of the materials arrived from Port Elizabeth, and when they were delivered on the police wagons for conveyance to the outposts, they were entered as in account with the Colonial Government. But that took place upon April 6, and it is quite conceivable and very probable that the plaintiff at that date had come to the conclusion that he had better contract with Captain White on the spot than with Macdonald, who was then 150 miles away. But if he came to that conclusion, and shaped his books to suit that view, he certainly did not consult Captain White on the matter, nor anyone who had authority to represent and bind the Government in such a matter. It will be noticed that it was at that date that he transferred the five windows and frames supplied on February 8 from the account of Macdonald to that against the Government. This is shown in the counter-book, though in the ledger the cross-entry was not made apparently until the end of April. Having thus far dealt with Annexures A and B, which are accounts against the Government directly for building materials, I pass to Annexure C, which is an account against Macdonald, and about which plaintiff and Mr. Wright, his late bookkeeper, state that on or about February 8, when Macdonald was about to start for Scuitdrift, he brought round to their place a kind of circular or general order addressed to any shopkeeper in



the place, authorising the supply of goods required by Macdonald to the value of £25, and asking anyone who might supply such goods to endorse the transaction on the order. They say that some other shopkeeper had supplied or did supply a few articles on such order, and that they supplied the bulk as shown on annexure C. They also say that they, after endorsing the memorandum on the order, returned it to the police office, but they are not sure who signed the order or to whom it was returned, their impression, however, being that the individual concerned was Captain White. Now, Captain White denies having given such an order—and it is curious that none of the other traders in Kenhardt were called to corroborate the plaintiff as to the existence at that time of such an order. I do not think it improbable in the circumstances that Macdonald, who was going into the country far from any shop or base of supply, should have endeavoured to procure such an order for the purpose of getting supplies, and it is even possible that White or a *locum tenens* might have conceived that it would be right and proper to help their contractor to obtain such necessities of life: but it is strange that White, who was a very candid witness, knows nothing of such order, that no copy of such a document was kept, and that no reference is made to it in any of plaintiff's books. I have looked through both the counter-book and the ledger, and find that all the articles were supplied to "H. Macdonald, c.o. Captain White," and no mention is made of any order or guarantee. I am, therefore, not entirely satisfied that such an order ever existed, or at least that sufficient evidence as to its existence has been adduced. Assuming, however, to the full the complexion which the plaintiff wishes to place upon the transaction, embraced in Annexure C, and also assuming that Captain White guaranteed on behalf of the Government as alleged in the declaration that payment would be made to the plaintiff for the goods supplied, as shown by Annexures A and B, the question arises whether the Government is in any legal sense bound by such undertakings. Captain White certainly was the ostensible local authority for all police matters: he was in command of the force in that division, and in matters affecting their duties and their discipline there is no doubt that he was held out as the agent of the supreme authority; but it by no means follows that by virtue of his position he was held out as the agent for the Government to enter into building contracts, to purchase building materials, or to give guarantees for payment. The most elementary knowledge of law and the slightest exercise of business principles would have served to show that for such

matters he would be obliged to get a particular authority, and if that were so it would be incumbent upon persons dealing with him in connection with such matters to inquire into the scope of his authority. Now, for the purposes of the buildings at Scuitdrift and Poffader, he had been invested with a particular authority, and the defendants are bound by all his acts in the execution of his mandate, but not further. What, then, was his mandate and what were the bounds of his authority? He was authorised clearly enough to enter into a contract with Macdonald to erect the necessary buildings for certain sums specified, and it appears to me that his authority did not extend any further than to do all things necessary for the purpose of effecting that object. It was indeed argued for the plaintiff that there was an implied authority to do all acts towards the accomplishment of the erection of the buildings, that the buildings could not have been erected by Macdonald without materials and the necessities of life, that the materials and such necessities would not have been supplied without a guarantee by the Government, and that therefore White had an implied authority to enter into such guarantees. But it is clear that such contracts by no means flowed out of the contracts which White had been authorised to make, and that his superiors could not have contemplated undertaking the risks which it is said that he undertook on their behalf. Considerable latitude in interpreting instructions and in construing authority would no doubt be allowed, and liberal concessions might be made by the Court in cases where public officers have to carry out orders in remote parts of the country where communication with headquarters was proved to be extremely difficult, if not impossible, and where immediate action was to be decided upon: but such was not the case at Kenhardt. There it was a simple matter to communicate with Kimberley, and to receive express instructions on such a matter of difficulty as arose in the case under consideration. Had the difficulty been reported to Commissioner Elliott at Kimberley he might have communicated with Cape Town and obtained authority to guarantee Macdonald's credit, or he might have elected to take some other course; but no such steps were taken, and the plaintiff chose to supply his materials, according to his own version of the matter, to a public officer, or to accept his guarantee for payments for them, without inquiring into and ascertaining the limits of his authority in the matter.

The rule in dealing with public agents is laid down by Story in his work upon agency in a passage which rests upon decisions of the American Courts, but which appears to me to be sound and applicable to this country, and to be

supportable upon the principles of our common law, and upon the practice regulating the appointment of public servants in this country. Public agents here are limited in law by the terms of their mandate, and their powers can be easily ascertained, so that no one need be misled into contracts which such agents are not authorised to enter into on behalf of the Government. Story, section 307 (a), says: "In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter, the principals are in many cases bound where they have not authorised the declarations and representations to be made. But in cases of public agents, the Government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent, to make the declaration a representation from the Government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agents. And there is no hardship in requiring from private persons, dealing with public officers, the duty of inquiry, as to their real or apparent power and authority to bind the Government." And this language I adopt as setting forth the law of this country. I am therefore of opinion that, even if Inspector White bought the goods in the name of the Government, or promised that the Government would be surety for Macdonald, the Government are not bound by his undertakings. But, as a matter of fact, I am satisfied that Inspector White promised no more than that he personally would protect the plaintiff when the money was paid into his hands by the Government for the purpose of settling with Macdonald. It should not be lost sight of that at the time he made such promise it must have been contemplated that the whole matter would be finished in a few months, and that White would still be on the spot to settle the accounts. As to what happened in the execution of the contract, it would appear that Macdonald, after spending a couple of months at Scuitdrift, and in that time doing a portion of the work stipulated for at that place, abandoned the contract, and crossed the border into German territory, where, it is said, he was last heard of. He left all the unused material *in situ*, both at Scuitdrift and at Poffadder, and eventually the Government authorised the expenditure of whatever balance might be over, after allowing for the work done by Macdonald, in the completion by the police themselves of the buildings at Scuit-

drift—the Poffadder post being apparently left to its fate. The inspector at Kenhardt — no longer Captain White, who had been transferred to another post — thereupon, in 1905, set Lance-Corporal Milling, a member of his force, about completing the buildings, informing him that there was a balance of £55 available for the purpose. Accordingly, Milling proceeded with the construction of the buildings at Scuitdrift, using for that purpose the material supplied by the plaintiff for that contract, but apparently did not complete them until January, 1907, the delay being probably due to interruptions, the nature of which was not explained in evidence. I regret that the parties have not been able to settle this matter without the expensive process of a law-suit, for it seems to me that when correspondence began it would have been possible by means of a little willingness to inquire into the truth to come to an amicable settlement. The correspondence, however, was protracted, and there was no display of willingness on the part of the various departments of the Government which it became necessary to address to unravel the difficulty or to do more than pass the plaintiff on from one department to another. The complication was not of the plaintiff's making, but was due mainly to the fact that the Kimberley office had been abolished, and all the papers transferred to Cape Town, and that confusion and loss of documents was alleged as a consequence. Still, even so, a little sympathy with the plaintiff on the part of any department might have elicited the facts, and led to a settlement without expense. At the end of nearly three years of correspondence about the matter, the plaintiff was informed that there was a sum of £69 14s. due to Macdonald, and that such sum would be paid over to him if he could produce the authorisation of Macdonald, or an order of Court to that effect. And this offer was made conditionally on plaintiff's withdrawing his action and paying the costs of the Government. This offer was made at the end of June, in the present year, when considerable costs had already been incurred, and it was not accepted by the plaintiff. As far as I can see, there should be a larger sum due to Macdonald than the sum mentioned, since it has apparently cost the defendants no more than £55 to complete the contract, which was for £140. There should then be a balance of £85; but it is possible that the defendants may be able to show that deductions from this amount can be fairly made in settling the matters of the Scuitdrift contract. I think that it is right and equitable that whatever sums of Macdonald's defendant has in hand should be paid in satisfaction of plaintiff's claim, and as an order of Court seems to be all that

is necessary as far as the present parties are concerned to effect such payment, I think that such order should be made. With regard, however, to this action brought by the plaintiff, it must fail, and there must be judgment for the defendant. Unsatisfactory as I think the conduct of the matter was on behalf of the various departments, through whose offices the correspondence passed, I do not think that such conduct excuses the plaintiff in bringing an untenable claim, and he must therefore pay the costs of suit. There will, however, be an order that the defendant be authorised to pay over to the plaintiff the sum of £69 14s., or such larger amount as an examination of the accounts of the Scuitdrift contract show to be due to Macdonald on a *quantum meruit*, or upon a deduction of such sum as it has cost the defendant to complete the contract from the contract price of £140.

[Plaintiff's Attorneys: Dempers and Van Ryneveld; Defendant's: Reid and Nephew.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### PROVISIONAL ROLL.

SYRKIN V. HIGHMAN. { 1907.  
Aug. 9th.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### DESVAGES V. AYRES.

Mr. D. M. Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest from the 1st January, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable, and the rents hereafter accruing to be attached.

Order granted.

#### ILLIQUID ROLL.

#### PIENAAR AND CO. V. ROSE.

Mr. De Waal moved for judgment under Rule 319 for £82 10s. 7d., with interest *a tempore morae* and costs.

Order granted.

### GENERAL MOTIONS.

#### *Ex parte* COX.

Mr. Sutton moved for certain rule nisi to be made absolute admitting petitioner to sue her husband *in forma pauperis* for a judicial separation.

Respondent appeared, and said he objected to the charge of cruelty. He, however, had no objection to raise to the present application.

Rule absolute. Mr. Sutton appointed counsel, and Messrs. Findlay and Tait attorneys to the petitioner.

#### *Ex parte* ESTATE GRUNDLING.

Mr. P. S. T. Jones moved, on behalf of John Cairncross, executor in the estate of the late Hendrik Grundling, of Oudtshoorn, for an order calling on all persons concerned to show cause why the Registrar of Deeds should not be authorised to pass transfer of 1-16 share in the farms Slang River and Surrounding Slang River, in the division of Oudtshoorn, from one George Dunn to the estate of the late Hendrik Grundling. The farm had been purchased by Grundling, but transfer had not been given. A bond for £50 given by Dunn in favour of one Ernest de Marillac on October 14, 1865, was still registered in the debt registry against the farm. Petitioner believed that the bond had been paid. De Marillac's estate had been sequestrated in 1866, and the final account had been filed and confirmed. No record could be found of the bond in the papers of the insolvent estate. One of the trustees was dead, and the other resident in Hamburg. Counsel also moved for leave to sell a portion of the farm Surrounding Slang River, which had been left subject to the condition that no heir was to have the right to sell till the second generation.

On the second part of the application counsel referred to the case of *Lind and Others v. Calitz and Others* (9 Juta, 268), where the meaning of the clause had been considered.

Buchanan, J., said that with regard to the second part of the application the executor did not require the authority of the Court to sell. With regard to the first part a rule nisi was granted calling on Lippert (trustee in de Marillac's estate) and others to show cause on 12th November why the application should not be granted. Personal service to be effected on Lippert and one publication of the rule to be effected in the Mossel Bay "Advertiser."

#### *Ex parte* DU TOIT.

Mr. Gutsche moved for the appointment of a *curator bonis* to represent

Godlieb Petrus du Toit, a deaf mute (brother of the petitioner), in connection with the realisation of certain estate. Counsel quoted *Mostert's Case* (4 C.T.R., 399).

Rule nisi granted calling upon respondent or any other person concerned to show cause why applicant should not be appointed curator bonis of the respondent, rule to be explained by some person other than the petitioner to the respondent, and to be served on respondent's parents, if either is alive, or, if not, on the brothers of respondent, rule returnable on the 12th September, costs to come out of the property.

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*Ex parte* NORTJE.

Mr. Gutsche moved, on behalf of the petitioner, as surviving spouse under a certain mutual will, for an order authorising the sub-division of certain property in the division of Oudtshoorn, and authorising the sub-divisional transfers to be passed. The Master recommended that the petition be confirmed, that the amount received (£225) to be paid in reduction of the mortgage bond, and that proof be exhibited to him that the amount had been so applied.

Order granted in terms of Master's report.

Buchanan, J.: Before the order is taken out, a sworn translation of the will, which is in Dutch, must be furnished. A translation is annexed to the petition, but it is not sworn.

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*Ex parte* DENHAM.

Mr. Sutton moved, as a matter of urgency, for the appointment of petitioner's brother, B. P. Denham, as *curator ad litem* to assist her in a certain action which she proposes to institute, and for the personal attachment of one Lieutenant Cooper, R.N., second officer of S.S. Tintagel Castle. Petitioner said that she was 20 years of age, and resided in Cape Town. Both her parents were dead. In November last, while the Tintagel Castle was lying in the Table Bay Docks, the respondent Cooper seduced her under promise of marriage, and she now intended to institute an action against him for £500 damages. Respondent had been seen by deponent's brother, and had stated that he was engaged to another lady. Respondent was resident at Southampton, England, but would be shortly touching at these shores with his boat, which left Durban on the 8th inst. for Cape Town. He had expressed his intention of going to Canada. She prayed for an order appointing her brother as *curator ad litem* to assist her in the action, and for an order authorising the arrest of

respondent on the arrival of the steamer at Cape Town, in order to found jurisdiction in this Court against him, such arrest to continue until the said Cooper shall have given security in such sum as the Court may think fit for the purpose of satisfying petitioner's claim. From correspondence annexed it appeared that a letter had been addressed to respondent at Durban, offering, in order to keep the case out of Court, to accept £100 in satisfaction of any claim petitioner may have against him. The offer was made without prejudice. To this letter no reply had been received.

Buchanan, J., said that he would be prepared to appoint Mr. Denham as *curator ad litem*, but, as to the other part of the application, petitioner had got her remedy under the 8th rule of Court.

Mr. Sutton: We cannot proceed for the defendant's arrest under rule 8, because he is not domiciled here.

[Buchanan, J.: You find him in the country, and you arrest him.]

Mr. Sutton: We cannot arrest him under the 8th rule, because he is not domiciled.

[Buchanan, J.: You have to find him in the country first. That is not a question of domicile.]

Mr. Sutton quoted Van Zyl's Judicial Practice (p. 136), and cited *Schunke v. Taylor and Symonds* (8 Juta, 103), and *Solomon v. Wolff* (8 C.T.R., 184).

Buchanan, J.: *Schunke's* case does not apply to this case. He was plaintiff, and was called upon to give security.

Order granted appointing Mr. B. P. Denham as *curator ad litem* to assist applicant in the action intended to be instituted by her against Cooper, and leave of Court granted to arrest respondent *ad fundandam jurisdictionem*, writ not to be executed, or if executed, to be discharged on the defendant giving security in the sum of £150.

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# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

KELLY V. R.M., WOODSTOCK. { 1907.  
Aug. 12th.

Agent in Magistrate's Court—  
Attorney.

*In an application to be admitted as an enrolled agent in the Woodstock Resident Magistrate's Court, it appeared that there were more than two attorneys of the Supreme Court habitually practising in the Woodstock Court.*

*Held, that although such attorneys had no offices in Woodstock, there was such a close proximity of their offices in Cape Town to the Woodstock Court as to justify the Magistrate in holding that they were in practice in the Woodstock Court.*

This was an appeal from a judgment of Mr. Justice Maasdorp, sitting as a Divisional Court of the Supreme Court, in an application brought by the present appellant against the Resident Magistrate of Woodstock, on notice to show cause why applicant should not be admitted and enrolled as an agent of the Resident Magistrate's Court at Woodstock, under section 36 of Act 20, 1856, as amended by Act 43, 1885.

Mr. Schreiner, K.C. (with him Mr. Rowson), was for appellant; Mr. Close was for respondent.

Mr. Schreiner said that the point raised in this case was whether an attorney, who in one magisterial district had his offices, could for the purposes of Act 43, 1885, be said to be practising in an adjoining district because he frequently appeared in that court, and because his offices were situate in close contiguity to the district. Could a person be said to be in practice in the Resident Magistrate's Court of Woodstock when anyone desiring to consult him had to go out of the district into Cape Town? "In practice," he submitted, meant in practice within the jurisdiction. Counsel quoted section 36, Resident Magistrate's Court Act, No.

20, 1856, and cited *Johnson v. R.M., Woodstock* (16 C.T.R., 776). Attorneys residing in Cape Town could not be said to be easily accessible and readily available to clients in Woodstock. It was of the essence of practice that the attorney should reside within the jurisdiction. It was not a question of degree or of mere propinquity of one district to another, but a question of the boundaries of jurisdiction.

Mr. Close submitted that all that Johnson's case decided was that if an attorney had an office in the district it was decisive on the question of practice, and if he had not got an office he had to satisfy the Court in some other way that he was in practice.

[Hopley, J.: These two places are contiguous. Where do you draw the line?]

Mr. Close: I would not like to suggest to the Court that a line should be drawn anywhere. Each case would have to be decided on its own merits. Counsel went on to say that Woodstock was practically part of Cape Town, and had been until quite recently strictly and technically a part of the Cape Town district. An attorney in Cape Town was just as available and accessible to a client in Woodstock as he was before. By tram and train, telephone and telegraph, the communication between the two districts was as close and perfect as could well be conceived. Counsel cited *Van Wyk v. Resident Magistrate, Willowmore* (13 S.C., 216).

Mr. Schreiner, in reply, said that in Van Wyk's case the Court looked to the actual local limits of the jurisdiction.

Hopley, J.: You seem to argue that a man cannot be in practice in the district unless he have a professional residence there?

Mr. Schreiner: That is so; he must be at hand to be consulted. Counsel went on to argue that his learned friend might just as well say that Wynberg was formerly part of the Cape Town district, as that Woodstock was until recently part of the Cape Town district.

De Villiers, C.J.: I quite agree with the learned judge in the Court below that the question whether or not there are two or more attorneys in practice in Woodstock is a question of fact, and it is impossible for the Court to lay down any rule which would apply to every case. Every case must be decided on its merits. It was said by Mr. Schreiner that if this application of his client were refused, it might be held that attorneys could occasionally go from Cape Town to Paarl, and by occasionally practising there, might prevent agents from being admitted. There is a vast difference, however, between such a case and the present. Here we have the case of Woodstock, which,



as we know, is in close proximity to Cape Town, and it appears also from the statements of counsel, which are not contradicted, that not long ago Woodstock formed part of the magistracy of Cape Town, and at that time, at all events, the attorneys practising in Cape Town, who were in the habit of practising in Woodstock, would come under the designation of practising in Woodstock, that is, in the Assistant Magistrate's Court. Well, then, Woodstock was cut off from the magistracy of Cape Town, and I should certainly consider that an attorney who had up to that time been practising in the Assistant Magistrate's Court could fairly be considered as practising in the newly-established Magistrate's Court of Woodstock. Reference was made to the case of Johnson, which was decided by myself. In that case the counsel on both sides fixed their attention to the one point, whether the attorneys there mentioned had offices in Woodstock, and, it having been proved that they had offices, the Court decided that that was conclusive. It does not follow that in the opinion of the Court it was necessary that there should be offices. That point was still left undecided, and that is the question which has now been raised. It would not be a long walk from Woodstock to Cape Town to see an attorney, or the telephone or telegraph might be used, and the attorney would be at Woodstock within half an hour. Therefore, I can quite understand the decision of the Magistrate, as well as the decision of the learned judge, that there was such a close proximity as to dispense with the supposed requirement that the attorneys should actually have their offices in Woodstock, if they have offices in Cape Town. On the whole, I think the decision should not be disturbed, and the appeal will be dismissed, with costs.

Buchanan and Hopley, J.J., concurred.

Appellant's Attorney: E. J. Sidney;  
Respondent's Attorney: A. J. McCallum.

[Before the Hon. Sir JOHN BUCHANAN  
and the Hon. Mr. Justice HOPLEY.]

BAVUMA V. MORUM BROS. { 1907.  
Aug. 12th.

This was an appeal from a judgment of the Resident Magistrate Matatiele, in which the present respondents were plaintiffs and the appellant was defendant. The summons called upon defendant to pay to plaintiffs the sum of £90 18s. 2d., being the balance of a certain account rendered for goods sold and delivered.

Mr. Seymour, who was for defendants in the Court below, took exception to the account on the ground that it was vague and embarrassing. Bavuma, the defendant, was described as a native peasant. He had a kraal near Isigogo, and a sufficient smattering of learning to enable him to read and write in Kafir, and to sign his name. Defendant objected to the account rendered by plaintiffs, as it had no dates, and no particulars so that he could identify the items. The Magistrate overruled the objections. Bavuma denied that he owed £50 for a wagon and £2 5s. cash. He admitted the rest of the account, with the exception of an item of £19. At a subsequent hearing a plea denying the whole of the account was put in. The item of £19 was the only entry that appeared in the books of Morum Bros., excepting a spasmodic entry in the cash-book, which was never carried forward to the ledger. Busse, the manager, admitted that no item was shown in the ledger with regard to the price of the wagon. Appellant complained that the Magistrate's reasons for his judgment were unsatisfactory. He found that the claim leaving a credit balance of £19 was correct, and therefore that the marriage goods, cart, etc., were supplied, a matter of £15 15s. 9d., which defendant claimed be deleted because he treated it as a private matter of the manager Busse. Morum Bros. stated that the oxen belonging to Bavuma were simply held as pledge for the payment of the balance due on the sale of the wagon, but the Magistrate's finding was distinctly against plaintiffs' statement upon this point. The Magistrate found that the present appellant was clearly entitled to receive back his oxen. These he allowed at £9 each, and £5 damages. The Magistrate believed that the cattle were obtained after a certain amount of misrepresentation, and that once obtained they were held by the firm without Bavuma's consent.

Mr. P. Jones was for appellant and Mr. Upington for respondents, who were also cross-defendants. Mr. Jones contended that obviously no judgment could be given for *bona fide* security, and no damages either. The Resident Magistrate stated that both parties obtained a substantial judgment, and therefore made no order as to costs.

Mr. Upington said although the item of the wagon did not appear in the books, still the purchase was not disputed, and when the defendant Bavuma said he had paid £30 of the amount, then the onus of proving this payment lay with the defendant. He did not see why the Magistrate's judgment should be overruled, simply because the books of the firm were badly kept. With regard to the matter of £15 15s., he submitted that there was evidence to support the Magistrate's finding. All

the evidence went to show that despite the fact that certain of the items did not appear in the books, the defendant Bavuma received them, and no serious attempt was made to dispute their purchase. Counsel held also that the oxen were purely held as a pledge for the settlement of Bavuma's debt.

Buchanan, J.: The plaintiffs, Morum Bros., sued the defendant in the Magistrate's Court of Matatiele, in the Transkei, for the sum of £90 18s. 2d. This amount is made up in round figures as follows: balance of account goods sold and delivered £40, and balance remaining unpaid of £50 on a wagon bought by the defendant, £80.

The defendant, on the other hand, filed a counter-claim for £217 6s., made up of a number of credits amounting to over £50, balance on an exchange of stock £15 15s. 9d., a further claim of £30 arising out of sundry credits, and a claim of £120 for the wrongful taking of cattle—being the value of 10 oxen at £10 each and £20 damages for their retention by the plaintiff.

When it came to an investigation of the account before the Magistrate, it was found that plaintiff's books—not kept by them, but by their manager—were in a most unsatisfactory state, and did not show many of the items charged by the plaintiffs in this case, and further investigation showed also that the £50 10s., being the first six items claimed in reconvention, had been taken into account by their manager, Busse, from which had been deducted certain counter-claims for goods sold and cash lent, leaving a balance of £19 for which credit had been given upon the account. Of the amounts deducted from the £50 two items, one of £14 5s. 6d. for what is called marriage goods and £9 for cash lent, do not appear at all in Morum Bros.' books. The defendant admitted having purchased the marriage goods, but said that he had paid cash for them, and had also repaid the amount which had been lent to him. He produced no receipt, and the Magistrate, after going into the evidence, has decided against the defendant upon that point.

Consequently, with the exception of a small error deducted by the plaintiffs of £2 6s., judgment for the balance of the account for goods sold and delivered was given in favour of the plaintiffs. As to the £50 said to be due as balance of the purchase price of the wagon, there is no entry whatever in the books of Morum Bros. as against the defendant, and, but for the defendant's own admission, the probability is that Morum Bros. would never have known about the claim and never would have made it against the defendant. The defendant showed that he had given certain heifers which the manager, Busse, had taken over at £50 on account of this wagon, which was bought originally for £80, and the de-

fendant says he paid the additional £30 in cash. He, however, was unable to produce any receipt showing the payment, and, in the absence of any entry on the other side, the Magistrate has given this item also against the defendant. The defendant's claim for £50 as the balance due upon the wagon was based on their allowing for the cattle taken over only £30. The Magistrate found that these cattle were taken over at £50, consequently the £50 balance was reduced to £30, leaving the total due plaintiffs on their account after these deductions were made, £68 12s. 2d., for which he has given judgment in convention.

On the claim in reconvention the Magistrate has found, as before stated, the first six items as against the defendant on the ground that they were included in the plaintiffs' account. On the second item of £15 15s. 9d. he found that this item arose out of a private transaction between the defendant and the plaintiffs' manager, Busse. Similar trading with stock had been done by the defendant, which Busse admitted were transactions on behalf of his principals. Morum Bros. said that their manager had no right to trade upon his own account, but in spite of this Busse says it was a private transaction. This allegation of Busse's, that this was a private transaction, rests upon his own bare statement. It is denied by the defendant, and he has also produced two corroborative witnesses to say that when he claimed a settlement of this £15 admittedly due to him, Busse said he would place it to the credit of defendant's account with Morum Bros. All defendant's transactions were with Busse, and he thought they were all on the same footing.

Under these circumstances I think, even if he had been carrying on this transaction on his own account, that it does not lie in the mouth of Morum Bros. to say that they would select this one transaction from a number of others and eliminate it from their account. The Magistrate has found that Busse's statement was correct, and consequently did not give judgment against Morum Bros. But I do not think that the Magistrate has considered the fact that there was nothing to show that this transaction was, to the knowledge of the defendant, to be separated from the other transactions, and therefore Morum Bros. should be answerable for this transaction just as they are answerable for the other transactions between the defendant and Busse.

I therefore think that the £15 15s. 9d. ought to be included in the claim in reconvention.

With regard to the £30 16s. claimed in reconvention, I do not see anything which would cause me to upset the judgment of the Magistrate.

There only remains the matter of the £100 for the price of the ten oxen and £20 for damages. With regard to that the Magistrate has given judgment for the return of the oxen or for £80, their value, and £5 as damages. It appears from the evidence that the oxen belonged to the defendant, and in his absence Busse, when managing Morum Bros.' business, sent to the defendant's kraal and got the oxen from the defendant's brother without defendant's knowledge or consent, and he kept these oxen as security for the debt to Morum Bros. There was a subsequent transaction about a horse, and Busse afterwards got two more oxen as security for the horse from the defendant's brother. The horse was returned, and the oxen ought to have been restored, but they never were. The ten oxen were handed over by Busse to his principals as their property, and were branded "M.B.," the plaintiff's mark. They were used for the work of Morum Bros., and were hired out by them and included in their stock. It is doubtful if there was any valid pledge of the oxen, and the defendant is entitled to have them returned. The Magistrate in his judgment has made a moderate estimate of their value—£9 each—and these oxen admittedly belonged to the defendant.

As to the Magistrate's finding of £5 for the defendant on the claim of damages, I consider it was thoroughly justified by the fact that Morum Bros. kept these oxen, which they had no right to, worked them and hired them out, and used them just as if they belonged to themselves. I think the damages were very moderate.

The Magistrate, whilst giving judgment for the plaintiff in convention for £68 12s. 2d., has given judgment for the plaintiff in reconvention for £113 18s., but has made no order as to costs, and this is one of the points of appeal. This question of costs is in the Magistrate's discretion, but he must exercise it in a judicial manner. The disputes between the two parties were upon a claim in convention and a claim in reconvention. Each set up claims against the other, and both succeeded very materially on parts of their claims and failed upon other portions of their claims. As the Magistrate was not satisfied with the manner in which the parties gave their evidence, he decided that, instead of giving the plaintiff in convention costs in convention, and the plaintiff in reconvention costs in reconvention, he would make no order as to costs. This is not an unusual judgment, and this Court is not prepared to interfere with that judgment.

With regard to the allowance of the item of £15 15s. 9d., we think that the Magistrate has erred, and the appeal must be allowed in so far as that item is concerned, as this Court is of opinion that the amount was clearly due to the

defendant to be credited against the balance of his account. The amount of £15 15s. 9d. will be added to the amount for which judgment was given upon the claim in reconvention, and the appeal in that particular will be allowed with costs; in other respects the judgment of the Magistrate will stand.

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

IZAAKS V. NIEUWSTADT ) 1907.  
AND CO. ( Aug. 12th.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Paarl, in which the present appellant was defendant, and the respondents were plaintiffs. The plaintiffs claimed the sum of £1 14s. 6d. from the defendant. The judgment of the Court was for the plaintiffs. The summons called upon the defendant to appear before the Court of the Resident Magistrate of the district to show cause why he had not paid to the plaintiffs, Retief and Nieuwstadt, trading as Nieuwstadt and Co., £1 14s. 6d., which they said he owed on a balance of account for goods sold and delivered to the defendant during the period June, 1903, to December, 1905. The defendant excepted to the summons on the ground that any dealing he had was with the firm W. A. Krige and Co., and not with the plaintiff firm. In June, 1903, and for a considerable time afterwards, there was no firm of Nieuwstadt and Co. in existence. The firm of W. A. Krige and Co. was taken over by the partners Retief and Nieuwstadt, and due notice was given of such transfer, and Nieuwstadt and Co. took over all the liabilities and assets of the firm. The bills were headed "Nieuwstadt and Co., late Krige and Co." Subsequently an amendment of the summons was applied for, and allowed, by adding the words, "taking over the business carried on by W. A. Krige and Co." A special agreement was pleaded as having been entered into between W. A. Krige, one of the partners of the firm, and the defendant, at the time when the goods were bought, that the amount had to be liquidated by the defendants making boots for W. A. Krige. The only evidence in the case was that of W. A. Krige, who was a partner in the firm of W. A. Krige and Co. The plaintiffs took over the business from his firm, and when it was handed over, there was an amount of £1 14s. 6d. due to the firm. When he gave the defendant credit, he agreed he should make boots for him, and so square off the amount.

These boots were not made for the partnership account, but for his own account. The plaintiffs took over the account of £1 14s. 6d., and gave witness consideration for it. The Magistrate, in his reasons for judgment, said it was contended for the defendant that he was not liable to Nieuwstadt and Co., but that he had a special arrangement by which the debt was to be liquidated by his making boots for W. A. Krige. In this case plaintiffs sued the defendant for £1 14s. 6d., balance and account for goods sold and delivered. In 1906 the partnership was dissolved, the two plaintiffs taking over the business, and the name was changed to F. W. Nieuwstadt and Co. Plaintiffs gave due notice of this, and also stated they were taking over the debts of the firm. During the time that the firm was carried on under the style of W. A. Krige and Co., the defendant purchased certain articles from the firm, and an agreement was entered into between him and W. A. Krige by which the defendant was to liquidate his debt by making boots for Krige for his own personal use. This was done. In 1906 Krige paid to the firm on behalf of the defendant £4 7s. in reduction of his account, leaving a balance of £1 14s. 6d., and this item was one of the amounts handed over to the plaintiff firm for which he received consideration. There was nothing to show that the plaintiffs, while partners in the firm, knew anything of this private arrangement between Krige and the defendant, and it was quite clear that the plaintiffs took over the amount owing by the defendant in all good faith. He found that the arrangement between Krige and the defendant was purely a private one, and the plaintiffs were not bound by this arrangement.

Mr. Upington was for the appellant (defendant), and there was no appearance for the respondents.

Mr. Upington said the defence in the case was really one of payment, and it was perfectly clear from Krige's own evidence that at the time the indebtedness was incurred there was an arrangement between the defendant and himself, as a partner of the firm, that this debt should be liquidated in a particular way. He submitted that Mr. Krige, as a partner of the firm of Krige and Co., had full authority to enter into such an arrangement with the debtor of the partnership. If that arrangement was entered into, and the debt had in fact been liquidated—there was no dispute on that point—in the manner in which it was arranged it should be liquidated, then the plaintiffs, who were at the time partners in the firm of Krige and Co., could not now, having changed the style of their firm to that of Nieuwstadt and Co., claim from defendant that he should

pay over again to them this amount of £1 14s. 6d. It would be a most inequitable thing that a partner of a firm should be enabled to persuade a man to purchase goods on the understanding that he should be allowed to liquidate the indebtedness in a particular way, and afterwards the partnership should repudiate any liability. He must be allowed to pay in boots. They never demanded any particular boots of him.

Maasdorp, J.: The evidence upon which the Magistrate came to a decision in this case was very simple in its character, and it appears from that evidence that Mr. Krige, one of the partners of the firm of Krige and Co., sold certain goods to the defendant, and at the time the goods were sold he agreed that he would accept from the defendant boots to be made by the defendant, and that the price of the boots should go off against the price of the goods which had been bought by the defendant. It has been argued that a contract of this nature was quite within the power of a member of the partnership. Now, I have grave doubts upon that part of the case. I do not think that it is within the power of any single partner to agree that he should accept a personal benefit in consideration for a debt due to the firm. It is quite possible, as has been argued by Mr. Upington, that any single member of the firm having power to accept payment of moneys might agree with a debtor that that money should be paid to someone else, and that credit should be given to him. It is quite within the power of a partner to make an arrangement of that kind, which is within the ordinary course of business, a debtor being prepared to pay his account, and paying the money to a certain person at the request of one of the partners. But that this actually settles with the firm the transaction, does not seem to me to be within the ordinary course of business. No partner has authority to arrange that certain articles should be handed over to him privately and personally, and that that should be regarded as settlement of the debt due to the partnership. The debtor must settle with the partnership or with its duly authorised agent. But I think this case ought rather to go off on another point. Taking it that Krige had the power to agree that for the moneys due by the defendant he should accept boots in payment from time to time, then, I think, this result still remains, that if at any time the debt has been reduced by the delivery of some boots and a balance remains due, the partnership is not bound to indefinitely give credit to the bootmaker, but may demand the payment of the balance which still remains due, after the debt has been reduced by the delivery of some of the articles. Now, it seems that after a certain time, some boots were delivered







vested on the death of the first dying, plaintiff's contention must be upheld as regards account "I."

Held further, that as G. S. never had more than a bare spes successionis to the farm T. F., all his fiduciary rights therein had, on his death rested in his children, and that defendants' contention as to account "J" must be upheld.

Held further, that as the separate will of the survivor disposed only of property which had come to her out of the joint estate, and as she had adiated under the joint will, the provisions of that will must govern the distribution of her estate, and that the account "K" must be amended in accordance with plaintiff's contention. Costs to come out of the estate. *Strydom v. Strydom* (11, S.C.R., 425) followed.

This was an argument on a case stated.

The special case was set out as follows:

1. The plaintiff is Cecilia Johanna Scholtz, in her capacity as executrix testamentary of the estate of her late husband Gert Daniel Jacobus Scholtz, who was a son of the late Gert Daniel Jacobus Scholtz and his subsequently deceased spouse Gezina Susanna Scholtz (born De Beer), hereinafter called the testators.

2. The defendants are Hendrik Lodewyk Aucamp and Joachim Jacobus Scholtz, (1) in their capacity as executors testamentary of the joint estate of the testators, and (2) in their capacity as executors testamentary in the estate of the late Gezina Susanna Scholtz (born De Beer), the testatrix.

3. The testators, who were married in community of property, executed their joint last will on June 1, 1895, and thereafter they executed certain codicils to the said will on November 30, 1897, January 14, 1898, September 2, 1898, and November 12, 1898, respectively.

4. The testator died on June 1, 1902; thereafter the testatrix adiated under the said will and codicils and accepted the benefits thereby conferred, and died on the 22nd December, 1904; but prior to the last-named date, to wit, on February 19, 1904, she executed a will, and thereafter, in April, 1904, she executed

a codicil thereto. She died without having revoked or altered the same.

5. The plaintiff's husband, Gert Daniel Jacobus Scholtz, who was married in community of property to the plaintiff, died on August 14, 1904, leaving his widow and children him surviving, and leaving a joint will executed with the plaintiff, and whereunder she was appointed executrix.

6. At the date of the death of the testator, there were nine children (including plaintiff's husband) born of the marriage of himself and testatrix, him surviving; and three children of the said marriage had predeceased him.

7. Under the aforesaid will the testators, after bequeathing to their son, P. E. Scholtz, as a prælegacy their farm Kareeboschfontein, declared to appoint the survivor and all their children *per stirpes* (staakgewyze) as their sole and universal heirs of all property movable and immovable, without exception (save the said bequeathed farm), the survivor to have and to enjoy as his or her exclusive property the one-half of their joint estate, the other half to devolve upon and belong to their said children in equal shares.

8. They further directed that at the death of the first-dying the whole joint estate, except the farm Mauritzfontein, should be sold, and the proceeds divided in manner stated above (in the last preceding paragraph), namely the children one-half and the survivor one-half, and with regard to the said farm, directed that the survivor should enjoy during his or her life the full, free, and undisturbed right and usufruct therein, and that after the survivor's death the said farm also should be sold and the proceeds distributed among their said children in equal shares *per stirpes*; and they reserved to themselves the right to alter the said will by separate instrument or otherwise.

9. Thereafter, by codicil "B," the testators directed that by the word "children" which appears in the institution of heirs in the said will must be understood also the children of such of their children who are already deceased or may still die, these stepping into their parents' place by representation.

10. By the said codicil they further directed that after the death of the survivor the share accruing to him or her under the will shall devolve upon and belong to the heirs appointed in their said will *per stirpes* and in equal shares, on the express understanding, however, that the survivor shall have and enjoy his or her full and undisturbed life interest and usufruct not only in and over the said share, but also in and over the hereinafter bequeathed landed properties (in the next succeeding paragraph hereof referred to).

11. By the said codicil they further declare to bequeath as a prælegacy their farms Klipfontein and Twee Rivieren to all their heirs *per stirpes* and in equal shares on certain conditions.

12. Thereafter, by codicil "C," they repeated the provisions set forth in paragraphs 9 and 10 hereof in similar terms and made other conditions, instead of those contained in "B." with regard to the bequest of the said farms Klipfontein and Twee Rivieren.

13. Thereafter, by codicil "D," they revoked section (b) of clause 3 in the last-mentioned codicil, and in lieu thereof provided as follows: "The said heirs shall not have the right to sell to strangers the herein bequeathed farms or any portion thereof, the children, grandchildren, and descendants of each *stirps* to be alone entitled to sell between and among themselves, but not the one *stirps* to the other, so that the 12 *stirpes* shall continue to possess in 12 equal shares *per stirpes*, it being the wish of the testators that the same shall remain under their descendants until after the fourth generation, and with that object the same shall from time to time devolve upon and belong to the descendants or successors of their said heirs equally and *per stirpes*, and on failure at any time of descendants of any *stirps* or *stirpes*, then the share or shares of such *stirps* or *stirpes* shall devolve equally on the remaining *stirpes*;" and anything contrary to the provisions of this codicil in the will or previous codicils was revoked and annulled.

14. Thereafter, by codicil "E," they altered the provisions of "D" in such manner that their son-in-law, A. J. Combrink should have the right to sell and cede to their grandsons, G. D. J. Scholtz, J. H. Scholtz, and J. J. Scholtz, children of their son, J. J. Scholtz, the rights and bequests devolving upon him by virtue of the said codicil, the said last-named three children to come in place of their said son-in-law as far as concerns the said rights and bequests, subject to all the directions contained in the said will or codicils.

15. After the testator's death the defendants entered upon the administration of his estate, and in December, 1903, filed their first liquidation and distribution account, according to which there was a balance for distribution of £3,241 15s. 8d.; the moneys thus distributed consisting of cash found in the estate, the proceeds of the sale of movables and of certain outstanding accounts collected. The testatrix was paid one half-share of this sum, and the other heirs (including plaintiff's husband, the said late Gert Daniel Jacobus Scholz, who received one-twelfth of one-half) the other half.

16. On March 6, 1905, after the testatrix's death, the defendants filed their second liquidation and distribution account, showing a balance of £3,519 14s.

3d., and awarded one-half thereof to the testatrix's estate, and one-twelfth of one-half thereof, namely £145 3s. 9d., to the estate of plaintiff's husband; the moneys distributed under this account consisted of amounts received from Government as compensation for war losses, the proceeds of a promissory note, and the sworn appraisement of the farm Twee Rivieren.

17. On September 15, 1906, the defendants filed their third and final count in the testators' joint estate, according to which the balance for distribution was £11,498 14s. 1d. This amount consisted chiefly of the proceeds of the sale of the farm Mauritzfontein. According to this account, they distributed to the estate of the plaintiff's husband £479 2s. 3d., and a like sum to his children jointly. The plaintiff objects to the said distribution, and claims that the sum distributed to the children should also have been awarded to her husband's estate, the whole amount of £958 4s. 6d. to be administered and distributed in terms of the joint will of herself and her husband.

18. The defendants, as executors testamentary of the testatrix's estate under her will "F," have filed two liquidation and distribution accounts, whereunder they have awarded property in the testatrix's possession at her death—being property accruing to her by virtue of the aforesaid joint will and codicils of the testators out of the corpus of the joint estate of the testators, and not being moneys acquired by or accruing to the testatrix from and out of the usufruct of the joint estate—in accordance with the provisions of the testatrix's will "F," and not according to the provisions of the will and codicils of the testators. The plaintiff disputes the correctness of the said accounts, inasmuch as they do not award to her husband's estate one-twelfth share or any share of the amounts which the testatrix was entitled to out of the corpus of the testators' joint estate, and submits that the testatrix could not by separate will deal with any property forming part of the joint estate.

The plaintiff contends: (a) That the defendants should be ordered to amend account "I," filed on September 15, 1906, by awarding to her the sum of £958 4s. 6d., instead of the sum of £479 2s. 3d. (b) That the defendants should be ordered to amend account "J," filed on March 11, 1905, by awarding to plaintiff the one-twelfth share of £1,540, or £128 6s. 8d., which has been awarded in the said account to her children, under the separate will of the testatrix. (c) That defendants should be ordered to amend account "K," filed on July 27, 1905, by awarding to plaintiff the one-twelfth share of £1,203 12s., or £100 6s., which has been awarded in the said account to her children under the said separate will. (d) That the

costs should come out of the estates whereof defendants are executors.

The defendants contend: (a) That by the terms of the said joint will and codicils thereto the survivor, the said late Gezina Susanna Scholtz (born De Beer), was instituted fiduciary heir as to one-half of the said joint estate (except the said bequeathed farm), and as to the farms Mauritzfontein, Klipfontein, and Twee Rivieren, forming part of the said estate, she was further instituted usufructuary in respect of the remaining half thereof. (b) That the plaintiff's husband, the said late Gert Daniel Jacobus Scholtz, having predeceased the said survivor, the right in and to one-twelfth of one-half of the proceeds of the said farm Mauritzfontein vested in him, and one-twelfth of the remaining one-half vested in his children upon the death of the said survivor. (c) That by reason of the said predecease, the right to the one-twelfth share claimed by the plaintiff in her contention (c) vested in the children to whom it has been awarded, and not in the plaintiff's husband. (d) That the accounts "I," "J," and "K" are correctly framed according to law, and should not be amended.

Mr. McGregor, K.C. (with him Mr. De Waal), for plaintiffs; Mr. Upington (with him Mr. P. S. T. Jones) for defendants.

Mr. McGregor said that on the authority of *Strydom's* case (11 Juta, p. 423), if the life interest given to the survivor was a usufruct, the presumption was that the vesting took place at the death of the first dying. If the life interest was a *fidei-commissum* only, then the life interest was deferred. There really was no separate estate; the whole of the estate was dealt with by the will and codicils. Even if their lordships should hold that there was a *fidei-commissum* in respect of one-half, then he said, on the authority of *Strydom's* case, the presumption here was overruled, and the facts here pointed to the intention that there should be a vesting. They changed the provision in the will, and just as he submitted there was a vesting at the death of the testator in respect of Mauritzfontein, so there was a vesting in respect of the whole of the balance. Counsel also cited the cases of *Kahl v. De Jager* (1 Juta, p. 38), and *Nortje v. Nortje* (6 Juta, p. 9).

Mr. Upington said his learned friend had lost sight of what really was the main feature that must be regarded in this will, and that was that the survivor was appointed heir with the children. This case was utterly and entirely different from the two cases cited by his learned friend. There was no revocation of the institution of the heirs under the will. His learned friend's contention in regard to the balance of

the estate was wholly untenable. Counsel cited the case of *Kahl and De Jager* (1 Juta, p. 38), *Nortje v. Nortje* (6 Juta, p. 9), *Lucas v. Hool* (Buch. 1879, p. 132), and *Hiddingh v. De Roubaix* (Buch. 1878, p. 86). As regards the farm Mauritzfontein, in one half of it there was Mrs. Scholtz's life interest, coupled with the ownership. She was the owner of one half. In the other half there was the bare life interest alone. With regard to the first half, counsel submitted the rights of the children would only vest upon her death, and the right of the second portion of the farm would vest immediately upon the testator's death. As to the general principle which he submitted should govern the case, the case of *Re Zipp* (Buch. 1878, p. 132) put what he was contending for very clearly.

Mr. McGregor, in reply, said the law of the case was contained in two cases. The one was *In re Zipp* and the other *Strydom's* case. These two cases had to be read together. It was pointed out in the latter that what was laid down as a presumption in *Re Zipp* was not more than a presumption, and in any case the Court was entitled to draw its own conclusion as to the intention of the testators. In *Re Zipp* it was admitted that the life interest was only the usufruct, and on that admission by counsel the question was discussed, and it was found that the rights under the will vested at the death of the first dying. In *Strydom's* case, the Court found that there was vesting at the death of the first dying. Counsel also cited the case of *Williams v. Williams* (12 S.C.R., 392).

*Cur. Adr. Vult.*

*Postea* (August 24).

Buchanan, J.: The late S. D. J. Scholtz and his wife, who had been married in community of property by mutual will, bequeathed their farm Kareeboschfontein to their son, P. E. Scholtz, for a price to be paid after the death of the survivor into the joint estate. They then instituted the survivor and all their children *per stirpes* as heirs of the whole of their remaining estate. The will directed that the whole of the joint estate except their farm Mauritzfontein should be sold at the death of the first dying, and the proceeds divided one-half to the survivor and one half to the children. The survivor was to have for life the full and free right and usufruct in and of the farm, Mauritzfontein, and after the death of the survivor the farm was to be sold and the proceeds distributed among their children *per stirpes*. Several codicils were afterwards made under the reservatory clause of the will. To make clear their intention, the testators in the codicil marked B declared that by the word "children" in the will must be understood "the

children of such of their children who are already deceased or may still die, these stepping into the place of their parents by representation." They then mutually declared their wish and desire to be that after the death of the survivor the share accruing to him or her should devolve upon their heirs *per stirpes*, the survivor, however, to have the full and undisturbed life interest and usufruct, not only over the said share, but also in and over the landed properties thereafter bequeathed. In this codicil they then bequeathed and prelegated their farms Klipfontein and Twee Rivieren to all their aforesaid heirs *per stirpes*, subject to certain conditions of entail extending to the fourth generation. The testator predeceased his wife, who made another will, dealing specially with property not now in question, and nominating generally her children and their descendants by representation her sole and universal heirs. The testator had twelve children, three of whom predeceased both their parents, leaving issue. Their son Gert survived his father, but predeceased his mother, and also left issue. The plaintiff was the widow of the son Gert, and sued in the capacity of executrix testamentary of his estate. The defendants were the executors, both of the joint estate and of the estate of the executrix. The defendants had filed several liquidation and distribution accounts, to three of which plaintiff took objection. In the account marked "I," filed in the joint estate, the executors brought up the proceeds of the sale of the farm Mauritzfontein, of which they awarded one-twelfth, or £958 4s. 7d., to each of the groups of twelve children or their descendants. The share coming to the son Gert they divided, giving one-half thereof, £479 2s. 3d., to Gert's estate, and the other half equally to the children of Gert. The plaintiff claimed that Gert's estate was entitled to the whole of the £958 4s. 7d., and contended that the account should be amended accordingly. The defendants supported their award on the ground that only one-half of the inheritance went to Gert under the joint will, and the other half passed to his children under the will of the survivor, Gert, having predeceased her. Though by the mutual will the survivor was to have one-half of the joint estate, yet the proceeds to be realised by the sale of the farm Mauritzfontein were therein specifically bequeathed to the children. The survivor by her sole will did not in terms interfere with the joint bequest. She adiated under the mutual will, and she enjoyed the life interest in the farm. This case resembles closely that of *Strydom v. Strydom* (11 S.C. Rep., 425), where it was held that under similar bequests on the death of the first dying, the rights of the children became vested,

and that the survivor, as far as the farm was concerned, was only a usufructuary, and not a fiduciary heir to the property. As the son Gert survived his father, his share in the proceeds of the farm became vested in him, and this vested interest was transmissible to his heirs. His death before the death of the survivor did not divest him of his interest. This interest was to the whole of his share, and I fail to see good reason for the action of the executors in awarding his estate only half of the share bequeathed to him. On this part of the special case, therefore, the contention of the plaintiff must be upheld, and the defendants be ordered to amend the account marked "I" accordingly. The next account to which the plaintiff objects is marked "J," and deals with the distribution of the shares in the farm Twee Rivieren. The defendants have awarded one-twelfth share to the children of Gert. The plaintiff contends that the award should have been made to the estate of Gert. This farm was one of the two properties placed under entail. All that was given to the son Gert was a right to the property for his lifetime, after the expiration of the life interest of the survivor therein. At the date of Gert's death he had not yet come into possession of his share in the property, and on his death his children stepped into his place. Gert, during his lifetime, had only a *spes successionis*, but whether he had come into possession or not, his death would terminate any rights he had in the property. The defendants, therefore, have properly awarded the share in the property to the children of Gert, and this distribution account will not be interfered with. There only remains the objection taken to the account marked "K." This is a liquidation account in the estate of testatrix. The amount coming to each of the twelve sets of heirs is only £100, and the executors have awarded this sum among the children of Gert. The plaintiff contends that this sum should have been awarded to the estate of Gert. The special case admits that the property distributed in this account accrued to the testatrix by virtue of the joint will and codicils, out of the *corpus* of the joint estate, and was not money acquired by the testatrix from and out of the usufruct of the joint estate. Under these circumstances I am of opinion that the provisions of the joint will and codicils must regulate the distribution of these assets. By these testamentary institutions the property is directly vested in the children *in esse* at the death of the first dying, the life interest therein only being reserved to the survivor. The decision in *Strydom v. Strydom* appears to me to govern plaintiff's contention as to this account, as well as to the first, and this account marked "K" will have to be amended



accordingly. As to costs, the plaintiff prays that they should come out of the estates, whereof defendants are executors, and this will be ordered. Judgment accordingly for the plaintiff in terms of her contentions (a) and (c) of the special case, with costs out of the estates.

Hopley, J., concurred.

[Plaintiff's Attorneys: Michau and De Villiers; Defendants' Attorneys: Syfret, Godlonton and Low.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

DHARSEY V. COLONIAL GOVERNMENT. 1907.  
1 Aug. 13th.

Indian—Permit for temporary absence from the Colony—  
Acts 47 of 1902, Sec. 3, and  
30 of 1906, Sec. 4.

*Save in the case of Asiatics domiciled in S. Africa previous to the promulgation of Act 30 of 1906, it is in the discretion of the Immigration Officer to fix the period during which permits for temporary absence granted under Sec. 4 of that Act shall be available.*

This was an application upon notice calling upon the Acting Chief Immigration Officer to show cause why he should not be directed to issue, in terms of section 4 (sub-section g) of Act 30, 1906, a permit authorising applicant to absent himself from the Colony for a period of 18 months or upwards, and at the expiration thereof to return and land in the Colony.

Applicant is an Indian and a British subject, and has resided in the Colony since 1890. He is the registered owner of a certain stand in the township of Vryburg, and has held a general dealer's licence there since the records were commenced in 1897. He had applied for a permit authorising him to go to India, and be absent from the Colony for a period of 18 months, and on his return to be re-admitted to the Colony without being subjected to the tests imposed under the Immigration Act of 1906. Correspondence had taken place between his attorneys and the Immigration Department, from which it appeared that the Acting Chief Immigration Officer took up the position that there was no obligation upon him to issue a permit to the applicant,

under section 4 (sub-section g) of Act 30, 1906, and that the issue of such a permit was optional and in his discretion. It was the usual practice to issue permits to Asiatics for a period of twelve months, under regulations 18 and 23, except in certain cases. The period of twelve months was fixed by the Minister. A longer period than twelve months was allowed to Asiatics going to Mecca or visiting some other country than India, as well as India. Applicant had not, the officer said, given any sufficient reason why a permit should be granted to him for any longer period.

Mr. M. Bisset was for applicant; Mr. Howel Jones, K.C., was for respondent.

Mr. Bisset said that this matter was brought before the Court by way of a test case in regard to the issue of permits to Asiatics for temporary absence from the Colony. The Chief Immigration Officer took up the position that he was not bound to issue a permit at all unless he thought fit. He also took up the position that if he did issue a permit it should only be for a period of 12 months, unless the applicant could show that he was going to Mecca or going to some other country than India as well as India, so that it would be necessary for him to take an additional period to enable him to visit both those countries. The Immigration Officer claimed that the period, like the granting of the permit, was within his discretion.

Counsel referred to section 3 (sub-section f) of Act 47, 1902, and section 1 of Act 30, 1906, and said that the question arose whether under Act 47, 1902, applicant had by reason of domicile acquired rights, privileges, or powers which he still retained in terms of the saving clause of Act 30, 1906. Counsel referred to section 4 of the Act of 1906. The direct question that applicant wished to have decided was whether Dharsey, being an Indian lawfully resident in the Cape Colony, the Immigration Officer was bound to issue to him a permit, and, if so, whether it was in his power to restrict the operation of the permit to a period of 12 months irrespective of circumstances. Counsel quoted section 4 (sub-section g) of the Act of 1906, and referred to regulations 18 and 23, framed under the Act. The former regulations seemed, he said, to refer specially to Asiatics, but he did not think the latter regulation was intended to apply to Asiatics. The Court, in deciding this case, must look solely to regulation 18 in conjunction with section 4 (sub-section g). He contended that under the section the Minister had no discretion in the matter of granting permits. Counsel contended that if the temporary absence were within the spirit of the Act, and even if the period were 18 months, then the Minister had no discretion to refuse a



permit. He quoted Maxwell on Interpretation of Statutes (pp. 344—et seq.).

Mr. Howel Jones said he did not think it necessary to go at length into the first part of his learned friend's argument. If the applicant were really exempt from the Act, owing to his having been domiciled here before the Act of 1902 was passed, then the ground of this application fell away entirely. Counsel went on to contend that there was no obligation under the Act which made it compulsory upon the Minister to issue a permit to anyone who desired to absent himself from the Colony. He submitted that the Minister was justified in fixing a period of 12 months under permits for temporary absence, unless certain special circumstances were shown to exist in favour of an extension.

Mr. Bisset having been heard in reply,

Maasdorp, J.: Under the provisions of this Act, it was intended to give the Government power to prevent persons from entering the Colony, whose presence here might not be considered desirable, and a definition is given in section 3 of Act 30, 1906, of such persons whom the Government should be authorised to exclude. These persons are denominated "prohibited immigrants," and the Act makes provision as to who should be regarded as prohibited immigrants. Under the 4th section of the Act provision is made for exempting certain persons from the disabilities contained in section 3. It would appear that under the Act 47 of 1902 (section 3), the classes of persons who were exempted were different from those now mentioned in the 4th section of the present Act. Incidentally, in this case, a question has been raised upon one of the clauses of the former Act, which also exempted such persons from disability as had been domiciled in the Colony. I do not think that any opinion need now be expressed with reference to the position of persons who had acquired a domicile and who were exempt under the previous Act, because if the applicant himself had acquired such privileges as he could insist upon as exempting him from the provisions of the present Act, then his present application is wholly unnecessary. If the applicant is actually entitled to privileges upon the ground of domicile, then such privileges can be insisted upon at such time as he claims the right of re-entering the Colony, and even if, by virtue of such domicile, he is entitled to certain privileges, the Court cannot now decide what his position may be with respect of domicile at some future period when he may again request to be allowed to enter the country. The decision of the Court must be confined to the terms of the application that has been submitted, and the decision of the Court must, also be confined speci-

ally to the facts of this particular case. It has been suggested that the opinion of the Court is required to some extent as a guide for future cases that might arise, but the Court will not express any opinion as to circumstances which might arise in future cases and which do not arise now. For instance, it is suggested that there is a dispute between the Government authorities and the applicant as to whether the Minister, or the officer appointed by him, has absolute discretion to refuse a permit without giving any reason for it. Now, that question has not been raised by the respondent in the present case. There has been some casual mention of the power which the Immigration Officer might possibly possess of absolutely refusing any permit to the applicant to leave the country, but that position has not been insisted upon by the respondent. The respondent is perfectly willing to grant a permit, but he wishes it to be subject to certain conditions. Now, the question is whether he is entitled to insert the conditions which he proposes in the permit, and to grant the permit under such conditions as he contends are provided for by the rules. Amongst the persons exempted from the disabilities created under section 3 of this Act, we find the following: "Any Asiatic who having, when lawfully resident within the Colony, obtained from the Minister a permit issued under such regulations as may be proclaimed by the Governor and authorising him temporarily to absent himself from the Colony, returns in accordance with the terms of the conditions of such permit." Now, it is contemplated by this clause that it shall be within the power of the Governor to make regulations providing for the conditions under which permits are to be granted to Asiatics who wish to absent themselves temporarily from this country. Such regulations have been made, and the Court will now have to decide whether the regulations so made are *ultra vires* or unreasonable. The regulation in question between the parties is to the following effect: "Permits to Asiatics lawfully resident in the Colony shall be issued in such form as may from time to time be prescribed by the Minister, which form shall state the period for which the permit is available, the port at which the grantee shall disembark on return to the Colony, and there shall be paid for every such permit a fee of £1 sterling. Every permit shall contain a photograph of the grantee and such particulars and marks as may be necessary for the purpose of identification." Now, it is only necessary to say, with reference to the conditions here provided for, that the question between the parties arises as to the reasonableness of the condition respecting the period for which the permit should be granted. In other respects, it seems

to me that it cannot be said that there is anything unreasonable in this rule, and, as far as the period of absence is concerned, it is a circumstance which is expressly contemplated by the section under which the rule is made. Provision is to be made for authority to the applicant temporarily to absent himself from this colony. It seems that the importance of the time for which the applicant should absent himself from this colony was in contemplation by the Legislature, and for some reason or other their attention was directed specially to the fact that the absence should be temporary. It is provided in the regulation that such period shall be stated in the permit, and I think that, not only is that a reasonable provision, but it is an absolutely necessary provision. If the absence is to be temporary and limited, that limit should be fixed in each case. The applicant in this case says he himself should be the judge as to the period for which he should be allowed to be absent, because he is the best judge as to how much time he may require for the business on which he may be engaged. But that is not what was contemplated by the Legislature. It was contemplated that the Minister should have a check upon the re-entry of persons into this colony, and that it was for him to fix the conditions that he might think fit within reason upon which the re-entry should be allowed. The applicant now claims that he should be granted a permit authorising him to be absent for 18 months. The Immigration Officer answers that he has power under the instructions of the Minister to fix the period, and that he regards twelve months as a reasonable period for the visit by the applicant to India, and that if the applicant can submit to him grounds which could reasonably induce him to extend that period, then he might still be willing to do so. The applicant has refused to lay his request before the Minister in such a form as would afford the Minister the necessary information for granting a further extension of time, and he wishes the Court to declare that he is unconditionally now entitled to receive a permit to absent himself for 18 months, and I am of opinion that that application must be refused. The application will be refused, with costs.

[Applicant's Attorney: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Reid and Nephew.]

#### PROVISIONAL ROLL.

BLAKE V. LEVE. { 1907.  
( Aug. 13th.

Mr. D. M. Buchanan moved for provisional sentence on a mortgage bond

for £8,500, with interest from the 1st July, 1906, bond due by reason of non-payment of interest; counsel also applied for £41 5s., premiums of insurance, and for the property hypothecated to be declared executable.

Order granted.

#### WIENER AND CO., LTD. AND OTHERS V. SCHAPERA.

Dr. Greer moved for a provisional order of sequestration to be superseded. Provisional order superseded.

#### ESTATE SMITH V. HARTSHORN.

Mr. D. M. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Order granted.

#### DONNELLAN V. KOHNE.

Mr. D. M. Buchanan moved for provisional sentence on a mortgage bond for £250, with interest from the 1st January, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ISAAC V. BARRABLE.

Mr. W. J. Van Zyl moved for provisional sentence on a mortgage bond for £400, with interest from the 1st January, 1907, and for the property specially hypothecated to be declared executable.

Order granted.

#### ESTATE THRUNIS V. PERUS.

Mr. Pohl moved for provisional sentence on a mortgage bond for £210, with interest from the 1st March, 1905, and for £4. taxed costs, and premiums of insurance; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ILLIQUID ROLL.

#### VAN DER BYL AND CO. V. VENNER.

Mr. Roux moved for judgment, under Rule 329d, for £101 8s. 2d., for goods sold and delivered, with interest a *tempore morae* and costs.

Order granted.

## DIVORCE SUITS.

### EDWARDS V. EDWARDS.

This was an action brought by Margaret Magdalene Edwards, of Cape Town, against her husband, Ernest Henry Edwards, of Cape Town, for divorce, on the ground of the defendant's adultery with some person or persons unknown to plaintiff.

Mr. J. E. R. de Villiers was for plaintiff; defendant had been barred.

W. T. Birch, clerk in charge of the Marriage Register, Colonial Secretary's Office, gave evidence to registration of the marriage.

Plaintiff said that she was married to defendant in community of property Cape Town on the 18th January, 1904. Defendant was a waiter. About April last, she found defendant was using certain medicines, and she asked him what he was using the medicines for. He admitted that he had not "played the game with her," and said that he had committed adultery. Witness had since been residing with friends. There was no joint estate.

Dr. Julius Petersen spoke to having treated the defendant in the early part of this year.

C. Leffler, clerk, in the employ of plaintiff's attorney, gave evidence as to an admission of adultery made by defendant.

Decree granted, with costs.

### ROWE V. ROWE.

Mr. Struben moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights. Defendant was sued by edictal citation, and counsel put in an affidavit as to substituted service by registered letter and publication in the "Melbourne Argus" as ordered.

Decree of divorce granted.

## GENERAL MOTIONS.

*Ex parte* MARAIS. { 1907.  
Aug. 13th.

Mr. Roux moved for a certain rule nisi, under the Derelict Lands Act, to be made absolute.

Rule absolute.

### *Ex parte* SLABBERT.

Mr. Howes moved for leave to petitioner to mortgage his share of property in the estate of his parents in the sum of £100 to enable him to enclose his defined share, and eradicate the prickly pear from the land. The landed pro-

perty bequeathed by the parents of petitioner and the co-heirs had been apportioned, and partition transfers had been duly effected in the name of each son. Under the will the legatees were restricted from mortgaging the property during their lifetime. All the heirs agreed to the bond being passed as proposed. Counsel explained that there had been previous applications in this estate.

Order granted as prayed.

### *Ex parte* DUCKITT.

Mr. D. M. Buchanan moved for leave to have transfer passed of certain property free of duty. From the petition it appeared that petitioner and her late sister acquired certain six lots of ground at Wynberg, and had 12 cottages erected thereon. Petitioner's sister was a better business woman than deponent, and she managed their affairs. Subsequently to her sister's death, petitioner discovered that the whole of the property was registered in the name of her sister alone. As indicating that she had a half share of the property as acquired, petitioner stated that in her last will her sister gave her a life interest in her six cottages. Petitioner asked for leave to have the error in the transfer amended by transferring one-half of the property to herself free of duty. Application had been made to the Treasury, but the Government officials referred the applicant to the Court.

Maasdorp, J.: I think the application is rather premature. You have not even established your right to have transfer. There is no one before the Court to represent the late sister's rights. You must be prepared to take transfer before you can have any order as to whether the duty should be paid or not.

Mr. Buchanan asked that the matter might stand over.

Maasdorp, J.: There will be no order at present. The matter may stand over.

### *Ex parte* VENTER.

Mr. Swift moved, on the petition of the executor dative, for leave to pass transfer to the Colonial Government of certain two portions of ground in the division of Willowmore, expropriated for railway purposes. There were three minors interested in the estate, and petitioners asked leave to sign all necessary documents on their behalf.

Order granted as prayed.

### *Ex parte* HAHN.

Mr. M. Bisset moved for the amendment of petitioner's name in the Deeds

Registry, in which he is described as "Charles Hahn," by which name he is generally known.

Order granted, subject to mortgagees' consent being obtained.

*Ex parte* ESTATE KANNEMEYER.

Mr. Roux moved, on the petition of the executor testamentary, for an order authorising him, on behalf of certain two minors, to pass a fresh mortgage bond on certain property at Salt River, so as to enable the shares of the legatees to be divided.

Order granted as prayed.

*Ex parte* KLOPPER AND ANOTHER.

Mr. Payne moved, on behalf of petitioners, who are minors, and are assisted by their tutor dative, for an order authorising registration of transfers of the farm Bonecavehill, division of Barkly East, in lieu of their undivided shares, with certain other parties in the farms Bonecavehill and Lamont.

Order granted as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

MALLOCH V. SOMERSET { 1907.  
EAST MUNICIPALITY. { Aug. 14th.  
" 15th.

Engineer (hydraulic)—Incomplete plans—Remuneration.

This was an action brought by Wm. Farquhar Malloch, hydraulic engineer, Uitenhage, against the Somerset East Municipality, to recover a sum of £225 1s. 9d. for professional services.

A number of amendments were made in the pleadings by consent between the parties.

Plaintiff, in his declaration, said that on or about the 23rd October, 1903, he was employed by defendants to prepare plans and specifications for carrying out certain scheme for supplying water to the town of Somerset East. Thereafter he prepared plans and specifications for such scheme, and delivered same to defendants in or about September, 1904,

and defendants accepted same in or about that month. The proper and customary remuneration for the preparation of plans and specifications for engineering work was 2½ per cent. calculated on the estimated cost of such work. The estimated cost of the proposed works was £8,943 11s., exclusive of engineer's fees. Plaintiff was by reason of the premises entitled to be paid for preparation of the plans and specifications £223 11s. 9d. On or about the 7th July, 1905, plaintiff, at the special instance and request of defendants, also took certain measurements on the mountain, for which work £1 10s. was a reasonable remuneration. He therefore claimed £223 11s. 9d. and £1 10s., with interest *a tempore morae*, and costs.

Defendants, in their plea, said that prior to the request made to plaintiff in 1903, and in or about the year 1902, plaintiff had been employed by them to do certain preliminary work in connection with the said water scheme. Thereafter he rendered to them an account for £175 14s., being a fee at the rate of three guineas a day, and expenses. The said account was paid in or about the year 1904. The work for which plaintiff was paid was such as was usual and necessary in connection with the preparation of plans and specifications. Defendants admitted the delivery of certain plans and specifications by plaintiff, but they denied that these were sufficiently detailed for the purpose of carrying out the water scheme referred to. They were unable to proceed with the said water scheme, and, in consequence, another and different scheme was being prepared. They admitted that plaintiff was entitled to reasonable remuneration for work done by him, but denied that 2½ per cent. on the estimated cost was reasonable and customary remuneration for such work, and said that the amount already paid to plaintiff should be taken into account in estimating what plaintiff was entitled to. They submitted that £100, over and above the sum already paid, was a fair and reasonable remuneration for the plans and specifications and the work done in July, 1905. The estimated cost of the works was £6,583. Defendants had tendered £100, and repeated this tender, otherwise they prayed that the claim be dismissed, with costs.

Plaintiff, in his replication, admitted having been paid £175 14s., but said that this sum was paid solely for and on account of certain services rendered in making certain inspections and reports, irrespective of the services subsequently rendered by him in and about the preparation of plans and specifications. He admitted the tender prior to summons, but said that the same was wholly insufficient.

Mr. Benjamin, K.C. (with him Mr. P. S. T. Jones), was for plaintiff; Mr.

Schreiner, K.C. (with him Mr. W. Porter Buchanan, K.C.), was for the defendant Municipality.

Wm. Farquhar Malloch (the plaintiff) said he was a consulting hydraulic engineer practising at Uitenhage and Port Elizabeth. When he first performed certain services for the Somerset East Municipality he was Town Engineer at Uitenhage. Proceeding, witness described in detail the work which he did on being called in on the first occasion by the Municipality, and for which he had been paid. He said that, except as to three days for which he was paid at the rate of three guineas per day, all the work which he did on the first occasion was independent of the preparation of plans and specifications. Witness said that subsequently in 1905 he was approached with regard to preparing a cheaper scheme, but was asked to postpone his visit for six months, as it would be impossible to go to Parliament with a Bill in the ensuing session in March of that year. One of the estimates which he had sent to the Municipality was £6,583. In that, however, the reservoir was only provided for, as half the size of the one he had been instructed to provide for. A sum of £1,194 should be added on account of that. Then there was also to be added 15 per cent. for contingencies, making a total of £8,943 odd. Witness was engaged for a period of between two and a half and three months in preparing the plans and specifications. He was engaged upon the work from October, 1903, to June, 1904, and did it in the evenings between 7 and 10 o'clock, and on Sundays. Certain of the work was done gratuitously for him by a friend. The plans and specifications were sufficient to enable any competent foreman to carry out the works without the intervention of an engineer.

Cross-examined by Mr. Schreiner: Witness was of opinion that the plans were sufficient for the purpose of calling for tenders. During the time he was employed on the plans and specifications, he was in the service of the Municipality of Uitenhage as Town Engineer. If he had been engaged in doing nothing else from day to day, the preparation of the plans and specifications would have occupied him about two months. He did not regard himself as a quick worker, or as a slow one, but he considered that he was an average worker. He could not have done the work in one month. From the scheme, as approved by the ratepayers, certain items were omitted. In his claim of 2½ per cent. he included these items. The estimate of £6,583 was made up as follows: Pipes, £3,112; pipes and tunnel, £1,902; small service reservoir, £1,569. In his first report he estimated for a reservoir of 500,000 gallons capacity. This was afterwards

reduced to a small reservoir. The amount of £1,569 was for a quarter million gallons' reservoir. The reduction was made in consequence of a conference with the Municipal Council. There was a difference of £1,194 between the large and the small reservoir. That made £7,777. To that amount 15 per cent. had to be added for contingencies. He considered that it was quite reasonable to include the contingencies in the estimate.

Mr. Schreiner: What right have you to claim a percentage on the contingencies?

Witness: I claim a percentage on the total estimated cost.

Cross-examination continued: Witness did not think it necessary to make any provision in the estimate he framed for presentation to the ratepayers of the amount of £175 that he had been paid. If he had never known anything previously about the scheme, and had been making plans and specifications, his charge would have been 2½ per cent.

Mr. Schreiner: Do you contend that you could bring in your prior knowledge, acquired during 19 days' work at Somerset East, and charge it a second time to the Council?

Witness: It was not used a second time. Except for three days' work, for which I allow nine guineas, the preliminary work was of no value in the preparation of the plans and specifications.

Further cross-examined: The plans and specifications that he prepared furnished, he considered, a workable scheme, on which tenders could be called. The plans were complete, except for the final detailed drawings. Sections were not shown, but all necessary provision was made in the specifications. Sections would be provided when the work was in progress. It was not necessary to have sections in order that tenders could be called for. He did not think that 1½ per cent. would be sufficient to allow for the work he had done on the plans and specifications, because he considered that they were quite complete, and sufficient for requirements.

Mr. Schreiner put it to witness that his claim was very belated, and that in May, 1906, he knew that the Council were not going on with his scheme?

Witness: No. They don't know yet whether they are going on with it.

With your scheme?—Yes. I was told not six weeks ago that if this other scheme that they are trying to get through Parliament falls through, they would fall back on my scheme.

Wm. Westhofen, consulting engineer, formerly of the engineering staff of the Public Works Department, said that, considering the magnitude of the work, he regarded the plans and specifications prepared by plaintiff as quite good



enough for any contractor that knew his work to offer a tender upon. He thought it was understood in the profession generally that 5 per cent. should be allowed to the engineer on the estimated cost—2½ per cent. for plans and specifications, and 2½ per cent. for additional plans and supervision. He did not consider that 2½ per cent. would include remuneration for reports and estimates that were prepared for the constructing body before any scheme was agreed upon. Preliminary surveys and investigations were generally paid for separately.

Cross-examined by Mr. Buchanan: Witness had had experience while in the Public Works Department of water schemes carried out by municipalities under contract. Plaintiff's plans and specifications would have been sufficient, if submitted to the Public Works Department, to ascertain the likely cost of the works and whether the estimate would be sufficient. Witness had not seen the plans while he was in the service of the Public Works Department. With the key plan, he would have been satisfied that the work done by plaintiff was sufficient to form an estimate or call tenders upon.

Buchanan, J., pointed out that the correspondence showed that the Public Works Department reported that the Government's professional advisers could not recommend a loan on the drawings so far supplied.

Further cross-examined: No contractor would have tendered for work of this kind unless he first went over the ground, otherwise he would simply be a gambler. He would not base his tender on plans and specifications merely.

Re-examined: When the plans came before the Public Works Department, witness was engaged on the construction of the Colesberg bridge.

Mr. Ingham said he was an Associate of Institute of Civil Engineers. He had had considerable experience in England and in this country as a water engineer. He was at present engaged in carrying out the new water scheme at Port Elizabeth.

Mr. Benjamin: What is the usual charge for specifications?

Witness: Two and a half per cent. for plans and specifications and two and a half per cent. for carrying out the work. On small contracts, say, of £6,000, the charge would probably be higher, 6 per cent. perhaps altogether.

Witness (continuing) said the charge was never in any case less than 2½ and 2½ per cent.

Mr. Benjamin: If you prepare preliminary estimates, is that included in these charges?

Witness: No, these would be special charges.

Mr. Benjamin: These estimates and

preliminary reports, are these simply rough estimates?—Yes.

Do you allow for contingencies?—I do. It would be foolish for any engineer not to do so.

The amount taken into account for contingencies is always taken into account in the estimates?—That is so.

Witness further stated that he had gone very carefully into the plans and specifications. They were quite sufficient for a contractor to work upon. It was not customary to put into these plans all the minute details of levels, etc.

Cross-examined by Mr. Schreiner. With a few slight alterations, witness said he would have sent in similar plans to those submitted.

Do you think a contractor ought to go over the ground before sending in tenders?—No good contractor would send in a tender without going over the ground. He would have to find out what it would cost to get his material on to the job and see the lay of the ground, etc.

Do you then say that no contractor can expect sufficient from an engineer purely from the plans alone?—Not in this particular case. A man would be very foolish to send in tenders without going over the ground.

[Buchanan, J.: You say that the usual charge is 5 per cent. altogether?]

Yes.

[To prepare these plans you have to get local knowledge?]

Quite so.

[If you obtained local knowledge in the first instance, would it be fair to charge twice over?]

That would depend on circumstances.

Thos. Wilson Cairncross, associate member of the Institute of Civil Engineers, previously City Engineer in Cape Town, stated that 2½ per cent. was the usual charge for drawing up plans and specifications. In the absence of any arrangements this amount would not be included in the amount charged for getting out the preliminary reports. A contractor would certainly have to go over the ground before sending in tenders. About 15 per cent. was usually allowed for contingencies, because they could not depend upon the prices of labour and material.

Cross-examined by Mr. Buchanan: Do you say that a man has to get 2½ per cent upon 15 per cent. for contingencies when these contingencies are not required?

Witness: The charge would not be unreasonable. Alterations may take place. The contractor may put on items himself for contingencies.

Do you agree with the question of the costs?—I have not been asked to go into that question.

Mr. Benjamin closed his case.

Reuben Archer said he was Town Clerk of Somerset East. Mr. Malloch, he believed, inspected the mountain reservoir, and the whole area. Witness gave plaintiff the fullest information. During the period before plaintiff was called upon to furnish plans, he sent in information regarding the distribution of the water. The scheme was approved of with the exception of the oil pumping tank on the mountain. Witness said he showed plaintiff a letter from the Public Works Department stating that the plans had been rejected. Plaintiff then stated that the Council still owed him 30s.

Cross-examined by Mr. Benjamin: He was under no misapprehension with regard to the amount of 30s. That was all plaintiff mentioned as being owing to him.

Thos. W. Stainthorpe, called, said he was employed in the Public Works Department. He was an associate of the Institute of Civil Engineers, and had large experience in water engineering. It was his duty to examine all the water schemes submitted to the Public Works Department throughout the Colony.

Have you examined the plans and specifications in question?—Yes.

Do you say that these plans were properly got out?—They were very slovenly got out. Few men in the profession would have turned them out so unsatisfactorily.

Witness (continuing) said these plans were in the department in 1906, and he rejected them with the approval of his chief, Mr. Gordon. The levels on the plans shown were only surface levels, and he believed that the enormous pressure would burst the pipes. Certainly, these plans should have been got out in such a manner that the contractor could work by them. There was no law with regard to the charge for getting out plans and specifications, but the usual custom was when an engineer was called in he was asked for a preliminary report. This preliminary report would be remunerated by so much per day, and out-of-pocket expenses. When the Council adopted a scheme the usual plan was to pay the engineer at the rate of 5 per cent. for the plans completed and for carrying out the work. The engineer had to prepare everything necessary for the contractor to base his tender upon.

Cross-examined by Mr. Benjamin: He did not approve of the scheme submitted by Mr. Malloch.

Mr. Benjamin: Engineers disagree, like doctors?—Well, there are engineers and engineers, and unfortunately for municipalities, there are far too many careless engineers in this country. The scheme in question was rejected by the Government.

Perhaps the Government hadn't any money?—I don't know anything about that.

Witness (emphatically): I wish to say distinctly that if the Municipality had to pay 2½ per cent. for these plans and specifications, they certainly would not have got value for their money.

Arthur Capel Valentine Baines, Town Engineer, Somerset East, said he did not consider the plans sufficient or proper plans and specifications. As an engineer, he would not go on with the works upon these plans. He thought it impossible for an engineer to get the necessary material to prepare the plans and specifications in two days' time.

James Just Niven, A.M.I.C.E., said that he believed 1½ per cent. was sufficient remuneration for the work done.

Mr. Stainthorpe (recalled) said about 30 days would be ample for the completion of the whole work. It would be quite impossible to take the levels in two days.

Mr. Schreiner closed his case.

Mr. Benjamin said that the great portion of the evidence for the defence was that the scheme was unsatisfactory, not that the plans were unsatisfactory. Mr. Malloch entered into an arrangement with the defendant Municipality, in which it was stated he would have three guineas a day and expenses, and in addition to that, he would have a special allowance for plans and specifications. The amount paid to Mr. Malloch was simply for preliminary reports, and it did not come into this liability at all. It was perfectly clear from the letter of the Government that they thought the plans satisfactory, with the exception of one or two points, but the fact was that the Government had no money, and therefore refused the scheme. If this £175 were already paid in full settlement to Mr. Malloch, why should the defendant Municipality tender a further £100? Mr. Malloch did not press his claim for remuneration, because the scheme was held up for six months. Mr. Benjamin, in conclusion, said that the amount asked for was perfectly reasonable, and really, if they took the 1½ per cent. which Mr. Niven thought enough, then they would find that even this was better than the amount the defendants tendered.

Buchanan, J.: In this action the plaintiff claims £225 for services rendered to the Municipality of Somerset East. These services were given by the plaintiff in his capacity of an engineer, and I admit at once that these services are not to be compensated at the rate of mere manual or clerical services, but specially as professional services. In the case of such professional services the professional education, training, and experience of the person must be taken into account, and must be compensated for accordingly. The claim is founded upon an agreement made with the plain-

tiff to prepare plans and specifications for the construction of a certain scheme of waterworks, the cost of which was estimated at £8,000 to £9,000. The defendant Municipality, it was stated, engaged plaintiff to take preliminary surveys to obtain the necessary information to prepare such a scheme. For the work done by plaintiff they paid him £175, and they have tendered another £100 in full settlement. It would appear from the correspondence that the plaintiff was originally engaged at three guineas a day and out-of-pocket expenses. On several occasions he visited the locality, and he also charged for work done at his own residence in Uitenhage. The plaintiff prepared preliminary reports, and eventually a meeting of ratepayers authorised the Council to carry out the work, whereupon the Council wrote plaintiff, requesting him to draw up plans and specifications in order to obtain a loan for construction purposes. These plans were handed to the Government, but the loan was not granted upon the information supplied. The plans have been produced in Court, and professional witnesses have been called, who gave their opinions upon them. As usual, the evidence called for the one side has differed from that called on the other. It was stated that five per cent. was the usual amount allowed for preparing plans and specifications and for supervising the work. If the work was not carried out, a charge of 2½ per cent. on the estimated cost should be awarded for making the plans. The plaintiff admits that these plans were not completed plans; but states that they were sufficient to lay before the Government for the purposes of raising a loan. He admits that a good deal more work would have had to be done to the plans if the work was to be carried out. If I were to use my own judgment, I would certainly say that the plans and specifications in the state they are now were not complete or sufficient to submit to tenderers or contractors. If the plans had been satisfactory, and details had been prepared properly, surely an item of 15 per cent. for contingencies would not be necessary in the estimate of the cost. I take it that such plans were not such as could be expected from a man who was to be paid 2½ per cent. for them. In the sum of £175 already paid, the plaintiff allotted £60 for preparing the estimates, £60 for personal inspection of the spot and taking levels, and £50 for expenses. Now, Mr. Ingham said that the charge of 2½ per cent. would include the preliminary expenses incurred by the engineer. In court the plaintiff offers to allow a small portion of these preliminary expenses which he has been paid, but I do not think that he makes sufficient allowance. The work and time for which he has been paid he is not entitled to charge for again

in the 2½ per cent. That being so, as these plans and specifications sent in had not been sufficient to enable the Municipality to get a loan. The plaintiff had been informed in February, 1906, that the matter must stand over indefinitely in consequence. No further claim was made until November of that year. I think that the tender of £100 by the Council was a reasonable and satisfactory tender, and one that plaintiff would have been well advised to accept. Judgment will therefore be for the plaintiff for £100, but plaintiff must pay the costs incurred since the tender.

[Plaintiff's Attorneys: Findlay and Tait; Defendant's Attorneys: Syfret, Godlonton and Low.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* PEILE. { 1907.  
{ Aug. 14th.

Mr. Inchbold moved, on behalf of the petitioner, for leave to sue her husband, Edward Dungannon Peile, *in forma pauperis*, for restitution of conjugal rights, failing which a decree of divorce by reason of the respondent's desertion.

The parties were married, counsel said, in Workington, Cumberland, on the 10th July, 1900, and the husband, without any lawful excuse, deserted the petitioner in Cape Town, in July, 1904, since when petitioner had not heard of her husband. She had made inquiries from all sources as to his whereabouts, but she was not able to find him. There were two children of the marriage, aged six and two years respectively. Petitioner was desirous of suing her husband by edictal citation for restitution of conjugal rights, and, failing his return, for a decree of divorce and custody of the children of the marriage.

The plaintiff said she was not possessed of property of the value of £10. The respondent came to Cape Town during the war with the Imperial Yeomanry in 1901, and in 1902, when he was discharged, he started business at Uitenhage as a butcher, which he carried on for over a year.

[De Villiers, C.J.: He deserted you in 1904. Did you know he was going?]

No, sir. He said he was going to a football match, and never returned.

[Did he come here to settle in Cape Town before he left?]

Yes.

[What was he doing here?]

He was a painter at Woodstock.

[Did he come to settle here in Cape Town?]

Yes, otherwise I should not have come out to him, but it was to Uitenhage I should have gone.

[You did go to Uitenhage?]

No, sir. He met me here.

A rule was granted calling on the respondent to show cause by the last day of the November term why the plaintiff should not be allowed to sue the defendant *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce, with custody of the children, the rule to be served personally, failing which one publication in the "Daily Telegraph," London.

#### REX V. CHONG.

#### Gaming in a public place—Summons.

*The accused was charged in a Magistrate's Court with contravening Sec. 7, Sub-sec. 13 of Act 27 of 1882, as amended by Sec. 37 of Act 36 of 1902, in that he did "wrongfully and unlawfully play a game of chance with dice and money in a public street."*

*Held, that although part of the charge was surplusage, the charge substantially stated an offence under these Acts.*

This was an appeal from a decision of the Court of the Resident Magistrate for the District of Cape Town in a case in which the accused was charged with the crime of contravening section 7, paragraph 13, of Act 27, of 1882, as substituted by section 37 of Act 36 of 1902, in that upon or about the 1st August, 1907, at or near Cape Town, the said Chi Chong was wrongfully and unlawfully playing a game of chance with dice and money in a public place. He was, secondly, charged with a contravention of the Police Offences Act by resisting a police officer in the execution of his duty. He was found guilty on both counts, and on the first fined £5, or three months' imprisonment, and on the second fined £2, or fourteen days' hard labour, to take effect after the expiration of the first sentence.

The appeal was brought on the grounds that the conviction was not supported by the evidence given before the Court, and was contrary to law, and that the charge was vague, embarrassing, and bad in law, in that

it did not disclose the offence in terms of section 37 of Act 36 of 1902, and, thirdly, that the offence, if any, amounted to an offence under Act 9 of 1889, section 3, as the form of gambling amounted to a lottery as defined by sections of the said Act.

Mr. Upington was for the appellant, and Mr. Howel Jones, K.C., was for the Crown.

Mr. Upington said he was not prepared to say that there was no evidence before the Magistrate upon which, assuming the charge to be in order, it would not have been competent for him to convict. There was a conflict of testimony between the policeman and one of the by-standers and Chi Chong. He did not appeal against that portion of the sentence which consisted in hindering or resisting the police in execution of their duty. The substantial ground of appeal was that the charge upon which he was found guilty did not disclose an offence under section 37 of the Gaming Act, which repealed sub-section 13 of section 7 of the Police Offences Act, and substituted a new sub-section rendering unlawful "betting in any street or open place, or playing therein at any game for a wager or stake, or playing at or with any table or instrument of gaming." Now, the charge on which the accused was found guilty charged him with wrongfully and unlawfully playing a game of chance with dice and money in a public place. It had been held frequently by the Supreme Court that where a statutory offence was charged that the words of the section should be set out in the charge substantially, or as nearly as possible. Now, this particular charge did not set out any particular offence under that section. He was not charged with playing a game for a wager or stake, and he was not charged with playing at or with any instrument of gaming.

[De Villiers, C.J.: Are not dice an instrument of gaming?]

Mr. Upington: Dice may or may not be. Of course, the essential part of the thing would be that the game played, in order to be a game of chance, should be played for money or for valuable consideration. Persons might play with money, money simply being regarded as counters in the game. It would not follow because I have dice or money that both of them are in a sense instruments of gaming. One can understand persons might play at a roulette table in a perfectly innocent and perfectly lawful manner, and it seems to me they would not be contravening this particular sub-section, which has been substituted for the old sub-section of the Police Offences Act.

[De Villiers, C.J.: Supposing a person had a roulette table in a public street and was playing with that table, would not that be an infringement of the Act?]



Mr. Upington: I submit not. After all, this is a penal statute, and of course the section would be construed strictly, and the whole object and intent of the section is to prevent actual gaming in the sense that the person plays at a game of chance or with one of these instruments of gaming.

[De Villiers, C.J.: What is the meaning of chance? Doesn't that imply that there is a chance of winning money? Where does the chance come in?]

Mr. Upington: The chance is that you may win or lose the game. There are plenty of games of chance that one does play without any stakes at all. For the matter of that, one can understand a game of cards, as bridge, being played for counters.

[De Villiers, C.J.: Supposing a man is playing with a roulette table in the street and there was no evidence that gaming was going on, would not that be an infringement of this Act.]

Mr. Upington: I submit an instrument of gaming must be taken to mean not only an instrument that can be used for the purpose of gaming, but that an instrument is used for it. In fact, a person might use dice or a gaming table, or a roulette table, or so forth in a public place for purposes other than the purposes of gaming. In such a case there would not be a contravention of the terms of the section.

[De Villiers, C. J.: But didn't money pass in this case?]

Mr. Upington: In this case money was used. I will read what the detective says on that point: "I saw accused sitting in the middle. He had a board in front of him, marked out in six squares. He then raised a tin box containing dice. He then paid out to those who had won, and pocketed the other money. There were several ticeys and pennies. I saw them play three rounds." Proceeding, counsel contended that the charge did not sufficiently set out the statutory offence provided for under the new sub-section 13 of the Police Offences Act. If it did sufficiently set out that offence in the way it should be set out, there was no doubt that there was some evidence before the Magistrate that an instrument of gaming was used, but the appellant was not charged with that specific offence. He was charged with playing a game of chance, but he was not charged with playing for a wager or stake. His submission was that a person might play a game of chance with dice and with money, using them in the course of the game, without actually gaming and without actually contravening the terms of the new sub-section 13 of the Police Offences' Act. No doubt, if the charge had been drawn up in this way: "The said Chi Chong was wrongfully and unlawfully playing at or with a table or instrument of gaming," then the

charge would have been correctly set out under this section. He submitted it had been ruled over and over again that where a statutory offence was relied upon, the words of the section must be followed as closely as possible, and that had not been done here at all. In the old Police Offences Act, section 7, sub-section 13, it was thus set out: "playing or betting in any street or other open and public place, at or with any table or instrument of gaming or pretended game of chance." "Or pretended game of chance" was specifically left out in this new sub-section. This was rather in substance a more important appeal than might appear on the outside of it, so to speak, in that the accused was liable to deportation in consequence of this conviction.

[De Villiers, C. J.: He can still be tried. Supposing you succeed, could he not be tried again?]

Mr. Upington: Yes.

[De Villiers, C.J.: Do you admit the evidence is clear on the point?]

Mr. Upington: I do not admit that, but my admission goes to this length, that there was evidence upon the record to support the Magistrate's finding. I am told there were other witnesses for the defence, and they were not called.

[De Villiers, C. J.: Why not?]

Mr. Upington: Because the objection to the charge was taken before the Magistrate, although it does not appear upon the record, and it was not amended. Proceeding, counsel contended that the charge did not disclose the offence it purported to disclose. There was another point taken in the appeal. It was contended that this offence, as disclosed in the indictment, if an offence at all, was one against Act 9 of 1889, an Act for the prohibition of lotteries.

Mr. Jones said it was difficult to understand how the accused was embarrassed by the charge. It was clear he was playing a game of chance with money and for money, and he was paying out to the winners. How could the accused say he was prejudiced by this charge? Dice were clearly an instrument of gaming. Counsel referred to the 9th section of the same Act, which said that whenever any such house or place was suspected of being kept or used as a gaming-house, was entered under a warrant, and any cards, dice, balls, counters, tables, or other instruments of gaming found, they would be evidence that the house was a gaming-house. That showed that dice were clearly an instrument of gaming. All that it was necessary to set out was that the accused was playing with dice in a public place, to wit, Albert-street. The charge here went a little further, and said he was playing a game of chance with dice with



money. It was not necessary to say he was playing for a wager or stakes, because there was another portion of the section which states it was an offence to bet in any street or open place.

Mr. Upington having been heard in reply,

De Villiers, C. J.: The main ground of the appeal is that the summons does not disclose an offence in terms of the Act of 1902. The charge in the Magistrate's Court was: contravening section 7, paragraph 13, of Act 27 of 1882, as amended by section 37 of Act 36 of 1902, in that the accused "did wrongfully and unlawfully play a game of chance with dice and money in a public place, to wit, Albert-street." Under that Act the offence would be playing at or with any table or instrument of gaming in any street or public place. And now the question is whether the charge does not substantially state that the accused did play at or with any table or instrument of gaming. It is quite true that the Court has always held that the charge should substantially state the offence with which the accused is intended to be charged. And to my mind this charge does substantially state what the charge against the accused is. If dice can fairly be ly be considered as an instrument of gaming, then I think substantially the charge is made. Now, under the 9th section of the Act, dice are referred to as being instruments of gaming. Cards, dice, balls, tables, or other instruments of gaming used in playing a game would be evidence under the 9th section. Therefore under the 37th section the statement that the accused had been playing at or with dice would be a sufficient charge. In the present case there are some words added to the words of the Act. The words added are "game of chance," and the words "and money." The addition of these words surely ought not to be held to make the charge a bad one. If money was used, and if it was a game of chance, then it was clearly a case of gaming with instruments of gaming, and the charge would be sufficiently stated. In my opinion, the provisions under the Lotteries Act do not apply to the present case. According to the evidence in the present case, the witness says: "I saw a crowd of coloured men at the top of Albert-street. I went close up to them. I saw accused sitting in the middle. He had a board in front of him, marked out in six squares. The men were putting money down on the squares. The accused then raised a tin box containing the dice. He then paid out those who had won and pocketed the other money." Well, to call that a lottery would be rather a mis-description of what actually took place. It

was a case of gambling pure and simple. This gambling took place in a public street, and clearly it is an offence aimed at by the Act of 1902. The appeal must therefore be dismissed.

## SUPREME COURT

### SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

CHASE AND ANOTHER v. ( 1907.  
RIGGE. ( Aug. 15th.

Unsoundness of mind—Lunacy  
—Asylum—Curator.

*On an application to declare of unsound mind a lady detained in a lunatic asylum under part 1 of Act 1 of 1867 and to have a curator appointed to her person and property, the Court was satisfied from the evidence that, although she suffered from mental excitability and a certain degree of incapacity to manage her own affairs, she did not suffer from such unsoundness of mind as would justify her further detention in the asylum.*

*Held, that she should be released from further confinement and a curator bonis appointed with the powers mentioned in the 35th section of the Act.*

[De Villiers, C.J., asked, in the case of Chase v. Rigge, which had been called, if Mrs. Rigge was in town?]

Mr. Sutton: No, my lord. I only heard at ten o'clock this morning that the case was coming on.

[De Villiers, C.J.: It may be a matter for consideration when the case is heard whether the Court cannot appoint some person with her consent, supposing the Court finds she is not of

unsound mind, to attend on her, and report to the Court from time to time.]

Mr. Sutton: Medical men?

[De Villiers, C.J.: Oh, no. Some of the family, I should think. Is there no one the parties could agree upon as a competent person?]

Mr. Bisset: I am for the applicant.

[De Villiers, C.J. (to Mr. Sutton): You, as curator, might consult her, and see whether she has not some friends who wish to live with her.]

Mr. Sutton: Yes; she has a sister. She told me she wanted the sister to go and live with her.

[De Villiers, C.J.: Is the sister unmarried?]

Mr. Sutton: Yes.

[De Villiers, C.J.: I understand the reports of the medical men appointed by the Court are somewhat conflicting. Sir Edmund Stevenson does not see any signs of insanity. Dr. Wright's opinion is more qualified. He does not think she should be kept at the asylum. He thinks she should go to her own home under supervision.]

Mr. Sutton: He says: "I consider this lady should be allowed personal liberty with a restricted pin allowance. That her establishment, carriage, etc., should be kept for her by some independent responsible person other than a relative, and that she should not be allowed to leave this Peninsula without the sanction of the Court until her complete recovery, that I consider will not be long, and which I consider will be hastened by adopting the suggestion I have made."

[Would the parties both agree to Mr. Coulter?]

Mr. Sutton: She seems to have a great confidence in him.

Mr. Bisset: The relatives are well satisfied with Mr. Coulter, who appears to be able to get on very well with Mrs. Rigge. With regard to Mrs. Rigge's sister, I am told she is looking after Mrs. Rigge's mother, and it will probably be impossible for her to leave Mrs. Rigge's mother at the present time. As for the rest, the relatives feel that somebody should be appointed to take care of the property. They would be pleased if the Court could see its way to allow Mrs. Rigge to be released from the asylum.

De Villiers, C.J.: Under all the circumstances, it will not be necessary to postpone the case further, nor will it be necessary to have the defendant, Mrs. Rigge, in court. At the last hearing in this case, the doctors' evidence appeared to be unanimous that the defendant was of unsound mind. The appearance of this lady in court, and the manner in which she gave her evidence, led me to doubt her mental unsoundness, and as she was anxious to be examined by some other doctors, and she mentioned Sir Edmund Stevenson

as the doctor she wished to be examined by, I appointed him, and subsequently I appointed Dr. Wright, of Wynberg, as a doctor to be associated with Sir Edmund Stevenson for the purpose of inquiring into the condition of this lady's mind. Dr. Stevenson has sent in a report, a very brief one, and to the point, and it is to the following effect: "As requested by the Court, I saw Mrs. Rigge, at Valkenberg, on the 9th inst. A full report of the case was read over to me by the resident medical officer. The impression received by me from the report is that Lucy Mary Rigge is suffering at times from occasional mental excitement. From my own immediate observation and examination, I was unable to find any symptoms of insanity. I am of opinion that Lucy Mary Rigge was not insane when I saw her." Dr. Wright is more qualified. He sends in a report, and he mentions certain facts in connection with the plaintiff's detention which shows she is a lady of some eccentricities, and indeed a little more than eccentricities, but, at the same time, even he is not prepared to recommend that she should remain in the asylum. He says: "I do not see that the degree of departure from the normal is a large one, but it undoubtedly exists, and her ideas are grandiose above what her fortune warrants, and I consider that if she had a full control of her fortune before her return to the normal occurs, she will squander a large portion if not the whole of it, as she frequently remarked: 'Why shouldn't I spend what money I like?' stated in a tone that was rather defiant and wanting in appreciation of its value." No doubt there was some importance in what the doctor here states, but, on the other hand, the evidence does not show that while she had the spending of the money that she was very extravagant. She was very kind to her relatives. She took them to Europe, and spent considerable money upon them, but upon herself there seems to be no great expenditure, nor do I consider that the expenditure upon her relatives was at all extravagant. Then Dr. Wright goes on: "This lady retains, however, so much of what is pleasant, sympathetic, and generous in her nature that I consider her present surroundings are detrimental towards her recovery. The classification of cases must at a public asylum be so crude that patients who are refined and only slightly deranged come in contact with so much that is offensive to their tastes and repulsive to their natures by being surrounded with other poor people having fits, rushing about using bad language, etc., can only rend the heart of others who are likewise confined with them when they are able to realise what it all is, as this lady, Mrs. Rigge, is able to do. If it is not presumption for me to suggest I would remark that I consider this lady should be allowed per-

sonal liberty with a restricted pin allowance; that her establishment, carriage, etc., should be kept for her by some independent responsible person other than a relative, and that she should not be allowed to leave this Peninsula without the sanction of the Court until her complete recovery that I consider will not be long, and which will be hastened by adopting the suggestion I have made." Now, I quite agree with what Dr. Wright says as to the inadvisability of keeping this lady at the asylum. However, kindly and sympathetic the treatment may be, still it is not the treatment which can, in my opinion, do any good to a lady like this who, at all events, has sufficient mental capacity to realise the position in which she is. It seems to me a case in which notwithstanding the opinion of the doctors, expressed in court, the Court should exercise its discretion. I consider this woman should no longer be retained in the asylum, but should be set at liberty. I consider, therefore, that for the present, for her own sake, it is advisable that somebody should control her money affairs. The evidence does disclose a state of mental excitability on her part, and a certain degree of incapacity to manage her own affairs, but not such unsoundness of mind as would justify her further detention in the asylum. The Court, therefore, declares that the defendant is not of such unsound mind as to require any custody of her person. The Court orders that she be discharged from confinement. The Court declares for the present the defendant is incapable of managing her affairs, and appoints Mr. Coulter as *curator bonis* with the powers conferred under the 35th section of the Act, and with further power to pay the fees of the doctors appointed by this Court to examine the defendant, the curator to file quarterly accounts with the Master of the Supreme Court, and report from time to time to the Court as to the mental condition of Mrs. Rigge, costs of the application to be paid by the curator.

Mr. Bisset said there was about £350 required to pay present liabilities, and he asked the Court to give the curator authority to obtain an advance from the bank to meet these liabilities.

The Chief Justice: The Court will authorise the curator to obtain an advance from the Standard Bank for £350 for the purpose of meeting present liabilities. What I would suggest is that this lady should have for the present some friend whom she trusts, and whom she likes to live with her for her own sake. I think the curator would have the power to pay any such person for the assistance she may give.

ESTATE LOUW V. ESTATE ( 1907.  
LOUW. ( Aug. 15th.

**Mutual will—Acceptance of benefits—Adiation.**

*A husband and wife made a mutual will, under which the survivor was to have a child's portion in addition to his or her half share of the joint estate, and was to enjoy the usufruct, during life, of certain two farms belonging to such joint estate. After the death of the wife, the husband, as executor, awarded to himself only half of the joint estate, and the remaining half to the children, such assets including the proceeds of one of the farms which the husband had sold as executor. He remained in possession of the other farm without any objection on the part of the children.*

*Held, that such mere occupation was not proof of adiation on the surviving husband's part in the face of the other indications of his intention not to adiate.*

This was a special case, stated in the following terms:

1. The plaintiff is Izaak Jacobus Louw, sen., in his capacity as executor dative in the estate of the late Maria Margaretha Klasina Louw (born Strauss), hereinafter called the testatrix, pre-deceased spouse of Nicolaas Everhardus Louw (now deceased), hereinafter called the testator.

2. The defendants are Clasina Johanna Louw (born Van Zyl), widow of the testator and Henry Allan Fagan, in their capacities as executrix and assumed executor respectively of the estate of the testator.

3. On the 28th of September, 1871, the testator and testatrix, who were married in community of property, executed a mutual will.

4. By the said will it was provided *inter alia* as follows: "It is further our will and desire that all our landed property, which we possess or may yet acquire, shall after the death of the survivor, be sold by public auction amongst our heirs." The survivor, together with the children of the first dying were appointed heirs, and after the institution of heirs the said will proceeded as follows: "and such to all the property to be relinquished by the first dying on demise, excepting the pre-

viously bequeathed property movable as well as immovable, Acts and credits, inheritances and expectancies, to be assumed and possessed by them for always as free and personal property, without the contradiction of any one; the survivor shall, however, be held and bound to bring up and maintain in an honourable and Christian way the children begotten of this marriage until their majority, earlier marriage or other approved states, at which time there shall be paid out to each of the same, for or in lieu of paternal or maternal portion, such amount of money as the survivor shall find to pertain to him or them according to the condition of the estate." It was also provided by the said will that the survivor should remain in full and undisturbed possession of the estate, in order the better to be able to educate and maintain the minor children until they should receive their inheritances. The parties crave leave to refer to the terms of the will for the further material portions thereof.

5. The testatrix died in 1876, and at the date of her death there was certain landed property in the joint estate of herself and the testator, consisting of the farm Augustfontein and a half-share of the farm Matjesfontein, both registered in the name of the testator.

6. Thereafter the testator remained for several years in possession of the said farms, and enjoyed the usufruct thereof. Subsequently the said half of the farm Matjesfontein was sold by him as the executor of the said joint estate, and an account framed and filed in the Master's Office by him distributing the whole of the proceeds of the said property amongst the children of himself and the testatrix. The testator continued in possession of Augustfontein aforesaid and in the enjoyment of the usufruct thereof till his death. The testator at no time filed any inventory in the said estate. In neither of the aforesaid accounts did the testator award to himself any child's portion under the said will, nor did he therein bring up or notify any reservation of usufruct of any landed or other property in the estate. To each child was duly paid out his or her share brought up in the said accounts.

7. The farm Augustfontein was not disposed of by the testator, and still stands registered in his name.

8. In or about September, 1877, the testator married again, and his second wife, now his widow, to whom he was also married in community of property, and by whom he has had several children, nine of whom survive, four of them being minors, is the above first-named defendant. The defendants submit that they sufficiently represent the said minors for the purpose of this action, their interests not being in

conflict with those of the first-named defendant.

9. On the 3rd March, 1905, the testator and his said second wife executed a mutual will, whereby it was provided *inter alia* that the survivor of them should have the right to remain in possession of their whole joint estate for life, and that after the death of the survivor the said estate should be distributed in equal shares among all the children of the second marriage, the children of the first marriage being especially excluded from participation therein.

10. The testator died in or about August, 1906, and thereafter the survivor took out letters of administration in his estate, and assumed the second-named defendant to act as co-executor. The plaintiff was on the 21st of December, 1906, appointed executor-dative of the testatrix at the instance of the heirs in the said first joint estate.

11. There are certain debts due by the testator which there are practically no assets in his estate to meet, unless it be held that the said farm Augustfontein registered in the testator's name, or the half-share thereof, is liable for such debts. None of the said debts were due by the said first joint estate, and they were all incurred after the first will came into operation.

12. Among the said debts are included the cost of a certain application in 1906 to have the testator declared a lunatic, of another application (which never came into Court, owing to the testator's death) respecting the maintenance of himself and his family, also the costs of litigation incurred shortly before his being declared a lunatic in defending a certain claim advanced against him, and other debts, amounting in all to approximately £360.

13. The Divisional Council valuation of the said farm Augustfontein is £850.

The plaintiff contends: (a) That the said farm Augustfontein must be submitted to public auction, without reserve, amongst the heirs sprung from the first marriage. (b) That the said heirs sprung from the first marriage are alone entitled to share in the proceeds of the realisation of the said farm. (c) That the testator's half-share in the said farm is not liable for his said debts. (d) If it should be held by this Honourable Court that the testator's half-share in the said farm is liable for his said debts then: that the heirs sprung from the first marriage are entitled to claim on the testator's estate for the amount realised by the said share concurrently with other creditors.

The defendants contend: (e) That the said farm Augustfontein should not be submitted to public auction without a reserve price of not less than £500 being fixed. (f) That the heirs sprung from both the first and second marriages are entitled to participate in the auction of



the said farm Augustfontein. (g) That the proceeds of the sale of the said farm, or (alternatively) the testator's half-share therein, is liable for and has to be charged with, his said debts, and the costs (as between attorney and client) of this litigation; and that the heirs sprung from the first marriage are not entitled to claim concurrently with the other creditors in respect of the testator's half-share. (h) That if this Honourable Court should find that there was adiation by the testator, the accounts heretofore filed by him in the estate as aforesaid have to be rectified, by awarding to his separate estate (represented by the defendants) the several "child's portions" not heretofore brought up or reckoned in the said accounts. (i) That in any event the costs of this litigation (as between attorney and client) should be paid out of the proceeds of the said sale.

Mr. Burton, K.C., for plaintiff. Mr. McGregor, K.C., for defendants.

Mr. Burton said that the matter in dispute could be regarded from two points of view, that of the children of the first marriage, and that of those of the second marriage. The children of the first marriage contended that the children of the second marriage had no claim to the proceeds of the farm Augustfontein, that was to say, that there was a massing of the estate after the first will so far as the landed property was concerned. The testator enjoyed benefits under the first will, and had, therefore, adiated and could not dispose of the farm in the second will. He had enjoyed the usufruct of the farm Augustfontein till his death, sold Matjesfontein and distributed half of the proceeds amongst the heirs of the testatrix without awarding himself a child's portion, but he kept the other farm Augustfontein all his life, and he would not have been entitled to do that but for the will. He took benefits, and that was the crucial test. If he did not mean to adiate he would have given up testatrix's half of Augustfontein.

[De Villiers, C.J.: It is not because he acted under the will that he did not give up half of Augustfontein, but because he neglected his duty as executor.]

Mr. Burton submitted strongly that the enjoying of the proceeds of the farm Matjesfontein amounted to adiation. The question of adiation was a question of fact. His not taking a child's portion was probably due to an oversight. He deprived his children of their half of the farm Augustfontein till the time of his death.

De Villiers, C.J.: As to adiation, the Court is of opinion that there was no adiation on the part of the testator. It is admitted in this special case that the mutual will gave the survivor a child's portion in addition to his own half.

When the testator came to administer the estate and to furnish his accounts of distribution, he did not take that child's portion. He practically renounced his right, and paid out to the children the full shares which would have come to them if he had not got his child's portion at all. That, in itself, is a strong indication of non-adiation on his part. But then it is contended that there was one act on his part which did amount to adiation, that he remained in possession of one of the farms. I do not think that what he did is such a strong indication of adiation as his paying out the children would be an indication to the contrary. It is quite consistent with the facts stated that he may have remained in possession of the farm Augustfontein with the approval of all parties interested, and without any intention of acting under the provisions of the will. But then it is said there was this bequest of sheep and cattle for the sum of £100. Well, that bequest must be taken in connection with the other prelegacies which were made, viz., to the children. It was a conditional bequest, as he gave consideration for the amount—for the sheep and other things that were pre-legated to him; and I do not consider the fact that he did pay that consideration ought to foreclose the defendants from now saying that there was no adiation on his part. The Court will declare that the heirs sprung from the first marriage are entitled to claim that the half-share of the testatrix in the farm Augustfontein shall be sold by public auction, the costs of this application to be paid by the plaintiff and the defendant in their respective capacities as part of the costs of administration.

Hopley, J., concurred.

[Plaintiff's Attorneys: Bisset and Hofmeyr; Defendant's Attorneys: Van Zyl and Buisinné.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

GOVEY AND CO. V. WARNER ( 1907.  
AND WARNER AND CO. ( Aug. 15th.

Mr. D. M. Buchanan moved for a provisional order of sequestration to be discharged, the defendants' estates having been assigned.

Provisional order discharged.



SEELIGER V. SCHACH AND ANOTHER.

Mr. Toms moved for the final adjudication of the defendants' estates as insolvent.

Order granted.

PHILIPS V. ZINMAN, ALIAS ZIMAN.

Dr. Greer moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £16 0s. 8d., together with £14 12s. 3d., taxed costs.

Defendant said that he was unable to pay the debt. He only earned about £3 a month, and he had to support his wife. He was prepared to offer 5s. a month.

Cross-examined: He had owed the debt about two years, and had paid nothing. He got married recently, but the expense was principally borne by his father-in-law, who also bought the furniture.

Decree granted, with costs, execution to be suspended pending payment of 5s. a month, first payment to be made on the 1st September, with leave to plaintiff to apply for an increased order when so advised.

CASTLE WINE AND BRANDY CO. V. WESSELS AND BOTHA.

Mr. Conradie moved for provisional sentence on a promissory note for £109 4s. 6d., less £50 paid since issue of summons, with interest from the 25th March, 1907, with costs.

Order granted.

BUYSKES V. DAVIDS.

Mr. H. S. van Zyl moved for provisional sentence on a mortgage bond for £50, with interest from the 1st January, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

GENERAL MOTIONS.

*Ex parte* WHILEY. { 1907.  
{ Aug. 15th.

Mr. H. S. van Zyl moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* PARKER.

Mr. Watermeyer moved for leave to petitioner to sue Stephanus S. Benjamin

Hoffman, of Fordeburg, Transvaal, by edictal citation for judgment on a mortgage bond for £60, and to attach the property hypothecated *ad fundandam jurisdictionem*.

Property attached *ad fundandam jurisdictionem*, and leave granted to sue respondent by edictal citation, citation returnable on the 10th September.

HOWSE, REYNOLDS AND CO. V. TILBROOK.

Mr. Watermeyer moved, on behalf of applicants, for an order declaring certain shares and book debts executable to a judgment obtained by applicants against respondent. Petitioners stated that they were the legal holders of a promissory note for £400, made and signed by defendant, due on the 31st May last. On the 21st April last respondent issued a power of attorney authorising petitioners to sell certain 425 shares in the Prieska Diamond Syndicate and to apply the proceeds to the liquidation of the note. He, however, failed, and neglected to give transfer of the shares. Petitioners had taken judgment on the note against defendant and a writ of execution had been issued against the movable property, upon which a return of *nulla bona* had been made. Leave was asked to have the shares and certain outstanding book debts declared executable to the judgment, and the proceeds applied in satisfaction of the writ, and the balance, if any, to be handed over to defendant.

Maaadorp, J.: I don't see how I can grant an order attaching the man's book debts. If they want to do that they must have him made insolvent. The shares will be declared executable, with costs, subject to production of affidavit of service.

ABRAHAMSON V. GUARDIAN INSURANCE CO., LTD.

This was an application upon notice to respondents to show cause why a commission *de bene esse* should not issue to take the evidence of Solomon Woolf Lorie, accountant, Johannesburg, in an action instituted by applicant against respondents, and why the case should not be removed from the cause list and postponed.

It appeared that the witness, while temporarily practising in Cape Town, had examined the applicant's books, and that it was desirable that his evidence should be procured for the trial. Applicant had carried on business as a general dealer at Brackenfell Siding, division of Stellenbosch, and his property had been insured in the respondent company. A fire took place, and the applicant had brought an action for payment of £500 insurance. The com-

pany urged that it was of the utmost importance that the witness should give his evidence before the Judge who had to try the case.

Dr. Greer was for applicant; Mr. Upington was for respondents.

Dr. Greer said it would be very inconvenient for the witness to come down, and it would also add very much to the costs if he had to attend the court. The defence of the company was threefold: (1) That proper notice was not given; (2) that there was misrepresentation of the nature of the buildings; and (3) that the first account filed was inconsistent with the second.

Mr. Upington: We say it is a false and fraudulent claim. Counsel urged that in view of the special connection Mr. Lorie had had with the case it was imperative that he should give his testimony in court. Two claims were put in of an utterly divergent character. The expenses of a commission would be far greater than if the witness came and gave his evidence in the court. No objection was raised by respondents to the postponement of the case until next term.

Dr. Greer, in his reply, said that only one claim really had been made, viz., £500. Respondents had made a good many misleading statements.

Maasdorp, J.: The applicant in this case asks for a commission to take the evidence of a Mr. Lorie at Johannesburg. It is said that Mr. Lorie's evidence is very material for the purposes of the plaintiff's suit. Mr. Lorie is an accountant who was employed in this case to go through the plaintiff's books and make up the necessary statement of his affairs. It does not appear to me that there is any reason why, in the absence of Mr. Lorie, someone else should not be employed to take the same steps that Mr. Lorie has taken to qualify himself for giving evidence in the case. But it is said that some expense has already been incurred in the employment of Mr. Lorie in his capacity as accountant, and that this expense will have to be incurred again if another accountant is now employed. It seems to me that the costs of employing another accountant will not be anything like the costs of a commission to take the evidence of Mr. Lorie at Johannesburg. If there are any other reasons which make the evidence of Mr. Lorie specially material beyond his information as gained from the books, then it might be necessary for those purposes to have Mr. Lorie here. But there are no other circumstances mentioned, and it is, therefore, only a question now whether to obviate the costs mentioned by the applicant a commission should be appointed to take the evidence in Johannesburg. If the applicant is fully convinced that he cannot proceed without the evidence of Mr. Lorie, then steps must be taken to obtain the

attendance of Mr. Lorie in court, but, upon the information that is now before the Court, it seems to me that the same evidence could be obtained by a cheaper course, and the application must be refused, with costs.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

DUMINY V. WESSELS. ( 1907.  
( Aug. 16th.

Mr. Bisset applied for provisional sentence on a promissory note for £89, made by P. J. D. Wessels, in favour of F. J. van H. Duminy, and also for interest and costs of application.

Application granted.

SMITH V. MCINNES.

Mr. Close moved for judgment under Rule 319 for an amount of £96 9s. 6d., with interest and costs.

Judgment granted for the amount.

*Ex parte* TENNANT.

Mr. Lewis moved for the cession of the articles of two articulated clerks of Mr. David Tennant to Mr. De Kock, Tennant's manager, during the principal's absence in England. He cited *Ex parte Trollope* (15 C.T.R., page 326), where the Law Society raised no objection.

Application granted.

*Ex parte* MURRAY.

Mr. Gutsche applied on behalf of Mrs. Maria Jane Murray, for leave to sue her husband by edictal citation for the restitution of conjugal rights, failing which for a decree of divorce by reason of his alleged desertion. The parties were married in 1906, and it was presumed respondent went to Buenos Ayres.

Leave was granted as prayed. Citation returnable on January 30. Personal service to be effected, failing which application papers to be published in an English daily newspaper in Buenos Ayres.

**SMITH V. IMPERIAL COLD STORAGE CO.**  
*In forma pauperis*—Two counsel assigned.

Dr. Greer applied for the appointment of a junior counsel in the matter of *Smith v. Imperial Cold Storage Company Limited*. The petitioner had been allowed to sue *in forma pauperis* and an attorney and counsel had been appointed. Dr. Greer said the case was an important one, and a number of witnesses had to be called, and it was thought necessary to have the services of a junior counsel.

The Court granted the order.

**BOTHA V. LE ROUX.**

Mr. Bisset asked for leave to remove this case to the ordinary Circuit Court at Oudtshoorn.

Order granted, costs to be costs in the cause.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

**COTTON V. ARNOLD AND CO.** { 1907.  
Aug. 19th.  
„ 31st.

**Contract of sale—Cancellation of contract—Time of payment of price—Future delivery—Measure of damages.**

*Where no time of payment is fixed in a contract of sale, the parties are presumed to have intended that the price shall be paid on delivery.*

*Where under such a sale, the vendor has delivered part of the goods without insisting upon payment, he cannot afterwards rescind the sale on the ground of the purchaser's delay in*

*payment of the price, unless such delay took place under circumstances evincing an intention on the purchaser's part to be no longer bound by the contract.*

*The measure of damages for the breach by the seller of a contract of sale of goods to be delivered in futuro is the difference between the contract price and the market price at the several periods of delivery, in the absence of evidence that the purchaser could have gone into the market and obtained another similar contract on such terms as would mitigate his loss.*

This was an appeal from the High Court of Southern Rhodesia.

In the Court below the present appellant had sued the respondent for breach of contract.

The declaration was as follows:—

1. The plaintiff is a broker and general agent, carrying on business at Salisbury. The defendants carry on business in co-partnership as auctioneers at Salisbury.

2. On or about the 19th June, 1906, the defendants agreed to sell and deliver during the month of August, 1906, to the plaintiff, at Salisbury station, 250 bags of 203 lbs. each in weight of mealies at 13s. 9d. per bag. Subsequently it was agreed that the place of delivery should be altered from Salisbury station to the Surprise Mine siding.

3. The defendants delivered 238 bags and 861 lbs. under the said contract, leaving a balance of 11 bags and 117 lbs. which it was agreed they should make good in making deliveries under further contracts hereinafter referred to, but on or about the 7th September, 1906, and before the defendants had made good the said deficiency they refused to deliver any more mealies under the said or any other contracts.

4. The plaintiff was compelled to and did purchase 11 bags of mealies on the 19th October, 1906, in the market at the market price of 18s. per bag, and thus suffered a loss of £2 6s. 9d. through defendants' breach as aforesaid.

5. On or about the 19th June, 1906, the plaintiff and defendant entered into another contract whereby the defendants agreed to sell and deliver to the plaintiff at Salisbury station, 1,400 bags of 203 lbs. each in weight of mealies at 14s. per bag, 250 bags of the said amount to be delivered in July, 1906, 350 bags in August, 1906, 350 bags in September, 1906, 350 bags in October, 1906, and the

remaining 100 bags in July and August, have delivered the same was 17s. per the place of delivery should be altered to Selukwe station.

6. The defendants delivered 1,156 bags and 177 lbs. under the said contract referred to in paragraph 5 hereof, but on or about the 7th September, 1906, the defendants repudiated the said contract and refused to deliver the balance of 243 bags and 26 lbs.

7. The market price of such mealies at the time when the defendants should have delivered the same was 17s. per bag, and in consequence of defendants' failure to deliver the said 243 bags, the plaintiff has suffered £36 9s. damages.

8. On or about the 13th July, 1906, the defendants agreed to sell and deliver to the plaintiff 750 bags of 203 lbs. each in weight of mealies at 14s. per bag, delivery to be made at the firm of Finnie and Finnie at Gwelo, 250 bags of the said amount to be delivered in August, 1906, 250 bags in September, 1906, and 250 bags in October, 1906.

9. The defendants delivered 506 bags and 131 lbs. under the said contract referred to in paragraph 8 hereof, but on or about the 7th September, 1906, the defendants repudiated the said contract and refused to deliver the balance of 243 bags, 72 lbs.

10. The market price of such mealies when the defendant should have delivered same was 18s. per bag, and the plaintiff was compelled to and did purchase 243 bags of mealies of a like kind, weight and quality at the said price of 18s. per bag, and has suffered a loss of £48 12s. through the defendants' breach aforesaid of the said contract referred to in paragraph 8 hereof.

11. On or about the 13th July, 1906, the plaintiff and defendants entered into another contract whereby the defendants agreed to sell and deliver to the plaintiff at the Giant Mine Gadzema, 1,500 bags of 203 lbs. each in weight of mealies at 14s. per bag, 500 bags of the said amount to be delivered in August, 1906, 500 bags in September, 1906, and 500 bags in October, 1906.

12. The defendants delivered 522 bags and 81 lbs. under the said contract referred to in paragraph 11 hereof, but on or about the said 7th September, 1906, the defendants repudiated the said contract and refused to deliver the balance of 977 bags, 195 lbs.

13. The market price of such mealies when defendants should have delivered same was 17s. and 17s. 6d. per bag, and the plaintiff was compelled to and did purchase 500 bags of mealies of a like kind, weight and quality in the market at 17s. per bag, and 478 bags at 17s. 6d. per bag, and has suffered a loss of £158 13s. through defendants' breach as aforesaid of the said contract referred to in paragraph 11 hereof.

14. On or about the 8th August, 1906,

the defendants agreed to sell and deliver between the end of August, 1906, and the end of November, 1906, to the plaintiff at Salisbury 2,000 bags of 183 lbs. each in weight of mealie meal at the price of 15s. 10d. per bag.

15. It was subsequently agreed on or about 17th August, 1906, that the defendants should sell and deliver before the end of October, 1906, to the plaintiff 500 bags of 203 lbs. each in weight of mealies at 15s. per bag instead of 500 bags of the said mealie meal.

16. The defendants delivered 950 bags of mealie meal before the end of August, 1906, under the said contract referred to in paragraph 14 hereof, but on or about the said 7th September, 1906, the defendants repudiated the said contract and refused to deliver the balance of 550 bags of mealie meal.

17. The market price of such mealie meal when defendants should have delivered same was 18s. 11d. per bag, and the plaintiff was compelled to and did purchase 550 bags of mealie meal of a like kind, weight and quality in the market at the said price of 18s. 11d. and has suffered a loss of £84 15s. 10d. through defendants' breach aforesaid of the contract referred to in paragraph 14 hereof.

18. The defendants failed to deliver the said 500 bags of mealies or any part thereof under the contract referred to in paragraph 15 hereof, and on or about 7th September, 1906, the defendants repudiated the said contract and refused to deliver the said mealies.

19. The market price of such mealies when the defendants should have delivered the same was 17s. per bag, and the plaintiff was compelled to and did purchase 500 bags of mealies of a like kind, weight and quality at the said price of 17s. and has suffered a loss of £50 through the defendants' breach as aforesaid of the said contract referred to in paragraph 15 hereof.

20. The plaintiff duly accepted and paid for all the mealies and mealie meal the defendants delivered under the said contracts in accordance with the same and performed all his parts of the said contract and was always ready and willing to accept and pay for all the said mealies and mealie meal to be delivered by defendants under the said contracts, and to continue to perform all his obligations thereunder, but the defendants in breach of the said contracts refused to continue to perform the same and all things have happened all times have elapsed and all conditions have been fulfilled entitling plaintiff to bring this action.

Wherefore the plaintiff claims:

1. £2 6s. 9d. damages as set out in paragraph 4 hereof.

2. £36 9s. 0d. damages as set out in paragraph 7 hereof.

3. £48 12s. 0d. damages as set out in paragraph 10 hereof.

5. £84 15s. 10d. damages as set out in paragraph 13 hereof.

6. £50 damages as set out in paragraph 19 hereof.

4. £84 15s. 10d. damages as set out in paragraph 17 hereof.

7. Interest *a tempore moræ*.

8. General relief.

9. Costs of suit.

To this declaration the defendants plead as follows:—

1. They admit the allegations in paragraph 1, and they say they are also commission agents and general dealers.

2. In regard to paragraph 2, the defendants admit the sale at the price therein stated. They say that the agreement of sale was reduced to writing in the form of a broker's note. The sale was for cash to be paid "f.o.r." Salisbury station, that is on delivery of the mealies on to the trucks of the railway at Salisbury at the defendants' cost. They deny that this contract was in any way departed from or varied. The mealies delivered under this contract was consigned to the Surprise Mine siding purely for the convenience of the plaintiff, and in no way altered his liability to pay cash on delivery at Salisbury Station.

3. As to paragraph 3 the defendants delivered 239 bags and 86 lbs. of mealies in terms of the above contract, and it was agreed that the balance should be delivered when the plaintiff asked for them. Prior to the 7th September, 1906, the plaintiff had no instructions in regard thereto and having failed to pay cash for so much as was already delivered the defendants on that date refused to be held further bound by the said contract.

4. As to paragraph 4, the defendants say the market price of mealies for cash at that date was 15s. 6d. per bag. They have no knowledge of the other allegations in that paragraph.

5. The defendants admit the agreement set out in paragraph 5, which they say was also in writing in the form of a broker's note. The terms of payment were cash on delivery at Salisbury station. They deny that the place of delivery was ever altered, and say that the mealies supplied under this contract were consigned to Selukwe purely for the convenience of the plaintiff, and that he remained liable to pay cash on delivery at Salisbury station.

6. The defendants delivered in all 1,180 bags and 160 lbs. under this contract; they admit they refused to deliver the balance.

7. As to paragraph 7, they say the market price was 15s. 6d. per bag for cash. They have no knowledge of the other allegations in that paragraph.

8. As to paragraph 8, they admit they sold 750 bags of mealies as therein mentioned and that the same were to be con-

signed to Finnie and Finnie at Gwelo, but they say this agreement was also in writing and that the place of legal delivery was Salisbury station, and that it was a term of the agreement that cash should be paid on delivery at the said station.

9. They admit the allegations in paragraph 9, and say that on delivery at Salisbury station the plaintiff refused to pay cash as was agreed upon.

10. As to paragraph 10, they say the market price for cash at that date was 15s. 6d. per bag. They have no knowledge of the other allegations in that paragraph.

11. They admit the allegations in paragraph 11, save the statement that delivery was to be made at Gadzema, but say that agreement was also in writing in the form of a broker's note and was part of the agreement set out in paragraph 9 of the declaration and subject to the same terms, and payment was to be made on delivery at Salisbury station.

12. They admit paragraph 12, and say they duly delivered the mealies therein stated at Salisbury station consigned to Gadzema, but the plaintiff refused and failed to pay cash for the same on such delivery.

13. As to paragraph 13, they say the market price was 15s. 6d. per bag for cash. They have no knowledge of the other allegations in this paragraph.

14. They admit the allegations in paragraph 14, and say the said sale was in writing and for cash.

15. They admit the allegations in paragraph 15 save that the date of delivery was November and not October. This agreement was also in writing and payment was to be made of cash on delivery at Salisbury station.

16. They admit the allegations in paragraphs 16 and 18.

17. As to paragraphs 17 and 19, they say the price of mealie meal was 17s. cash and of mealies 15s. 6d. cash, but otherwise they have no knowledge of the facts set out in those two paragraphs.

18. They deny the allegations in paragraph 20 save the allegation that the goods delivered were duly accepted, and they refused to continue to perform the said contracts.

19. The defendants say that in all the above agreements it was stipulated and agreed that cash should be paid for each amount delivered at the stated place, viz., Salisbury railway station, and it was essential to the due and proper fulfilment of such contracts that payment should be made as stipulated, yet the plaintiff in breach of his agreement never save once made payment of cash against delivery and only from time to time after they became due made smaller payments on account.

20. The defendants on numerous occasions informed the plaintiff that payments had not been made as agreed



upon, and on the 10th August, 1906, they informed the plaintiff that they refused to deliver further supplies unless due payment was made.

21. Nevertheless the defendants continued to deliver, and on September 7th, 1906, the plaintiff owed the defendants the sum of £966 9s. 1d., being arrear amounts for goods delivered.

22. The defendants were so hampered and jeopardised in their business by the aforesaid non-payment that it was impossible for them to continue the contracts, and the statements made them by, and the conduct of the plaintiff showed the defendants that he had no intention and was incapable of fulfilling his contracts on their original terms. Thereupon the defendants rightly and legally gave notice on the 7th day of September, 1906, that they declined to be held bound by, and fulfil, the contracts any further.

23. Summons was subsequently issued by the defendants against the plaintiff, and the said amount was paid in full on the 19th day of September, 1906.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

To this plea the plaintiff makes replication, and says:—

1. That in all the contracts referred to in the declaration after the same had been entered into as therein alleged the plaintiff in his usual course of business handed to the defendants broker's notes containing a note or memorandum of the particular contract or contracts.

2. Subsequently the places of delivery stated in such notes was altered at the request of the defendants and for their benefit and convenience to the places mentioned in the declaration, and the defendants undertook and agreed to deliver the said grain and meal at such places.

The plaintiff denies that he agreed or was liable to pay for the said grain or meal as alleged by the defendants or until after the same had been delivered as aforesaid.

3. The plaintiff from time to time duly paid the defendants the amounts accruing due in connection with the said contracts when the defendants had delivered the said grain or meal as agreed and the plaintiff denies that there has been any undue delay in making such payments or any breach by him of any of the said contracts entitling the defendants to repudiate and break the same as they did or any breach at all by the plaintiff of any of the said contracts.

4. And further, with regard to the allegations in paragraphs 20, 21, 22, 23 of the said pleas the plaintiff denies each and every allegation in paragraph 20 and 22, except the breach and repudiation by the defendants of the said contracts on

the 7th September, 1906, mentioned in paragraph 22. The plaintiff says that no dispute occurred between the defendants and himself until the month of September, 1906, when a dispute arose as to the quality and condition of certain mealies which the defendants had delivered at Selukwe and the plaintiff claimed from the defendants a reduction in the price of such mealies on account of their unsound condition.

5. Subsequently on or about the 6th of the said month the defendants requested payment of a sum of £823 15s. 4d., and the plaintiff thereupon informed the defendants that his books and accounts did not show that amount to be due but that he was ready and willing to pay them whatever amount was due to them as soon as they should furnish him with proper invoices and details showing the amount due.

6. On the 7th September, 1906 the defendants sent the plaintiff a letter of demand for the sum of £966 9s. 1d. The plaintiff thereupon sent the defendants a cheque for £748 for the amounts due to them not in dispute, and again informed the defendants that he was ready and willing to pay them whatever further amount were due to them as soon as such amounts were ascertained to be correct and to pay them all further moneys accruing due to them from time to time under the said contracts as soon as the same became due. The defendants returned the said cheque and repudiated as aforesaid the said contracts.

7. On or about the 10th September, 1906, the plaintiff paid the defendant a sum of £806 6s. 5d. the amount then ascertained to be due, and again informed them that he was ready and willing to pay them whatever further amounts were due to them as soon as the same were ascertained and became due.

Notwithstanding the said payment the defendants on or about the 12th September, 1906, caused the said summons to be issued for the sum of £966 9s. 1d., which the plaintiff denies was the correct amount due to the defendants at that date.

9. On the same day, viz., the 12th September, 1906, a further amount of £58 17s. 6d. having accrued due to the defendants under the said contracts the plaintiff paid the same, and on the 17th September, 1906, a further amount of £81 15s. 11d. having been ascertained by the plaintiff as being due to the defendants the same was paid by the plaintiff, together with the sum of £17 12s. 6d. the amount in dispute in connection with the unsound mealies referred to in paragraph 4 hereof.

10. Save as aforesaid and except as to admissions by defendants in their pleas the plaintiff denies the allegations of fact and conclusions of law therein con-

tained and again prays judgment in terms of his declaration.

The defendants made rejoinder and said that:—

1. They admit the allegation in paragraph 1 thereof and deny those in paragraphs 2 and 3.

2. As to paragraph 4 they admit that the dispute therein set out did take place, but otherwise refer to the allegations already made in their plea.

3. As to paragraphs 5 and 6 the defendants say that when the demand for £823 15s. 4d. was made the defendants did not include the value of the lot of mealies consigned to Selukwe station which are those referred to in the aforementioned dispute. The plaintiff alleged these mealies were unsound and the defendants offered to take them back, this offer plaintiff did not accept, whereupon defendants included their value, to wit £142 4s. 9d. in all subsequent demands, together with a sum of 9s. previously omitted. The defendants deny the other allegations in paragraph 6.

4. As to paragraph 7 the defendants admit the said payment and say the total indebtedness was then ascertained and due and there was no need of any further inquiry.

5. The defendants deny paragraph 8 and crave leave to refer to the summons when produced for the full terms thereof.

6. As to paragraph 9 the defendants admit the payment of £58 17s. 6d. as therein set out but say the sums of £81 15s. 11d. and £17 2s. 6d. were not paid until the 19th day of September, these amounts being ascertained and due when and before the first demand was made for them.

7. Save as above and save as to the admissions contained the defendants say they deny all and singular the allegations in the replication contained.

The judgment in the Court below was as follows:—

Plaintiff sues for damages for the alleged breach of what he calls six separate contracts, but I think there is much force in the Attorney-General's contention that this was one consecutive series of acts looked at always as one contract. I shall consider the distinction later on, but for the present I shall treat the transaction between the parties as one continuous whole.

Defendants admit that they contracted to sell and deliver to plaintiff certain mealies and mealie meal, but they join issue with him as to what were the exact terms of the contract, and they go on to say that plaintiff's action in the course of their dealings was such a gross violation of the terms of the contract as justified them in withdrawing from it.

Defendants' contention on the pleadings is that the contract is contained in five brokers' notes, and the Attorney-General objected to any evidence to vary these notes.

The plaintiff contends that these notes do not constitute the whole contract, but must be read subject to certain subsequent verbal agreements.

The first note is quite plain. It is for the sale of 250 bags of mealies delivered at Salisbury Station f.o.r.

These terms the plaintiff certainly did not observe.

The second note is for the sale of 1,400 bags of mealies, but no place of delivery is mentioned. I agree with the Attorney-General that without further evidence the proper interpretation of this note is delivery at Salisbury and prompt cash payment. The last term the plaintiff did not observe.

The third note which it is contended contained separate contracts contains the words "250 bags nett Salisbury station, consign to Finnie and Finnie, Gwelo," and "500 bags monthly. consign to Giant Mine, Gadzema."

For plaintiff it is contended that the words "consign to" imply a contract to deliver at the places named and to await payment until such delivery.

I am inclined to the Attorney-General's contention that without extrinsic evidence the true construction of this note is that legal delivery was to be made at Salisbury station, and payment made on such delivery. But whatever be the true construction, I find from the evidence that plaintiff was in default in payment in either case.

The fourth note was for 2,000 bags of mealie meal and is unambiguous—delivery was to be at Salisbury, and payment should have been cash on delivery. On this note the plaintiff was to a small extent in default. For 500 bags he paid promptly on delivery: 300 bags were delivered but not paid for promptly, but the payment for this was only a few days due when the contract was repudiated.

The fifth note is only a variation of the fourth, substituting mealies for a portion of the mealie meal.

This Mr Russell strongly urged was a separate and distinct contract, that in this the plaintiff could not be in default as the time for execution had not arrived, and that with regard to this contract at all events the plaintiff was entitled to succeed. I shall deal with that contention later on.

I wish now to deal with the plaintiff's version of the contract as set forth in his pleadings. He contends in effect that the contract in each case was the broker's note plus certain verbal agreements.

In brief his version is that defendants agreed to deliver the mealies and mealie meal at certain railway stations to be

named by him, he to be responsible for railage from Salisbury to such other stations, and that payment was to be made when he (plaintiff) received advice that such mealies and mealie meal had been duly accepted by his clients at such places of consignment.

This version is absolutely denied by the defendants, and it lies on plaintiff to prove this version if he wishes to succeed. For whatever was in his own mind, unless he can prove that defendants agreed to this deferred payment he has proved no *consensus ad idem*, and therefore has no contract to sue on.

In order to ascertain if defendants did agree to this it is necessary to go at some length into the history of the dealings between the parties, for in order to judge the intention of the parties at the time of entering into the contract we must not only take what they now say, but test it by their actions right through.

Defendants admit that they agreed to consign the mealies and mealie meal to such places as the plaintiff required them, but alleged that this was an entirely separate agreement for the mutual advantage of both parties, and in no way varied the agreement that cash was to be paid on delivery at Salisbury railway station. Both defendants repeatedly emphasise their view that this was to be a "spot cash" transaction f.o.r. Salisbury station.

The negotiations for the transactions now in dispute commenced on June 18th. There had been other transactions between the parties, but they do not affect this case. The plaintiff is a broker, but in this case he acted as principal. He had sold in advance large quantities of grain to various clients, chiefly mining companies, and he came to defendants to buy in order to complete his own contracts.

The next day, June 19th, the broker's notes Nos. 1 and 2, already referred to, were passed.

It is admitted that at the same time it was further agreed that defendants should consign the grain covered by these notes right through from places where they bought on the Umtali line to the stations where Cotton wished to deliver to his clients.

Each side alleges that this additional agreement was made at the request of the other. I don't think it matters at whose request it was made—it was obviously for the advantage of both parties. Defendants saved 3d. per bag on railway charges—plaintiff was saved the trouble of re-consignment at Salisbury station.

This agreement was verbal and as is not unusual in verbal agreements there is a dispute as to what took place.

Plaintiff states that he told Messrs. Arnold and Co. that he would pay on advice that the goods had reached the

place of consignment, and that he must have a reasonable time to pay.

Both Mr. Arnold and Mr. Bernstein say that nothing of the sort took place. They both insist that they plainly told Cotton that this arrangement for consigning through was not in any way to affect the date of payment, that the transaction was to be "spot cash," and payment to be made as the goods passed through Salisbury station. They say Cotton gave them to understand that he was a big buyer with unlimited cash at his disposal; he talked of buying many thousands of bags, and forced them down to bed rock prices by threatening to go behind them and buy direct from their suppliers—that they could not afford to sell at these prices except for "spot cash" that he laughed at their fears about not getting cash, and said that he had always plenty of money at the bank, and that they could have it whenever they wanted it; that on those representations they agreed to consign through.

In the middle of July defendants commenced to deliver—the first invoice for £98 17s. 7d. was presented on July 14th; the mealies covered by this invoice left Salisbury station on July 15th and reached Selukwe on the 18th. This was paid in full by Mr. Cotton's clerk on the 19th. I gather from Mr. Pollard's evidence that this was not paid in consequence of advice from Selukwe—that, he did not receive until the 27th, but that he paid it is a sort of advance to assist defendants.

On July 19th and 21st invoices for £176 2s. 1d. and £66 11s. 6d. were presented. No definite cheques for these specific amounts were ever paid, but on July 21st Mr. Cotton's clerk paid £125, as he says that was all that it was convenient to pay at the time.

With regard to this cheque, Mr. Arnold states that he had great difficulty in getting it out of Pollard; that Cotton had promised him the money would be paid; that Pollard said a cheque for more would not be honoured by the bank, and he was compelled to accept what he could get. It will be noted that up to this point the action of the parties are consistent with Arnold and Co.'s contention that money was to be paid on delivery of invoices. We have not yet heard the contention put forward later that plaintiff was not to pay till he had received advice from the mine—Pollard merely says he has not the money to pay, and Cotton was out of town.

Consignments continued to go through, and invoices were sent on July 27th and 30th. With regard to the latter, it is alleged that Cotton never received it. On the evidence I think it probable that this invoice, as also one for August 11th, was not seen by Cotton though sent by defendants. I think it must have been somehow mis-

laid in Cotton's office. But I cannot acquit Cotton of blame in the matter. In his letter to Selukwe G.M. Co., September 8th, he says he considers these mealie deals to have been done in a most unbusinesslike manner, and to a certain extent I agree with his words, though not in the sense in which he meant them to be understood.

If instead of paying vague amounts from time to time on account he had—as I consider it was his duty to do—paid specific cheques against specific consignments, the absence of these invoices would at once have been detected. However, defendants have not made this a cause of quarrel, and have been prepared to base their case on the supposition that these invoices reached Cotton on September 7th, instead of on the due dates. The amounts were not sufficiently large to alter the principle for which they are contending.

No further payments were made until a cheque for £150 was paid on account on August 8th.

There is a serious disagreement as to the circumstances under which this cheque was paid. Cotton says that Bernstein came and asked for money—his memory is rather weak as to whether he dealt with Arnold or Bernstein, and as to whether conversations were direct or over the telephone—as a matter of fact Bernstein was away at the time. Cotton says that by his books at that date he owed defendants about £50, but it appears that he did not credit defendants until he received advice from his mines or I am inclined to think from some later evidence, until he actually received payment from his mines. According to invoices delivered, he owed defendants at that date over £200. He states that he offered Bernstein or Arnold, or whoever it was, £50. More was asked for. He was overdrawn at the bank. But on defendants' assurance that a certain consignment of Finnie and Finnie, Gwelo, had gone forward, he gave the cheque for £150, on defendants' promise to send the rail note, as he had an arrangement with the bank, and Finnie and Finnie, that on production of the rail note he could draw against consignments forwarded to the latter—that the note was not sent, and he compelled defendants to hand over the cheque. This is, to a certain extent, corroborated by Pollard. Arnold, for he was the partner who interviewed Cotton on this occasion, gives a different version. He states that on August 7th he by telephone demanded money—that Cotton said he would come and see him—that later Cotton came to his office and talked about taking up further options—that he, Arnold, suggested first paying for what he had received—that Cotton promised a cheque the next day—that the next day, August 8th, he, Arnold, went to Cotton's office about 11 a.m. to ask for the cheque—

that Cotton offered £50—that he, Arnold, pointed out that over £200 was due. Cotton said: "You are in a great hurry for your money," and he mentioned certain mines that owed him money. I, Arnold, said I had nothing to do with his mines, and wanted his cheque. I said, "You will get no more grain unless you pay up." Then Cotton gave the cheque for £150, but subsequently telephoned to have it held over. Arnold held it over till the 10th, when it was paid. He states he was compelled to hold it over as he was told it would not be paid. Arnold denies absolutely that there was any talk about drawing against Finnie and Finnie's rail note. The consignment for Finnie and Finnie did not go through until August 11th, therefore on August 8th there was no rail note to draw against, and it was impossible for a business man like Arnold to have promised to deliver it that day. The invoice for this consignment was delivered to Cotton on August 11th or 12th. Arnold's story seems to me the more credible one.

On August 11th Bernstein returned from Johannesburg. On the Monday morning, the 13th, he asked by telephone for the money—he got none, but was promised a cheque next day. Consignments continued to go forward, and Messrs. Arnold and Bernstein say that in each case they asked for money. They say that their practice was to send over the invoice, and later in the day to telephone for a cheque. No further payments were made until August 22nd, when a cheque for £200 was handed to defendants' clerk, Lover, who had been sent to ask for the money. Bernstein states he, Cotton, was promising us cheques from day to day.

About this date 500 bags of mealie meal were delivered at plaintiff's request to Wightman and Co. These were promptly paid for by cheque on August 23rd, and a small cheque for railage was also paid that day. A good deal of grain and meal was now going forward.

On August 24th an important conversation took place; I shall take the evidence of it from my note book:—

*Cotton*:—"Later in the month Bernstein came and asked me for money, but he did not press me. On the 23rd Bernstein may have asked for the money. On the 24th I paid two cheques, £150 each. I paid £150 in the morning, and then I received advice from the Giant Mine that they had received 487 bags, for which I owed £322. I then sent him another cheque for £150. The first £150 was an advance."

And later on:

"August 23rd, I told Bernstein that he owed us money."

*Pollard*:—"August 23rd—Arnold and Co. asked for money. I think by



telephone. I said to Arnold, we didn't owe them money. Two cheques on August 24th. . . .between times of sending them the mail arrived, and we got advice of further delivery of grain at Giant Mine."

*Bernstein:*—"Returned from Johannesburg August 11th—found money was owing by Cotton—on morning of August 13th I telephoned over—can't say who answered—we didn't get any money. A cheque was promised next day. A week or so later I went over. About that date our heavy dealings began. I went over to Cotton and asked for cheque—could not get one—he promised one the next day. On morning of 24th he telephoned that he had received money—he asked me to send for cheque—he sent me cheque for £150—he had given Arnold £200 on the 22nd, and he had paid for Wightman's mealie meal £395, and for railage £36. On 23rd there was still a large amount owing. £496 5s. 11d. was due to us, omitting two invoices said to be lost. Immediately I received cheque I rang up Cotton and asked what he meant by sending such a sum when he knew that a much larger amount was due. and I threatened then to stop supplies unless more money was sent. He asked me to send over for another £150. I sent over and got it."

*And in cross-examination:*

"August 24th, before Cotton sent me the first cheque he telephoned that he had received over £300 from Giant Mine. I sent my own messenger for the first cheque."

By that morning's mail Cotton had received not merely advice of delivery at Gadzema, but the actual cheque from the Giant Mine sent in reply to an urgent wire of his on August 22nd.

Cotton and Pollard say that Messrs. Arnold and Co. never demanded or pressed for money though they asked for it. I do not know what meaning Messrs. Cotton and Pollard attach to these words, but my impression of the evidence is that Arnold and Co. were most persistent duns.

After the 24th still more consignments went through, but nothing was paid except a cheque for £50 on account on August 30th, wrongly dated August 12th.

Plaintiff states that up to this point the relations between the parties had been perfectly amicable, except for the dispute on August 8th re Finnie's rail note, which I have already referred to, and a complaint about the non-forwarding of a certificate of origin with certain mealies, consigned to Selukwe. (I do not know if he considered Messrs. Arnold and Co.'s persistent dunning, which I referred to above, as quite amicable.)

The matter of the certificate was this:—It had been agreed that in order to obtain the cheaper rail rate South African grown mealies only should be supplied. On August 1st the Selukwe G.M. Co. wrote that the requisite certificates of origin had not been sent with a certain consignment. Bernstein says the Selukwe people might well have taken them, and subsequently obtained a refund from the railway, and Arnold remarked that as the mealies came from Rusape they might well have been accepted as South African, however the matter was set right before the final breach between the parties, and although Cotton in a letter to Selukwe G.M. Co. on September 8th says that Arnold and Co. have made these mealies a cause for breaking their contracts there is no evidence to support it. Arnold and Co. never by any evidence before me made this question a pretext for breaking their contract. Their reason for refusing supplies has been plainly given and always adhered to, viz.: the neglect or refusal of Cotton to pay promptly on delivery of invoices.

I understood Mr. Cotton to contend in Court that the final rupture between the parties was due to certain alleged unsound mealies, delivered to the Selukwe G.M. Co. early in September.

On September 4th Cotton intimated to defendants that he had received advice that Selukwe G.M. Co. refused to accept certain mealies alleging they were unsound. Several letters on this subject passed between the parties between September 4th and September 7th. Cotton alleges that this dispute was the reason why defendants repudiated the contract and refused to deliver any more grain. Bernstein denies absolutely that this had anything to do with their refusal to deliver any more, and gives evidence as follows:—

"He said he couldn't pay because he hadn't got it. He puts us off from day to day. We continued to supply till August 29th. I called up Cotton and asked for money. He said he had no money—had received money from his mine. I told him we had nothing to do with his mine, and if he did not pay up at once we should refuse to deliver any more grain. I said we wanted the money and must have it. He replied, 'You will have to wait.' I replied that unless he did pay we should refuse to deliver any more grain. Then he said, 'Do you really mean you won't deliver any more grain.' I replied, 'Not unless you pay up at once.' This was at end of August or beginning of September. We had not then heard that Selukwe mealies were unsound. We refused to deliver any more."

This dispute regarding the Selukwe mealies was considering the dealings be-



tween the parties not a matter of great importance.

350 bags of mealies consigned to Selukwe station were reported as unsound. Cotton asked defendants to either consent to a reduction of 1s. per bag or to take back the mealies, supply others, and pay for cartage to and fro between the station and the mine. Defendants replied that they were quite willing to accept re-delivery at Selukwe station, but objected to pay the cartage as their point of delivery was the railway station. The mealies had not as a fact been removed from the station, but Cotton was under a misapprehension on this point. Cotton accepted the reduction of 1s. per bag from the mine. The defendants held him bound to his original price. The amount in dispute was therefore about £17 10s., as Mr. Cotton's attorney subsequently remarks, "Not worth the cost of a High Court action," and it is alleged that for this dispute the defendants repudiated the contract.

Whilst this dispute was proceeding, and before it had reached an acrimonious stage, defendants wrote a letter as follows:—

"We hereby request an immediate settlement of the enclosed account due for grain delivered. Our arrangement being for cash against delivery from time to time cheque per bearer will oblige."

In the account annexed to this letter the 350 bags then in dispute were not included. The account is dated September 4th, but the covering letter is dated September 6th, which it is admitted was the date on which it was sent and received. Mr. Lover took over this letter but returned without a cheque.

The next day defendants having heard that Cotton had sold the unsound mealies at reduced price, write:—"As you have seen fit to sell them we hold you responsible for the full amount. We now enclose further account including the 350 bags above referred to, totalling £966 9s. 0d., and must ask you to settle same forthwith, failing which we shall place the matter in the hands of our solicitors."

The correspondence is then continued by the attorneys on each side. Vigne and Honey on behalf of Arnold and Co., write a letter of demand. Mr. Nicholls, for Cotton, makes some proposal, but as it is said to be made "without prejudice," I can take no notice of it. Vigne and Honey reply: "Our clients stand by our letter to Mr. Cotton, and summons will now be issued." Mr. Nicholls replies on September 10th "enclosing cheque for £806 6s. 5d." This cheque had originally been dated September 8th, and made out for £748 4s. 8d., and in this form had been refused. It was now sent with the date and

amount altered. This letter contained some important passages as showing the state of mind of the parties. With regard to one item Mr. Nicholls writes:—"This debit my client cannot yet accept as he only received invoice for same on 7th instant, and has only now invoiced it out himself." This refers to one of the invoices said not to have been received on due date. With regard to another item the letter states: "This my client cannot yet accept as a debit as the Surprise write him under date the 6th instant, that this consignment has not yet arrived." At close of the letter "my client further instructs me to say, the arrangements concluded are set out in the brokers note." Vigne and Honey accept the £806 6s. 5d. on account, and repeat that the contract was for cash against delivery from time to time, and allege that amounts are long overdue. A further cheque for £58 17s. 6d. is sent for amount of delayed invoice less railage, and a further letter from Mr. Nicholls states, "My client has never sought to evade any of his liabilities, but naturally objects to meet them before they become due. Further cheques will be paid as they fall due." On September 17th Mr. Nicholls sent cheque for £99 8s. 5d., waiving the dispute for £17 odd for damaged mealies at Selukwe. This liquidated Arnold and Co.'s demand.

The above summarises the history of the case as given by each side. Messrs. Arnold and Bernstein were minutely cross-examined, their letter books ransacked, their dealings with other people gone into, and every attempt made to find a flaw in their evidence, but they explained every point to my perfect satisfaction.

On the evidence, therefore, I cannot find that defendants entered into any such contract as is alleged by plaintiff in his pleadings. On the contrary, I am satisfied that defendants agreed to sell and deliver solely on condition that payment was to be "spot cash" on certificate that the grain had passed through Selisbury station. I cannot know what was actually in Mr. Cotton's mind, but the evidence seems to lead to the conclusion that he also at first accepted that view of the contract, as witness payment of the first invoice before receipt of any advice from Selukwe (I reject altogether the statement about advances for mutual assistance). It seems that it was only because he had not the money that he failed to pay promptly, and put off defendants until he could get money from his buyers. Compare the prompt payment for mealie meal delivered to Wightman and Co. in this town, for which he was probably paid promptly with the delay in connection with consignments to distant places, and in particular the payment made on August 24th. I do not think Mr. Cotton was quite candid on this point. He

stated in Court that on the morning of the 24th he received advice by mail that certain grain for the Giant Mine had been delivered at Gadzema station. The facts are that on August 22nd Cotton sent an urgent wire to the Giant for a cheque, and the same day—August 22nd—the secretary of the Giant Mine posted him a cheque for £377, and it was therefore the actual cash and not advice of delivery that Mr. Cotton received by mail on the 24th, and even then he did not pay in full. Mr. Cotton says he could have paid Arnold and Co. at any time—that he could have drawn on his clients—that the mines would have financed him. This is hardly consistent with his correspondence—see wires to Giant August 22nd, to Strathmore Selukwe, and Surfeit Selukwe of September 4th, they are urgent demands for cheques. His letter to Finnie and Co. of September 8th says that the bank refuses to discount any more bills on them, and they must make arrangement so that he can pay his suppliers. In his letter to Selukwe G.M. Co. of September 8th he says they could have got delivery "and so have paid for them, in which case I could have paid Arnold." Evidence is given that he had an arrangement with Wightman and Co., who would have been prepared to finance him at a price. He did not make any use of this arrangement. I can only presume that he did not wish to pay the price demanded, and preferred to keep defendants waiting for their money.

In my opinion, therefore, plaintiff has failed utterly to prove the contract set up in his pleadings, and I think that alone entitles defendants to absolution from the instance.

But Mr. Russell has argued in effect that there was some contract, and whatever the contract was the defendants broke it by stopping delivery. I doubt whether he is entitled to set up one contract in his pleadings, and then when an entirely different contract is proved to turn round and say, "Well, if you didn't break the contract I allege you broke the one that has been proved." That was in effect his argument when he said, "Even on defendants' own version of the contract they had no right to stop delivery."

But as he has urged this I shall say at once that in my opinion upon the facts I find proved defendants had every right to stop further delivery.

Mr. Russell relied on the Cape case of *Attwell v. Logan* (3 J., 107) and *Mercy Steel and Iron Co. v. Naylor, Benson and Co.* (L. R. 9 App. Cases, 434), and upon an unreported judgment by myself in 1896 in the case of *Willoughby's Consolidated v. Culverwell and Matthysen*.

I quite agree with him that if defendants had been sued on the contract that I find proved for failure to deliver it might not have been sufficient for them

to set up one or perhaps even two or more delays in payment by Cotton. But I think the rule governing these cases is best laid down by Lord Coleridge, C.J., in *Freeth v. Burr* (L.R. 9 Com. Pleas, p. 208) where, at page 213 of the report, he says: "The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

I am satisfied that the acts and conduct of Mr. Cotton, especially his refusal to pay promptly, which I find to have been of the essence of the contract, evinced an intention to be no longer bound by the contract as understood by defendants, and as I find proved to have been agreed to, and that entitled defendants to repudiate the contract on their part and to stop further delivery.

As to the small question of the 500 bags of mealies which Mr. Russell urged was a separate contract, I am of opinion that it was part of the whole transaction and must fall with the rest. But if it can possibly be said to be a distinct contract separable from the others, then I say that here also Mr. Cotton by his acts and conduct had practically told defendants that he did not intend to pay promptly, and, therefore, they were entitled to refuse to deliver.

In my opinion, taking the case from any point of view, defendants are entitled to absolution.

JUDGMENT:—Absolution from the instance, with costs.

Mr. Schreiner, K.C. (with him Mr. Benjamin, K.C.), for appellant. Mr. Uppington (with him Mr. Louwrens) for respondents.

Mr. Schreiner said that on the first three contracts the evidence was that certain portions of the mealies were delivered, but on none was the whole amount delivered. The parties differed as to the point when payment was legally due, but that point was not determined in any of the contracts. There was no such phrase as "spot cash" Salisbury or statement as to when payment was to have been made.

[De Villiers, C.J.: I suppose the rule would be where the contract was silent that payment should take place on delivery?]

But in that case payment is not so much of the essence of the contract as to make payment for one parcel a condition precedent before delivery of the other parcels. Defendants' remedies would be to sue for payment. He referred to *Attwell v. Logan* (3 J., 107) and *Hiddling v. Schade* (16 S.C., 128).

[De Villiers, C.J., referred to the case of *Sadie v. Standard Bank*.]

Mr. Schreiner said that in Sadie's case the decision went upon the ground that the man never intended to part with his property. The goods in this case passed through Salisbury in sealed trucks, and no investigation could take place at Salisbury. He referred to the case of

*Greenshields v. Chisholm* (3 J., 220), which was not cited in the Court below, and where the contract was very much like the one in question. Counsel then proceeded to discuss the evidence given before the Court below, and was asked by the Court to confine himself to the documentary evidence.

[De Villiers, C.J.: Do you contend that plaintiff was not bound to pay till the goods arrived at their destination?]

Mr. Schreiner replied in the affirmative. The learned judge seemed to have taken f.o.r. to include payment as soon as the goods were on rail. There was nothing in the contract to say that payment had to be made immediately the goods were on board at Salisbury. He referred to the *Mersey case* (L.R. 9, A.C. 434, and 51 L.T., 637), *Freeth v. Burr* (L.R.G.C.P., p. 208). Plaintiff paid up everything on September 17, and called on defendants to go on delivering, which they did not do. Mealies had in the meantime gone up in price. Defendants said, "Because you have not paid promptly in the past, therefore we shall not deliver on any of the other contracts providing for future delivery." But plaintiff had never repudiated the contract or done anything that went to the root of the matter. Defendants should have tested the matter by tendering delivery on any one of the other contracts.

De Villiers, C.J., suggested that there was another way of testing the matter, namely, by claiming back the goods for which plaintiff had not paid.

[Buchanan, J.: Would that cancel the contract?]

Mr. Schreiner: Not the future contracts. We set out five contracts in the declaration, and the learned judge considered them as one. Continuing, he said that delivery was to be of so much every month, and failure to pay after one delivery did not entitle the sellers to cancel the contracts as regards all deliveries. There was nowhere anything to show that time was of the essence of the contract. If a man honestly believed his contract to mean a certain thing and the other party believed it to mean something else, then if it was not a matter that concerned the essence of the contract the erroneous view would not justify a termination of the contract, and that is where the learned judge—he submitted with all respect—went wrong. He cited the *Rimney Railway Case* (93 L.T., p. 112), where all the English cases were discussed; *Voet* (19, 1, 21), *Leake* (on Contracts, p. 461), *Sadie v. Standard Bank* (7 J., 87), *Quirks' Trustees v. Assignees of Liddle* (3 J., 322).

Mr. Upington said that there were three main issues to be determined. (1) What was the contract between the parties? (2) Had that contract been performed by the plaintiff? And, if not, (3)

whether the acts and conduct of the plaintiff amounted to an intimation to the defendants that he repudiated the contract as it stood? With regard to (1), the delivery was to be at Salisbury. In approaching the question of what the contract really was, it was necessary to see what the position taken up by the parties in the pleadings was; outside the pleadings the Court would not go. He said that the contract was set out in the brokers' notes plus subsequent verbal agreements; defendants said in brokers' notes only. The learned judge in the Court below found the alleged oral additions not proved. The brokers' notes meant that payment and delivery had to be as far as possible simultaneous. He distinguished *Sadie's case*, and referred to *Greenshields v. Chisholm*.

De Villiers, C.J., asked if a misunderstanding on an immaterial point gave a right to repudiate—a misunderstanding that would not go to the root of the contract.

Mr. Upington replied that it all depended what was meant by a circumstance that would go to the root of the contract.

[De Villiers, C.J.: Did not your clients treat it as immaterial by not insisting on payment before the goods left Salisbury?]

Mr. Upington: They could have insisted, but with regard to the first contract the plaintiff paid up promptly, and later on the difficulty arose through defendants' construction of the contract.

He relied upon plaintiff's refusal to take the goods unless delivered at the mines. He referred to *Attwell v. Logan*.

[De Villiers, C.J.: The parties did not consider the matter of the payment as of very much importance, as they did not put it in the contract. The contract was of so much importance to the plaintiff that he would have entered into it even if it stipulated that payment should be made on delivery at Salisbury?]

But there is the other side of the question, that of the defendants, and they say plaintiff was allowed to buy the mealies at bedrock prices because the payment had to be made against delivery at Salisbury. It was quite certain that the invoices were sent in promptly. It was not necessary to say that plaintiff repudiated the contract; he refused to perform it, and defendants could not go into his motives. Whether the refusal was *bona fide* or not the result was the same to the defendants.

[Maasdorp, J.: Did you at any time say to the plaintiff, "If you insist in your view of the contract then we stop"?]

Mr. Upington said his clients were not in law bound to do that. He cited *Withers v. Reynolds* (2 B. and A., 882) and *Bloomer v. Bernstein* (L.R. 9, C.P. 588).

Mr. Schreiner, in reply, referred to Pollock on Contract, 7 ed., pp. 266, *et seq.*

*Cur. Adr. Fult.*

*Postea* (August 31st).

De Villiers, C.J.: The plaintiff instituted his action in the High Court of Southern Rhodesia for damages sustained by him by reason of the defendants failing to deliver to him certain mealies and mealie meal, which had from time to time been purchased by him from them. The contracts of sale were in the form of brokers' bought notes signed by the plaintiff and by him delivered to the defendants. In four of these notes delivery was required to be made at Salisbury Railway Station, and on the face of two of these it appeared that such delivery was required for the purpose of consignment to mines away from Salisbury. In one of them the place of delivery was not mentioned, but the plaintiff admits in his declaration that delivery was to be made at Salisbury Station—although he adds that it was subsequently agreed that the place of delivery should be altered to Selukwe Station. Two of the notes were dated 19th June, 1906, the third was dated 13th July, 1906, the fourth 8th August, 1906, and the fifth 17th August, 1906. The course of dealing in fulfilment of the contracts was for the defendants to deliver invoices to the plaintiff on the goods arriving at Salisbury Station, and thereafter to apply to the plaintiff for payment, but on no occasion was payment demanded as a condition of delivery at or consignment from Salisbury. "It was foreseen," said one of the defendants in his evidence, "in making a contract that Cotton (the plaintiff) would not see mealies as they passed through. We agreed that all shortage and damage should be made up on future consignments. Cotton knew we were getting grain down the Umtali line. Only once or twice did we post the invoices. Mr. Lover, our clerk, sometimes took them over; usually our head boy took them." Upon receipt of these invoices, the plaintiff would pay the whole or part according as he had funds in hand or had advices that the mealies had been received in good condition by the consignees to whom they had been forwarded by the defendants. The balances in favour of the defendants gradually increased, and although the plaintiff was continually pressed for payment, he never kept up in his payments with the quantities appearing from the invoices to have been forwarded. I do not, however, find any evidence that the plaintiff ever repudiated any of the contracts. To prove such repudiation the defendants' counsel relied, among other things, upon the evidence given by the plaintiff himself,

where he says: "I said to Arnold (one of the defendants) I would pay as soon as I had proof of delivery at the mines—but I don't mind advancing you money on what you say has gone forward." The fact that the plaintiff wished to treat the money so paid as advances cannot be regarded as a repudiation of the contract even if, according to the true construction of the brokers' notes, payment had to be made on delivery at Salisbury. Quite independently of his view that payment should be made on delivery to the consignees, he would naturally not wish to bind himself by payments made before he could possibly know whether the mealies had arrived in proper quantity and in sound condition. He certainly was entitled to better proof of arrival at or despatch from Salisbury than the defendants' invoices. In point of fact, disputes did from time to time arise as to whether the invoiced quantity had been received, and as to the condition of those actually received by the consignees. Early in September a correspondence passed between the parties as to 350 bags of mealies alleged by the plaintiff to have been delivered at Selukwe Station in a weavilly condition. On the 6th of September the defendants wrote: "As the point of delivery was Selukwe Station, you must either accept the mealies at the original price or return them to us at Selukwe Station." On the same day the plaintiff said in reply: "Under the circumstances, I have given instructions that I will sell the mealies to the mine at the reduced price of 17s. 6d. per bag, and shall debit you with the 1s. per bag that I have lost from the inferior mealies you have supplied me with." On the 7th September the defendants wrote: "As you have seen fit to sell the 350 bags of mealies we hold you responsible for the full amount. We now enclose further account, including the 350 bags above referred to, totalling £966 9s. 1d., and must ask you to settle same forthwith, failing which we shall place the matter in the hands of our solicitors." On the same day the plaintiff, in answer to a letter from the defendants enclosing an account of September 4, 1906, wrote in reference to two items: "We have never received invoices for the above," and as to a third item appearing from the account to have been delivered at the Surprise Mine: "This has not been received by the Surprise, as per their letter which we received to-day. Kindly prove delivery, or give us original rail notes. On receipt of the above details we will send you a cheque for what is due to you." This letter would seem to show that, whatever might be the plaintiff's opinion as to his obligation to pay on arrival of the mealies at the Salisbury Station, he was prepared to pay on being satisfied by the rail notes



that the requisite quantity had been forwarded from Salisbury Station to the mine. On the same day, however, the defendants' attorneys wrote to the plaintiff as follows: "Our clients instruct us to intimate to you, as you have failed in keeping your agreement to pay cash against delivery from time to time, they will not deliver further grain to you, and consider the contract at an end." A further correspondence followed between the attorneys of the respective parties, but after one of the parties had given definite notice that he considered the contract at an end, the further correspondence does not throw much light upon the real issue between them. Within two days after the defendants had put an end to the contract the plaintiff paid the full amount due for the goods already delivered, and he then instituted his action for damages for non-delivery of the remainder.

The learned Judge in the Court below held that the plaintiff had failed to prove the contracts set up in his pleadings, that it was one of the terms of the contracts that the plaintiff should pay promptly on arrival of the goods at Salisbury Station, that this condition was of the essence of the contracts, that the acts and conduct of the plaintiff, especially his refusal to pay promptly, evinced his intention to be no longer bound by the real contracts, and that consequently the defendants were entitled to repudiate the contracts.

In regard to the question whether there is a variance between the contracts, as alleged in the declaration and the contracts as actually proved, there is considerable force in the argument as to those goods which the plaintiff would have no opportunity of inspecting at Salisbury, that the parties might fairly be considered to have intended that payment should be made at the places where the goods were to be delivered for acceptance. On the whole, however, I consider that, in regard to those notes in which Salisbury Station was mentioned as the place of delivery, the defendants were entitled to demand payment upon such delivery, even although the goods were consigned to places beyond Salisbury. In this view of the case there certainly was a variance in respect of the contracts embodied in the first and third notes, and the judgment of absolution from the instance, in so far as it affects the counts in the declaration relating to these contracts, will not be disturbed.

In the second note no place of delivery was mentioned, but, in point of fact, the mealies were sent to Selukwe Station, and, as already pointed out, one of the defendants himself referred to that station as "the point of delivery." It is true that the plaintiff, in his declaration, admits Salisbury to be the

place of delivery originally agreed upon, but that admission is coupled with the statement that it was subsequently agreed that the place of delivery should be altered to Selukwe Station. As Salisbury was not mentioned in the note as the place of delivery, the Court is of opinion that, having regard to the actual dealings of the parties, they must have intended Selukwe to be the place of delivery of the mealies bought under the second broker's note.

In regard to the fourth and fifth notes, it is common cause that delivery was to be at Salisbury. On the fourth note the plaintiff was, as the learned judge held, to a small extent in default. For 500 bags he paid promptly on delivery; 300 bags were delivered, but not paid for promptly, but the payment for them was only a few days due when the defendants repudiated the contract. Under the note, delivery had to be made to the end of November. Under the 5th note, delivery had to be made between the 17th August and end of November, and the contract was repudiated before the time had arrived for the execution of the bulk of the order.

The important question then arises, whether the plaintiff's undoubted delay in paying for some of the parcels as they arrived at the places of delivery legally justified the defendants in repudiating all the contracts, and refusing to deliver any more mealies or mealie meal. According to Voet (19, 1, 21), the non-payment of the price of goods sold is not, in the absence of express agreement, a ground for dissolution of a contract of sale and restoration of the goods already transferred by delivery. The proper remedy, he says, is to compel the purchaser to perform his part of the contract, but I do not understand him to go so far as to say that where a purchaser evinces a determination to repudiate the contract, the seller is bound to deliver such of the goods sold as have not yet been delivered to the purchaser. As was pointed out in *Wolff v. Bruce* (7 Juta, 130), Voet refers in this passage to the case in which the thing sold has been delivered. "Where it has not been delivered," it was said in that case, "the absolute refusal of the purchaser to accept it in terms of the contract would justify the seller in treating the contract as at an end." And even where there has been delivery, if the sale was for cash, the vendor may assert his right to the ownership of the goods within the time allowed by law (see Voet, 19, 1, 11, and 12, and *Sadie v. Standard Bank*, 7 Juta, 87). Where under a contract of sale for cash, part of the goods only has been delivered, the seller is quite justified in refusing to deliver the remainder until he has received payment for what he has delivered, and he may even, failing payment,



re-claim the goods within ten days after delivery, but he has no right to cancel the contract unless the delay in payment had taken place under such circumstances as to evince an intention on the purchaser's part no longer to be bound by the contract. In this respect there appears to me to be no substantial difference between the law of England and the law of Southern Rhodesia. In the case of *Attwell v. Login* (3 Juta, 107), the English cases of *Fretwell v. Burr* (L.R. 9, C.P. 268), and *Mersey Company v. Naylor* (L.R. 9, A.C. 434) were not cited, but I take it that the law as laid down by the Supreme Court is quite in accord with these English cases.

A person may repudiate his contract in express words, as the defendants did in the present case, or he may evince his intention to repudiate by his acts and conduct, and the question is whether the plaintiff's acts and conduct before the 7th of September evinced an intention on his part no longer to be bound by his contracts. It was clearly his interest to abide by the contracts, for the price of mealies was rising, and he had effected sales which he wished to complete by delivery. He had, however, himself to deliver mealies and mealie meal of sound quality and in proper quantities, and was anxious to be assured that the goods sent on by the defendants to his customers were of the desired quality and did not fall short of the proper quantity. The mere fact, therefore, that he insisted upon treating any payments made by him as advances does not evince any desire to repudiate. It is, no doubt, quite true that at times the delay in payment was due to the plaintiff not having the funds immediately in hand, but it is not suggested that he was in insolvent circumstances, and when early in September he was pressed for payment he had no difficulty in paying for the goods already supplied. The defendants could have protected themselves by refusing delivery of any parcel without simultaneous payment of the price of such parcel, and the plaintiff might well have supposed that, as the defendants did not insist upon his fulfilling his obligations to the letter, his delay in payment would not afterwards be regarded as evincing a desire to repudiate his contract altogether. If it be correct, as the learned judge held, that cash payment on delivery was of the essence of the contract, the defendants themselves did not so treat it, for they sent the goods away from Salisbury without insisting upon previous payment. The broker's notes say nothing whatever as to time of payment, but I quite agree that the vendor was not bound to deliver without cash payment. In one sense, no doubt, time is of the essence

of every executory contract, for if a party to any contract delays in performing his part under such circumstances as to show that he is evading the contract altogether, the other party is not bound to fulfil his own obligations under the contract. Where, in a contract of sale, no time is fixed for the payment of the price, the presumption is that the parties intended cash to be paid on delivery, but if the vendor delivers part of the goods without payment of their price, he cannot afterwards cancel the sale merely because the price was not paid on delivery. Where there is a further delay in the payment of the price, the vendor can only cancel the sale if it can fairly be inferred from the acts and conduct of the purchaser that he no longer considered himself bound by the contract. Holding, as the Court does, that no such intention can be inferred from the acts and conduct of the plaintiff, the Court is of opinion that he is entitled to damages for the defendants' refusal to deliver the remainder of the goods sold under the second, fourth, and fifth contracts. No evidence was given on behalf of the defendants that the plaintiff could have gone into the market, and obtained contracts for the purchase of mealies and mealie meal for delivery at the dates mentioned in the broker's notes, or on such terms as would mitigate his loss. It is fair, therefore, that the measure of damages should be the difference between the contract prices and the market prices at the several periods of delivery. The plaintiff has given evidence of the prices actually paid by him in the purchase of grain to supply his customers in consequence of the defendants' breach of contract, and the defendants' counsel has not seriously disputed the correctness of the amounts claimed by the plaintiff as damages. On the second contract the damages amount to £36 9s., on the fourth £84 15s. 10d., and on the fifth £50, making a total of £171 4s. 10d. The appeal will, therefore, be allowed to this extent that judgment will be entered for the plaintiff for £171 4s. 10d., with interest *a tempore morae*, and with costs in this Court, and in the Court below. There will be absolution from the instance in respect of the first, third, and fourth claims in the declaration. I may add that my brother Maasdorp concurs in this judgment.

Mr. Justice Buchanan concurred.

[Appellant's Attorneys: Findlay and Tait; Respondents' Attorneys: Van Zyl and Buissinné.]

# SUPREME COURT

## FIRST DIVISION.

[ Before the Hon. Mr. Justice MAASDORP. ]

ROSSOUW V. RANER.

1907.  
Aug. 20th.  
" 21st.  
" 22nd.

This was an action for the recovery of a debt of £225, which the plaintiffs (Daneel G. Rossouw and Son) alleged was due to them from the defendant Raner. The declaration stated that on or about December, 1906, defendant negotiated to sell to the plaintiff certain premises, the property of the defendant, situated in Vandeleur-street, Cape Town. He entered into an oral agreement with the plaintiff, whereby he agreed that if the plaintiff purchased the said premises he (the defendant) would be bound without remuneration to collect the rents of the said premises, and to pay to the plaintiff for and in respect of such rents a fixed sum of £45 per month for the period of two years from January 1, 1907. Thereafter the plaintiff purchased the premises from the defendant, and duly executed a written guarantee in terms as aforesaid. All the conditions had been fulfilled necessary to entitle the plaintiff to claim the sum of £225, being at the rate of £45 per month for the five months ending May 31.

Defendant, in his plea, stated that plaintiff, according to the agreement had to effect certain repairs to the house, but failed to do so, with the result that some of the properties could not be let. By this he suffered loss to the extent of £50 12s. The properties were sold to the plaintiff for £6,250, and on the same day the plaintiff sold, on behalf of his son, to defendant's son, a certain farm situate in the Malmesbury district for £5,500, the farm being valued at £5,000, and the movables at £500. It was agreed that the difference in the price between the property in Cape Town and the farm and movables (£750) should be paid in cash, and that the £5,500 balance should be paid by transferring and delivering to the defendant's son the aforesaid farm and movables. Defendant states that in violation of the agreement there was due in respect of the non-delivery of movables a sum of £297 1s., caused by the removal of certain vats necessary for pressing grapes. He admits the liability of £225 claimed by plaintiff, but is entitled to a set off against this amount of £50 12s., £297 1s., and £138. This was his claim in reconvention.

Plaintiff, in replication, admitted paying the sum of £750. It was his son Rossouw, jun., who sold the farm and movables to defendant's son by a broker's note signed by both Rossouw, jun., and Raner, jun. Certain of the movables were removed by mistake to the value of £83 19s., and that sum was tendered to defendant, but it was refused, and although denying the liability in reconvention, he is willing to set that amount off his (plaintiff's) own claim.

Mr. De Villiers, with him Mr. Van Zyl, was for the plaintiff; Mr. Burton, K.C., with him Dr. Greer, was for the defendant.

Mr. De Villiers intimated that his learned friend might like to lead evidence at this point.

Mr. Burton agreed.

Nathan Raner, the defendant, said he was a builder and contractor, residing in Cape Town. He had some negotiations with Mr. Rossouw for the exchange of some property in Cape Town. In connection with this, plaintiff came into Cape Town to inspect the property. There were in all 10 houses, which Mr. Rossouw inspected. Witness asked £7,000 for the property, but the plaintiff refused. The whole arrangement was simply an exchange of the town property for a farm and movables in the Malmesbury district called Modderkloof, and a cash payment.

Mr. Burton: Had you any idea that this farm did not belong to plaintiff?

Witness: No; I thought it belonged to him.

Did you come to an arrangement about the price?—After a good deal of discussion we came to an arrangement.

What was that arrangement?—He was to give me the farm and £750 cash.

That is to say, £6,250 for the property and £5,000 for the farm, and £500 for the movables?—Yes.

When these broker's notes were signed, did you then discover that Rossouw was not the proprietor?—Rossouw called his son in to sign, and then explained that he (Rossouw) was the real owner of the farm, as he had a bond of £4,000 upon it, although it stood in his son's name. Witness said he wanted his son to have this farm, but as he was not of age, he did not take any part in the contract. Afterward, his son, having become of age, he placed his signature on the back of the promissory note because plaintiff's attorneys stated that if his son did not wish to have the farm, then the arrangement would fall through. He did not make arrangements to keep the town property in repair at the price agreed upon. While on the farm he saw certain of the assets, the sheep and goats. In the broker's note was inserted the words "all assets and stock."

[Maasdorp, J.: Were the goods on the farm valued at £500?]

Mr. Burton: Yes, my lord.

Mr. Burton (to witness): This list of articles you show, you say were removed from the farm?—Yes, with the exception of two wine tubs, which were afterwards returned.

What about this item of oathay?—The loft was full of oathay when I saw it, but it was afterwards removed by Rossouw.

There were 6,000 bundles, and you claim £60 for these?—Yes.

How did you arrive at that figure?—I took it at £1 per 100 bundles.

Witness said he bought 200 sheep, but he only received 190. He claimed for the difference, and as out of the flock of 277, Rossouw, junior, selected 77 of the very best, he claimed for an adjustment also in the value on the number bought.

Witness further explained that he bought a horse and three mules from the plaintiff, but the horse he actually bought was not worth 15s., and he claimed £15 as compensation. Young Rossouw was left on the farm by arrangement when the farm was bought until such time as he (witness) got a manager. The tubs, which were removed by plaintiff, were necessary for the vintage, and he wrote Rossouw telling him that he would hold him responsible for any loss that might arise through any delay in returning them. With regard to the house rents he got a special power of attorney from Rossouw to collect the rents. Rossouw agreed to keep the properties in repair while witness held the power of attorney, but he did not do so. On account of this certain of the people left the houses. Rossouw had recently put the places in repair. The loss on rents he claimed in reconvention on account of the repairs not being made as £42 10s. He wrote plaintiff and told him that a certain door had to be cut to retain a tenant. Plaintiff wrote asking for an estimate, but when the estimate was sent he considered that the amount was too much. Afterwards he wrote plaintiff stating that he declined to send the rents until the movables removed from the farm had been returned. The rents he received were less than the £45 per month agreed upon.

Cross-examined by Mr. De Villiers: He signed the guarantee for £45 per month for a period of two years. The purchaser was entitled to the rents from January 1, 1907. During these two years witness said he had to remain in possession, and collect the rents.

Mr. De Villiers: Do I understand that if you received £50 per month you would have to hand the full amount over?—Yes.

It is stated in the declaration that you agreed to deliver the premises in a proper state of repair to plaintiff?—I didn't undertake to do that.

Witness handed in a statement showing

the amount collected from January to May, which exhibited considerable reductions. Asked whether he could get out another statement showing his receipts for the previous six months, witness said he could easily do so.

You signed "q.q." on the agreement, but you did not put the name of your principal. Do you know that made the agreement void?—I don't understand what you mean by the word "void"—that is high English.

The plaintiff's attorneys wrote stating that it would be necessary to have your son's signature on the agreement, so as to put the agreement in order?—I paid for the farm, not my son.

[Maasdorp, J.: When young Rossouw was on the farm, where did the father live?]

Witness: In Wellington.

How far is that from the farm?—About 1½ hours or so.

Mr. De Villiers: During the time young Rossouw was there, you had three mules and a horse on the farm there; these had to be fed?

Witness: The horse could not eat. He was too sick. I think he was a donkey of a horse.

Witness further added that young Rossouw was never left as manager of the farm, and he had no authority to kill sheep to feed either himself or the boys.

Mr. De Villiers: You say in your plea that the vintage was delayed three weeks on account of the non-delivery of these pressing tubs. Where did you get your information from?

Witness: From my manager—Mr. Louw.

Continuing, witness said that he estimated he lost 15 leaguers of wine by the delay, and one leaguer of brandy. The grapes in many instances were allowed to turn into raisins, and were useless for wine making.

Johannes Basson said he was engaged on the farm under Rossouw, junior, as manager. Witness said there were 6,000 bundles of oathay at the time of purchase. These bundles were mainly sold by Rossouw, junior, to a man in Malmesbury, and Rossouw also took away some. It would not pay to put up this hay in bundles of three or four pounds.

Dr. Greer: Did you know about the cart that was taken away from the farm?—Yes.

What is the price of it?—About £7 is a reasonable price.

Where are the pressing tubs?—They have not been delivered.

If you had had these pressing tubs when would you have begun to press?—Early in February.

Witness went on to say that Modder Kloof was an early farm, and the vintage had to be got over early.

Dr. Greer: Did any of the grapes go to ruin on account of defendant not having these tubs?—Yes.

What was the loss?—About 12 to 15 leaguers, and about a leaguer of brandy.

Witness (continuing) said that the 14 pigs were made up of well-grown pigs and a litter of two. Only 190 sheep were handed over, but he could not say what number of sheep were slaughtered. There were 8 leaguers of wine in the cellars, part of which was sold to various farmers. With regard to the horse which Raner received, witness said that Raner stated the horse wasn't worth 1½d. Young Rossouw said that everything not on the paper belonged to him.

Cross-examined by Mr. De Villiers: He was under the various managers at one time, now he was overseer. With reference to the cart which witness said young Rossouw had made, it was worth £7. Witness emphatically denied that the farm was a late farm for wine-pressing.

Mr. Edmund Parry said he was a broker residing at Kalk Bay. He was responsible for the drawing up of the agreement. He did not recollect that Rossouw agreed to keep the houses in repair. It was certainly stated that defendant should have one of the horses, and he chose the one that drove them to the station with the three mules.

Adrian Siebrits stated that the tubs in question were not available at the vintage. Witness's evidence went to prove the removal of certain of the movables incorporated in the agreement. He also stated that a quantity of the wine was sold to various farmers in the neighbourhood.

Julius Verster said he had been acting as agent for the houses now owned by the plaintiff Rossouw. He had had frequent complaints about the condition of the houses, and had on that account been unable to let them.

Alfred Raner, son of the defendant, said he was now living on Modder Kloof farm, and carrying on operations there. On December 25 he was 21 years of age. Witness corroborated the statement made that the farm was bought in his name. He could not say when the pressing of the grapes began. With reference to the removal of the tubs, witness affirmed that many of the grapes could not be pressed, on account of this. What tubs they eventually used were those of the neighbouring farm.

Mr. Burton closed his case.

D. G. Rossouw, the plaintiff, said he had been farming in the Malmesbury district for 25 years. He bought a farm for his son in that district, for which his son passed a bond. With regard to the Cape Town property, he inspected it. The defendant was not present when the first inspection was made, but he was present on the second. The idea was that the defendant should hand over the property as new.

Mr. De Villiers: Which of the mov-

ables were to be handed over to defendant?

Witness: I was under the impression that it was all the articles mentioned in the schedule. Continuing, witness said the words "all assets" in the agreement were not suggested by him, but were put in by the broker. Certain of the articles he could not understand how they got into the schedule. Personally, he did not undertake any liability for the handing over of the movables. Witness stated that his son was put in possession of the farm until Raner found a manager. His son was told to engage boys at 3s. per day, and was also told to buy meat for them. His son was afterwards told to slaughter sheep, and to provide food for himself and boys. When plaintiff viewed the houses, he told defendant that as rents were coming down all over the town, that he would not buy the property unless he had some guarantee regarding the rents. Afterwards defendant agreed to pay £45 a month for two years. Raner only wanted to give a guarantee for a year, because after that time, he said, would improve, and plaintiff would benefit accordingly. Witness, however, stated that it did not matter whether times improved or not; he would insist upon a two years' guarantee of £45 per month. Witness further stated that he gave no guarantee to keep the houses in repair. With regard to the removal of certain articles, these were removed by witness's son. Witness was not on the farm at the time. Witness further stated that the price of good wine sold by him to the merchants was from £5 to £6 per leaguer. Brandy would fetch about £12. He did not know how much wine there was in the cellar at the time when defendant agreed to buy the farm, but certainly he did not specify that any particular horse should be handed over to the defendant.

Mr. De Villiers: Do you know what horses and mules were to be handed over to defendant?

Witness: Three mules and a horse.

Continuing, witness said that with regard to the pressing tubs, he was of opinion that Raner would prefer the money rather than the articles. The agreement was that young Raner should ask his father which he preferred.

Mr. De Villiers: Is it easy to get a new pair of tubs?

Witness: Oh, yes; quite easy. You can get a tub in two or three days for about £7.

Cross-examined by Dr. Greer: He inspected the property, but insisted that the property should be handed over to him in good repair.

Dr. Greer: Why did you not put it into the broker's note?

Witness: Because everything was done so hurriedly at the farm, and that point was omitted.



Dr. Greer: I put it to you that you agreed to take the property as it was?—That is not correct.

Did you tell Mr. Raner that the vines were affected with phylloxera?—I simply told him what young vines had been planted.

Who wrote the broker's note?—Parry and Verster. Parry wrote and then Verster copied it. The copy I signed.

You say that you took no personal liability with regard to the movables?—Yes.

But these were included in the purchase price?—When the place was sold it was sold with all the movables that I understood were on the schedule.

Witness (continuing) said that it was after he discovered that the words "all assets" were in the broker's note that he offered the sum mentioned in the replication for the articles missing. Witness admitted that on the advice of his attorneys he had put the houses in proper condition, but maintained that if the houses had been handed over in good repair there would not be any need for any outlay.

Mr. De Villiers closed his case, and counsel having been heard in argument on the facts:

*Postea* (August 22nd).

Maasdorp, J.: In December, 1906, plaintiff bought certain buildings in Cape Town from the defendant, and in the past the defendant had drawn certain profits from these buildings in the shape of rents. The plaintiff expected to draw similar profits, and a discussion took place as to the condition of the buildings and the probable amount of the rents in the future. Thereupon, as an inducement and as part of the consideration, the defendant guaranteed that the monthly rental from the buildings would be £45. The defendant admitted the agreement and admitted liability on the guarantee for five months, but he counter-claimed for damages suffered through loss of tenants owing to the houses not being kept in a proper state of repair by the plaintiff. So it was necessary to ascertain the duty of the plaintiff with regard to repairs. When the defendant guaranteed the rents, it should be taken, in the absence of any agreement to repair, that he guaranteed the rents from the buildings as they then stood. If the plaintiff had been expected to make repairs, the guarantee would have been a different form. The plaintiff knew the condition of the buildings; they were not in good repair, and it was natural that the plaintiff should call the defendant's notice to their condition and ask for a guarantee. No evidence whatever was given on behalf of the defendant that the plaintiff had undertaken to repair the buildings, while on the other hand there was evidence that the defendant had undertaken to put them

into a proper state of repair. So he (the judge) thought that the buildings were guaranteed as they stood and there was no promise by the plaintiff to put them into good repair. Of course, it was the plaintiff's duty to keep the buildings in as good a state of repair as they were when handed over to him; it was admitted, however, that in January the buildings were in the same condition as they were in before the sale, and the Court was quite satisfied that there had been no breach of duty or delay on the plaintiff's part in making repairs. Even if the plaintiff had not done the necessary repairs there was still the question whether the loss of rents from the building had been traced to lack of repairs. A statement had been put in showing the fall of the rents, but complaints were only made about a portion of the buildings, and yet there was a fall in the rents of all the buildings except two—2, William-street, and 39, Vandeleur-street. So he (the judge) came to the conclusion that no neglect had been proved on the part of the plaintiff to cause damage to the defendant by the fall in rents. There was another issue between the parties; the sale of a farm in the Malmesbury district from the plaintiff's son to the defendant's son was contemplated, so it was agreed that part of the value of the buildings should be paid in cash and the balance settled by this transaction. The contract for the sale of the farm was drawn up in writing, and it was clearly a sale by the plaintiff's son to the defendant's son, consequently it might have been contended that the proper parties were not before the Court. The counter-claim was made by the defendant against the plaintiff for property which the plaintiff's son had removed from the farm belonging to the defendant's son, and so the plaintiff might have repudiated liability. The plaintiff might also have pleaded that the things were not removed from the farm till after he (plaintiff) had given delivery of the farm and the movable property to the defendant, and so he (plaintiff) was not liable. These pleas had, however, not been raised, and the plaintiff accepted liability for all his son's actions, and the only question to be decided was the amount of damages. To do that the Court had to consider the value of all the property. It was a matter of very material importance whether there had been any dishonesty in the removal of the goods from the farm. If the removal had been dishonest the Court would have thrown the burden of the loss on the plaintiff, but if the removal were honest the Court would inquire very carefully into the value of the things removed. The plaintiff's son said that he honestly believed he had a right to remove the goods, and certainly if the written contract were looked at it might



he strongly contended that there was good ground for his belief. Not only might he have rested his belief on the words of the contract, but also on certain conversations which might have led to the conclusion that all the assets of the farm were not included in the sale. The plaintiff had, however, not set that up in his replication as a ground of defence, but he was prepared to pay the value of the goods removed, and he (the judge) thought that he had been very well advised in doing so. He thought young Rossouw acted quite honestly, and so the only question remaining was as to the value of the goods removed. There were two witnesses as to the amounts and values of these articles, Basson and young Rossouw. The one was in a subordinate position and the other not, and one relied on his memory, and the other on documents, and it was quite clear that Rossouw's figures were more accurate. There was one item which affected the credibility of the parties seriously. Witnesses for the defendant said the young Rossouw had substituted one horse for another, which had been sold with the farm, and this was denied. Now the defendant's claim with regard to the horse had at one time been quite different; he had previously claimed that the horse had been damaged by young Rossouw, but now he claimed that a horse had been substituted. He (the judge) believed Rossouw and Furter on that question, and did not believe the defendant. The Court came to the conclusion that the goods removed from the farm had been fairly enumerated and fairly valued by the plaintiff, and £83 19s. would be awarded to the defendant on that counter-claim in terms of the tender. There was a further counter-claim for damages for the removal of two wine pressing tubs. On that point the Court was quite satisfied that Raner could in a few days have procured other tubs, and that he need not have lost any of his vintage, so he had not proved that he had suffered any damage from their removal. The plaintiff had tendered £3, the value of the tubs, and had also returned the tubs, so he had over-tendered, but he was bound by his tender. The Court also held, as a question of fact, that there was not sufficient evidence before it to show what the amount of the vintage would have been. There was the evidence of Basson, but he was young and inexperienced, and so the defendant had failed to prove any damage. Consequently judgment would be given for the plaintiff on the claim in convention for £225, with costs; judgment would be for the defendant on his counter-claim for £83 19s. in terms of the plaintiff's tender, costs to be paid by the defendant.

[Plaintiff's attorneys: Michau and De Villiers. Defendant's attorneys: Dempers and Van Ryneveld.]

### THIRD DIVISION.

[Before the Hon. Mr Justice HOPLEY.]

ADMISSION. } 1907.  
 } Aug. 20th.

Mr. Sutton moved for the admission of Gilbert A. W. Head as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Port Elizabeth.

### PROVISIONAL ROLL.

FIELD AND CO. V. NEL AND ANOTHER.

Mr. Roux moved for provisional sentence on a judgment of the Resident Magistrate's Court at Ladismith for a balance of £69 10s. 6d. sterling, and £3 10s. 6d., taxed costs, and for certain property mentioned in the summons to be declared executable.

Order granted.

KEMP V. STEPHAN.

Mr. Gutsche moved for provisional sentence on a promissory note for £250, payable in January last. When the note was presented defendant admitted the signature, but said that he had received no money and denied liability.

Dr. Greer (for defendant) said that certain replying affidavits had been filed that morning by plaintiff, and no opportunity had been given to defendant to file answering affidavits. Furthermore, he submitted that the case could not be decided on affidavit.

Mr. Gutsche said it seemed to him also that the matter was not one that could be decided on affidavit.

Dr. Greer said that if the plaintiff was ordered to go into the principal case he should have to apply for security for costs, as plaintiff was not domiciled in this colony.

Mr. Gutsche said that the plaintiff was only in England on a visit.

Hopley, J., said he would make no order at present as regards security for costs. That matter might form the subject of a substantive application.

Ordered that the parties go into the principal case, costs to be costs in the cause.

### ILLIQUID ROLL.

MATARE V. SILPERT.

Mr. Payne moved for judgment under Rule 329d for £197 11s. 10d., balance of account for goods sold and delivered,

with interest *a tempore moræ* and costs of suit.

Order granted.

#### WILSON V. SPENCE.

Mr. Toms moved for judgment under Rule 329d for £43 5s. 4d., money lent, with interest *a tempore moræ* and costs of suit.

Order granted.

#### MAZZUR V. AARONSON.

Mr. Inchbold moved under Rule 329d for judgment for costs, the rest of the plaintiff's demand having been satisfied.

Order granted for costs.

#### REHABILITATIONS.

Mr. Roux applied under section 14 of Act 38, 1884, for the discharge from insolvency of Carel P. R. Cronje.

Granted.

Mr. Louwrens applied under section 117 of the Insolvent Ordinance for the rehabilitation of Matthys P. Z. Raubenheimer.

Granted.

#### GENERAL MOTIONS.

*Ex parte* MURRAY. { 1907.  
                                  { Aug. 20th.

Mr. De Waal moved for a certain rule nisi, under the Derelict Lands Act, to be made absolute.

Rule absolute.

#### *Ex parte* MCGREGOR MUNICIPALITY.

Mr. Benjamin, K.C., said that this was an application, under the Derelict Lands Act, and it had already been placed before Mr. Justice Maasdorp in Chambers. Mr. Justice Maasdorp endorsed the application thus: "Referred to the full Court, under section 6, Act 28, 1881." Counsel added that he did not quite know whether "full Court" meant a bench of three Judges.

Hopley, J., said that no doubt when the Act was passed, what was meant was a Court of two Judges, as was constituted in those days. He would hear the application.

Mr. Benjamin then read the petition of the Mayor of McGregor, from which it appeared that the Municipality desired to have registered the remainder of the farm Over-de-Berg, situate in the division of Robertson, of the extent of 1,811 mongen, inclusive of streets, roads, and squares, in the name and as the property of the Municipality. The ground had

hitherto been used as commonage under a grant from one Naude.

Hopley, J., remarked that Naude seemed to have transferred portions out and out, and to have given commonage rights over the remainder. The question was whether he intended to do anything more with regard to the remainder? Now the applicants came and asked to be given full rights of ownership over the remainder. They did not show that they had exercised anything more than commonage rights for over 30 years, and it did not appear that anyone was trying to deprive them of those rights.

Mr. Benjamin: A portion of the land has been set aside or sold, I don't exactly know which, by the Municipality for school purposes, and it is necessary that this piece of land should be transferred. Counsel said that on the 23rd May last there was a somewhat similar fered. Counsel said that on the 3rd application from Villiersdorp (17 C.T.R. 397).

Hopley, J.: Applicants seem to me to have taken a good deal upon themselves. I think that Mr. Justice Maasdorp probably meant, when he endorsed this matter to be heard before a full Court, that it should be heard before a Court more fully constituted than one Judge. I think we had better follow out his intention by referring this application to the full Court, especially as there has been a similar matter before. The application may be renewed before a full Court, and set down for Monday next.

#### ATTWELL V. CUTHBERT AND CO., LTD.

Mr. W. Porter Buchanan, K.C., moved to make absolute a certain rule nisi admitting petitioner to sue the respondents *in forma pauperis* for £1,000 damages, alleged to have been sustained by reason of the fact that judgment had been taken by the East London branch of respondent company against petitioner in respect of a debt which he had already satisfied.

Respondents did not appear.

Rule absolute, Mr. Buchanan, K.C., to be counsel, and Mr. P. A. Myburgh Cloete to be attorney to the petitioner.

#### HOFFMAN V. CAPE TOWN TOWN COUNCIL

Applicant in this matter (Hoffman) had obtained leave to sue the Cape Town Council *in forma pauperis* for damages, and counsel and attorney had been assigned to him. He now applied in person for the appointment of fresh attorneys.

Dr. Greer (who appeared for A. and C. Friedlander) explained that the Court originally appointed Mr. Frank as the

petitioner's attorney. Mr. Frank had gone up-country, and he had handed over to Messrs. Friedlander his papers in this and other matters. Applicant objected to Mr. Friedlander acting as his attorney, seeing that he was a member of the Town Council. He (Dr. Greer) was asked by Mr. Friedlander to state that he had no desire to act in the matter, but the papers had been handed over to his custody, and he thought it best that they should remain in his custody pending the appointment of fresh attorneys.

Applicant (in answer to the Court) said he desired that Messrs. Wahl, Fuller and De Klerk should be substituted as his attorneys.

Rule discharged, so far as the appointment of Mr. Frank is concerned, no order as to costs, and Messrs. Wahl, Fuller and De Klerk substituted as attorneys of record to the petitioner in his suit against the Cape Town Council.

*Ex parte* FRANCIS BROS.

Mr. Close moved, on the petition of Francis Bros., of Ugie, district Maclear, for leave to sue by edictal citation one Rachel Charlotte A. Devonshire, as executrix testamentary in the estate of the late Hajo Jacobus A. Spandau, and to attach certain property in the estate *ad fundandam jurisdictionem*. From the petition it appeared that applicants in July, 1903, bought, at public auction, a certain piece of perpetual quitrent land, situate at Ugie, and belonging to the estate. Petitioners had duly paid the purchase price, but the said Rachel Devonshire had repeatedly refused to give transfer of the property in her capacity as executrix. Respondent was domiciled at Krugersdorp, Transvaal. Petitioners asked that the land in question, as well as the farms Deep Valley and Mount Hope, situate in district Maclear, should be attached *ad fundandam jurisdictionem* in an action which they proposed to institute to obtain transfer of the quitrent land, and to recover £50 damages, sustained by reason of respondent's refusal to pass transfer.

Leave to sue by edict granted, and to attach the property named in the petition *ad fundandam jurisdictionem*, with leave to serve intendit, citation, and notice of trial together, personal service, citation returnable on the 6th September.

*Ex parte* ESTATE CONRADIE.

Mr. Roux moved, on the petition of Johannes S. Conradie, as executor testamentary of the late H. C. Conradie and spouse, for the appointment of a *curator ad litem* to represent Gabriel

L. M. Conradie and Aletta P. Conradie, in an action to have them declared of unsound mind, and a curator of their persons and property appointed, with power to invest certain funds and to pass transfer of certain property. The parties reside in the division of Robertson.

Hopley, J., said that he did not see how the respondents could be joined in one action. It appeared to him that two summonses would have to be issued.

Ordered that an inquiry be made into the state of mind of the respondents, Advocate De Waal appointed *curator ad litem* of the respondents, summonses returnable on the 10th September, with leave to give proof on affidavit in each case.

WOLHUTER V. DE KOCK AND LOW.

This was an application upon notice to respondents, an auctioneer and attorney respectively, at Prince Albert, to show cause why they should not pay over to applicant from the insolvent estate of Fredk. J. de Kock a sum of £38 19s. 8d. as dividend, or such other sum as may be due to him, or in the alternative, why they should not render an account of all sums received and disbursed by them in the said estate.

Mr. P. S. T. Jones was for applicant; Mr. W. Porter Buchanan, K.C., was for respondents.

Mr. W. P. Buchanan said that the position the respondents took up was that the application was wrong in form and practice. An action should have been instituted for the payment of this money, and for debate of the account in the usual way; and apart from that, on the notice of the application, there was no cause shown for it. Counsel then read replying affidavits by the respondents.

Hopley, J., I regret so much time has been taken up with this application. The respondent did not disassociate himself from the firm when acting as trustee. Respondents were called, not as attorneys, who would be amenable to the discipline of the Court, nor is the one partner, Mr. De Kock, called as the trustee of an insolvent estate, in which capacity he would also be amenable to the jurisdiction of the Court, but the action is brought against De Kock and Low in their capacity as applicants' agents, to recover moneys collected for them. The payment of this sum of money to his agent arises, it is true, on the payment by one of themselves—the trustee in an insolvent estate, to his own firm as agents for the applicant, but that does not change the aspect of the case, nor make the procedure, which would be irregular, against anyone else regular by these agents. Without

going deeply into the contradictory question as to the rights of the matter, or as to whether there was some misunderstanding, or without going into the contradictory matter in the affidavits with regard to the tender of money, the question I have to ask myself is, is this a proper or competent procedure to adopt when a principal wishes for a settlement with his agent for money received? I know of no principle, I know of no case in which it has been done. On the contrary, I know many instances where the procedure has been the ordinary course of an action. It is said, I must look at this matter in another light, because there is no dispute that the agents have not received this money, and they seek to do on motion what requires an action at law. I do not think that is a fair test to apply, because we would be constantly having applications here of a similar nature. Mr. Jones said that in this particular case, even if this irregular notice had been given, and certain costs had been incurred, and his clients had been tendered the amount with costs to date, he would not have gone further, and that makes me still more disinclined to deal with the application, because the matter of a few pounds and the costs incurred to-day should not have stopped them. It is true that a person who has been kept waiting for his money may always proceed against his debtor, but then he must proceed in the proper way, and that brings me back to the question as to whether the applicant has proceeded in the proper way or not. He should have proceeded by action, but he did not do so. He has brought the matter on by motion, and costs have been incurred on both sides. It seems to me that the whole proceedings are wrong, and therefore the application must be refused with costs.

#### ALBOW BROS. AND GEZNER V. ISSEROWE.

Mr. P. S. T. Jones moved as a matter of urgency, on behalf of the applicants for the appointment of a *curator bonis* in the insolvent estate of Chone Isserowe, a butcher.

In reply to the Court, Mr. Jones said the urgency arose through the insolvent having perishable goods in his custody.

[Hopley, J.; What are the perishable goods?]

Mr. Jones: Contracts he may have for the supply of meat.

[Hopley, J.: But those contracts cease to exist when he becomes insolvent.]

Mr. Jones said that the insolvent might have some live-stock.

Hopley, J.: So as not to put your clients to any additional expense, you can mention this case to-morrow, but

if you have no further particulars you need not do so, as the application will not be considered by the Court.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* HAHN. } 1907.  
 } Aug. 21st.

Mr. Bisset applied for leave to amend order granted on August 13 in application of Carl Hahn, for leave to amend deed of transfer in his favour. The order incorrectly referred to the deed as in favour of Hahn and Jakens.

The words "and Jackens" were ordered to be struck out.

[Before the Hon. Sir JOHN BUCHANAN.]

ESTATE GOLDSTUCK v. } 1907.  
GOLDSTUCK AND OTHERS. } Aug. 21st.  
 } " 22nd.  
 } " 23rd.  
 } " 26th.

Insolvent Ordinance, Secs. 83 and 84—Sale—Mortgage.

*G., finding himself pressed by certain creditors, sold a certain farm to his two sons, who passed a mortgage bond in his favour on the farm for the full amount of the purchase price. The S. Bank already held a mortgage on the farm, but raised no objection to the sale by G. to his sons.*

*Held, that as no proof had been given that at the time of the sale G.'s liabilities exceeded his assets, and as he had acted bona fide, the sale could not be impeached under either the 83rd or the 84th section of the Insolvent Ordinance.*

This was an action in which Hugo Michaelis in his capacity as sole trustee in the insolvent estate of Benjamin

Goldstuck sought a declaration to the effect that the sale of a certain farm at Vrouwpan and all the stock, the property of the insolvent Benjamin Goldstuck, to Simon Goldstuck, of Vrouwpan, division of Hope Town, and Nicholas Goldstuck, a minor, residing at Vrouwpan, on the 9th July last, is null and void, and that the pledge cession or delivery of a certain mortgage bond for £3,500 passed on August 11 by the defendants, Simon Goldstuck and Nicholas Goldstuck, in favour of the insolvent, Benjamin Goldstuck, and by him pledged, ceded, or delivered to the Standard Bank, constituting an undue preference, a declaration that the Standard Bank has on the ground of collusion forfeited all right to claim on the insolvent estate of Benjamin Goldstuck.

Plaintiff's declaration was as follows:

1. The plaintiff sues in his capacity as the sole trustee in the insolvent estate of Benjamin Goldstuck, of Hope Town. The first and second defendants reside at Vrouwpan, in the division of Hope Town, and are the sons of the said insolvent; the second defendant being a minor, and therefore sued as assisted by his father and natural guardian, who also resides at Vrouwpan aforesaid. The third defendant is the Standard Bank of South Africa, Ltd., carrying on business at Cape Town and elsewhere in this Colony.

2. The said Benjamin Goldstuck applied on or about the 11th of December, 1906, for the surrender of his estate, and the same was accepted as insolvent on or about the 17th of January, 1907. The plaintiff was duly appointed as sole trustee thereof on or about the 4th of February, 1907.

3. Prior to the 1st of August, 1906, the said insolvent was the registered owner of the said farm Vrouwpan, upon which there rested a mortgage bond for the sum of £1,400 in favour of the defendant bank at Hope Town, to which the insolvent was at that time indebted in an amount far exceeding the amount of the said bond.

4. In or about July, 1906, it was arranged between the insolvent and the third defendant that the insolvent should sell the said farm with certain live-stock thereon to the first two defendants for the sum of £3,500 in all, being £2,500 for the farm and £1,000 for the live-stock, and that the first two defendants should pass a mortgage bond in favour of the insolvent for the full amount of the said purchase price, which bond should then be ceded by the insolvent to the third defendant.

5. In pursuance of the said arrangement, the insolvent on or about the 9th of July, 1906, purported to sell to the two first defendants the said farm and live-stock for the said sum of £3,500 and thereafter delivered the said property to them, transfer of the said farm

to them being passed on or about the 1st of August, 1906. On or about the date last mentioned, the two first defendants passed a mortgage bond in favour of the insolvent, as arranged with the third defendant, for the sum of £3,500 (being the said purchase price), binding specially the said farm and containing also the usual general clause, and on or about the 9th of August, 1906, the insolvent, still in pursuance of the said arrangement, pledged, delivered, or ceded the said bond to the third defendant, which cancelled the previously existing bond for £1,400.

6. The plaintiff says that, at the time of the said sale, delivery, and transfer by the insolvent to the first two defendants, the liabilities of the insolvent fairly calculated exceeded his assets fairly valued, that the said sale and alienation were not made *bona-fide* upon just and valuable considerations, and that the same are null and void under the provisions of the 83rd section of Ordinance 6 of 1843, or otherwise are void as having been made in fraud of creditors.

7. The plaintiff also says that the pledge, delivery, or cession of the said bond for £3,500 as aforesaid to the third defendant, who was then a creditor of the insolvent, was made at a time when the insolvent contemplated the sequestration of his estate, and that he intended thereby to prefer the third defendant before his other creditors, and that the said pledge, delivery, or cession is null and void as an undue preference under the terms of section 84 of the said insolvent Ordinance.

8. The plaintiff says further that the said undue preference was received by the third defendant by or through a collusive arrangement, mutual understanding, or common consent between the said defendant and the insolvent, the one to give and the other to get such undue preference.

Wherefore the plaintiff prays: (a) As against the first two defendants, a declaration that the said sale, alienation, and transfer are null and void, either under the 83rd section of the said ordinance or under the common law, and that the said farm and live-stock belong to the said insolvent estate; (b) as against the third defendant a declaration that the said pledge, delivery, or cession of the said bond constituted an undue preference, and is null and void under the provisions of section 84 of the said ordinance; (c) as against the third defendant, a declaration that it is not entitled, on the ground of the said collusion, to claim or prove as a debt the amount of the said bond, but that it shall wholly forfeit such amount as regards the said estate, in terms of sections 86 and 88 of the said ordinance. As against all the defendants: (d) Alternative relief; and (e) costs of suit.



The plea of the first and second defendants was as follows:

1. Paragraphs 1, 2, and 3 of the declaration are admitted.

2. The defendants admit that in or about the month of July, 1906, the insolvent sold and the defendants bought the said farm Vrouwpan, together with certain live-stock, for the price or sum of £3,500, that the said live-stock were duly delivered to them, that transfer of the said farm was duly passed to them on the 1st day of August, 1906, and that they duly passed a mortgage bond in favour of the insolvent for the said sum, binding specially the said farm, and containing the general clause, which said bond was subsequently duly ceded to the third defendant. The defendants crave leave to refer to the terms of the said transfer and mortgage bond when produced at the trial.

3. The defendants and the insolvent entered into the said contract of sale *bona fide*, for just and valuable consideration, and in the usual and ordinary course of trade and business.

4. Save as above, the defendants have no knowledge of the allegations in paragraphs 4, 5, 7, and 9, and put the plaintiff to the proof thereof. They deny each and every allegation in paragraph 6, as specifically as if herein set out.

Wherefore the first and second defendants pray that the plaintiff's claim may be dismissed, with costs.

The plea of the third defendant was as follows:

1. Paragraphs 1, 2, and 3 of the declaration are admitted.

2. The defendant admits that in or about the month of July, 1906, the insolvent sold and transferred the said farm Vrouwpan, together with certain live-stock, to the first two defendants for the sum of £3,500, and that the said defendants passed a mortgage bond in favour of the insolvent for the said sum, specially hypothecating the said farm, and containing the general clause.

3. On or about the 9th day of August, 1906, the insolvent *bona fide* for valuable consideration, and in the ordinary course of business duly ceded the said bond to the defendant, in security of his indebtedness to the latter, and the defendant, in consideration thereof, *inter alia*, released the said farm from the operation of the said bond for £1,400.

4. The defendant denies that the said cession and, or, bond are null and void, under the provisions of sections 83, and, or, 84 of Ordinance 6 of 1843, or as having been made in fraud of creditors, or that it has received any undue preference by or through a collusive arrangement, mutual understanding, or common consent between the defendant and the insolvent, the one to give and the other to get such undue preference.

5. Save as above, defendant denies each and every allegation in paragraphs 4, 5, 6, 7, and 8, as specifically as if herein set out.

6. The defendant contends, if the Court should find the allegations in paragraphs 6 and 7 to be proved, but not otherwise, that it is still entitled to claim preferently upon the said insolvent estate for the sum of £1,400, with interest, being the amount of such mortgage bond so released as aforesaid.

Wherefore the third defendant prays that the plaintiff's claim may be dismissed, with costs.

Mr. Burton, K.C. (with him Mr. Howes) for plaintiff. Mr. Schreiner, K.C. (with him Mr. Upington) for defendants.

Hugo Michaelis stated he resided at Cape Town, and was trustee in the insolvent estate of Goldstuck. Witness put in the schedules in the estate, which showed liabilities at £11,678, and assets at £3,965, for immovable property, £1,562 for stock-in-trade and movable property, and £4,217 outstanding. After witness was appointed he went to the district of Hope Town, where the insolvent had resided. The bank proved for £3,281. The total amount of the debts proved in the estate was £11,905 16s. 1d. The assets realised outstandings £87 14s., but from the total amount had to be taken the bond of £3,500. Two of the amounts in the outstandings had been advanced as collateral security to the Standard Bank. They amounted to £240. Owing to the faulty way in which the insolvent kept his books it was impossible to take proceedings to recover the outstandings. It was impossible to find specified accounts, and consequently many accounts had to be abandoned. The movables realised £298 6s. 10d., with the exception of 22 ostriches, which were subsequently sold together with the farm. The prices realised were very fair. The goods were in a very poor condition. The farm realised £2,500, although it was brought up in the schedules at £3,965. That left a final deficiency of £4,969.

In cross-examination by Mr. Schreiner, the witness stated that Hirsch and Loubser were the principal creditors. Witness said that the action was instituted by several of the creditors. It was the Port Elizabeth creditors who were pushing the bank. The outstandings that could not be recovered were sold by public auction. Witness could not say that the farm Zaaïdam was more valuable than Vrouwpan. Witness could not say the value of Vrouwpan. He had sold Zaaïdam for £2,400.

Alexander Yule, accountant, in the employment of Hirsch, Loubser and Co., of Port Elizabeth, stated that he was sent out to insolvent's farm in September last. Insolvent resided on the farm Zaaïdam, and his sons held the

next farm. He carried on a business at Vrouwpan for insolvent. Witness drew up a balance sheet for Goldstuck, and found he had a balance to his credit of £410. The farm property was put down at £3,965 at Goldstuck's valuation. The live stock was valued at £600, also by Goldstuck. The insolvent communicated to witness his disabilities. Goldstuck kept his books very badly, not specifying to whom payments were made from time to time.

In cross-examination, witness stated that in September last, after he had made his investigation, he handed Goldstuck £200 to purchase wool for Hirsch, Loubser, and also sent him on goods. When witness went to Vrouwpan he knew that the farm had been sold.

[Buchanan, J.: Did you give Goldstuck the £200 before or after you had inspected the estate?—Before.

Witness (continuing) said he asked Goldstuck's son for a return of the money, as he was doubtful about leaving it. Witness went down to Vrouwpan again in November. He wrote to his principals whilst up there. He really went up to collect overdue accounts. He did not get cash, but some "bills," which were no good. Goldstuck offered witness stock, but witness told him to sell them and send on the amount as a remittance.

Witness further stated that Goldstuck had not sent along £200 worth of produce, and he wrote to him advising him to go to Port Elizabeth and settle the matter up amicably.

Do you mean to say that you went up to see this man and threaten him with a criminal prosecution?—Yes.

But he was not amenable to that sort of thing, was he?—No.

Mr. Loubser, of the firm of Hirsch and Loubser, stated his firm had dealt with Goldstuck for about 12 years. He carried on a mercantile and farming business at Zaaïdam. In 1904 they got from him a power of attorney to pass a bond dated July 8. He acknowledged his indebtedness to the firm of between £3,000 and £4,000, and gave authority to bind Zaaïdam and Vrouwpan for a special bond to that amount. They also got his title-deeds, which they continued to hold. He requested them not to pass the bond, so they held it over. On April 25, 1906, they sent the title-deeds to insolvent, at his request. They wrote several letters asking for their return. Goldstuck wrote back on May 31 stating he had not received transfer. The next letter witness received was on August 20, informing him of the sale of the farm. They wrote to him to go to Port Elizabeth to see them, and he did so. They had bought the farm Zaaïdam.

In cross-examination, the witness stated he was in Port Elizabeth in September when Goldstuck went down, but he left in October, and did not return until August. Many of the documents put in

by witness were received and sent by his partners. The power of attorney passing the bond was drawn up in September. Witness discussed the position with Goldstuck, and took the bond as a set-off to the deed of transfer previously in his possession. At the time the bond was taken they had not arrived at the conclusion that Goldstuck was hopelessly insolvent. Mr. Yule was sent up to investigate, but did not send in any report. He just submitted the balance sheet. Mr. Goldstuck was written to on October 23, stating that he owed £2,200, and asking him if it would not be desirable to remove his stock from Vrouwpan to Zaaïdam. Witness's firm did not take any steps to sequester Goldstuck's estate. Witness objected to the bank having a mortgage on the property and his firm having none. Witness had known Goldstuck for 12 years, and trusted him and gave him credit until about two years ago, when they took over the power of attorney. A bond was not issued until September, 1906. Witness did not know before he went to England that Goldstuck had gone security for Gallowitz. Goldstuck led them to believe that the bank was going to advance him £1,000 to stock his son's farm.

Did you really think the bank was going to do anything like that when you knew the state of his account?—That was what we understood.

Witness (continuing) said he had always found Goldstuck honest in his dealings.

In re-examination witness said that when he received Yule's report he came to the conclusion that Goldstuck was hopelessly insolvent. Taking his assets at the value put on them by Goldstuck into consideration, witness arrived at the conclusion that the margin was not sufficient to conduct such a business.

Claude V. Krummech, a clerk in the Deeds Office, produced the bonds, etc.

Mr. Burton closed his case.

Benjamin Goldstuck stated he had been sixteen or seventeen years in South Africa. He came here from Russia. He had always lived in the country between Hope Town and Prieska, and could only speak Dutch. He paid £2,600 for Zaaïdam, and improved it much, spending £1,200 in doing so. He brought it up in his schedule as valued at £3,960. He bought Vrouwpan after. It was larger than Zaaïdam, but the latter was better. He gave £1,900 for it, and spent £600 in improvements. Late-ly he had business at both farms. He sold the stock for £1,000, and the farm for £2,500. He went on with the business till November, 1906, after which he carried on the business at Zaaïdam only, his sons carrying on the other business. He had two bonds—one for £1,800 on Zaaïdam, and one for £1,400 on Vrouwpan. When he

first thought of selling Vrouwpan, he was surety for one Nieberg, to whom he had also lent £800, and who went insolvent, and the bank was pressing him. He told his sons that he would sell them the farm, and they must arrange to pay the bank's claims. Nobody from the bank suggested that he should sell to his sons. After they had agreed to purchase the farm, witness went to the bank and told them, and the local manager said he could not do anything until he heard from Cape Town. Later on witness received a letter from the bank, stating they approved of the sons purchasing the farm. Witness would have been better off in this respect. He would not owe the bank anything. Witness considered £2,500 was a fair price for the farm. It had cost him that amount. Witness's sons kept his books for him. After the receipt of the letter from the bank, witness went to Hope Town, and saw the bank's attorney (Mr. Van Coller), and the documents were drawn up. Witness left them with him, and eventually heard the bond had been passed. They made an agreement that the sons should pay over £100 a year and the interest. Witness told the bank manager the arrangement was to be made in June. He had no expectation of insolvency then. He had had no threats of sequestration; £2,500 was a fair price for the farm. From time to time he gave balance-sheets to the bank. The last was in February, 1906. The figures were in the handwriting of the bank manager, and detailed by witness. The bond was passed on August 1. After he communicated with Hirsch and Loubser, Yule went up to see him. He told Hirsch and Loubser that the bank had promised to stock the farm with £1,000. He had paid £1,000, and considered that as if the bank had given him £1,000 for the stock. His sons had purchased £1,000 worth of stock from him, and that money was put into the bond. He owed the bank on Nieberg's account between £1,700 and £1,800. He showed Yule all his books, and gave him all the information he could. He gave Hirsch and Loubser power to pass a bond when he was in Port Elizabeth in September. They passed the bond, and wrote to him in October. Gallowitz was his son-in-law. He had a shop at Prieska. Witness had guaranteed Gallowitz for £1,000. In June Gallowitz paid off £300. Witness could not say how he got the money; he did not give it to him.

In cross-examination, witness stated, although he had carried on business at Zaaïdam for twelve years, his cash-book only began in July, 1906. Prior to that the only books he had were little ones, written in Yiddish. The reason why he kept books in English was to see his position. Witness had had

business dealings with Heydenrich, Nieberg, Ashpole, and Yellowitz, and lost money through them. Nieberg, Ashpole, and Gallowitz had all become insolvent. With regard to Gallowitz, he had a letter from the bank in April, stating that Gallowitz had renewed the bill for four months, which was contrary to the agreement, and that he was opening a business at Prieska. He paid his bill off a little at a time. Witness could not say when Gallowitz came to this country. When witness's daughter married him, he trekked about the country with horses and cart, selling jewellery. He had £1,500 or £1,600 when witness's daughter married him. Witness denied that he financed Gallowitz. Witness borrowed £260 in September from Gallowitz to buy produce. Witness had no reason to suspect, in November, that Gallowitz was going insolvent. He had always had good reports from people coming from Prieska.

It is very strange that you should have written to the bank on November 8, stating that Gallowitz had surrendered. Did you get information from him?—No.

When Michaelis was round in January, 1906, he insisted on witness signing bills for Gallowitz. Witness did not tell Michaelis that Gallowitz was all right. Witness rendered balance-sheets to the bank at intervals.

They progress backwards. In February, 1906, you show a balance of £6,450?—Yes.

And in May, you show a balance of £3,491?—I do not know. I did not make up the books.

[Buchanan, J.: That was not sent to the bank?]

Mr. Burton: It is in his books. (To witness): Can you explain the difference of £3,000 between February and May?—I cannot.

Between May and September there is another drop of £3,000. In the latter month you have only a balance of £418. We know Nieberg let you in for £1,600. What happened to the £1,400?—I put in my estimate of the value of the things I sold, and Mr. Yule put down his valuation. He was present when Yule put the valuation on.

On July we find £320 paid in wages; what is that?—That is for my clerks.

How many clerks do you employ?—Two.

Your sons?—Yes.

And in July you paid your sons £320?—Yes; it was due to them as wages for the time they worked for me. Over three years.

Did you pay it in a bulk sum, or spread over the three years?—Over the three years. They were entitled to over £500.

Later on in the same month you have a sum of £200 for wages. How do you account for that?—That was due to my sons, but I did not pay them.

His eldest son had been in his employ four years, and the youngest 2½ years.

If you paid them nothing on the last day, what made you enter that you had?—I was going to have a reckoning up with them. The eldest son got £8 a month, but after the farm was purchased the eldest son only got £5, and the youngest, who had been receiving £5, only got £3.

What is the meaning of the entry, dead stock, in November, £360. I see in September you value your stock at over £600, and in November they have reduced £360 in value?—The stock died from the drought and the subsequent rain.

Witness denied that he had told Mr. Michaelis that the bank manager told him to sell the property to his sons.

It was your own idea then to sell to your sons?—Yes. It was not a very big idea.

It was rather a good idea for your sons and yourself and the bank?—I only did it so that the bank would not press me. Continuing, witness said he wrote to Hirsch and Loubser for his title deeds, because the bank wanted them. Witness did not say that Hirsch and Loubser had power of attorney to pass a bond over the property. Witness and the bank manager agreed that the sons should pay £100 a year on the bond. After the bond had been passed, witness did not get a further advance from the bank. Witness understood the bank had a cover for its money.

You expected no more trouble from them?—No. The bank manager knew witness had debts. He knew he owed £4,000 to Hirsch and Loubser and £1,500 on behalf of Gallowitz. No suggestion was made to witness that the bank should have a second bond on the farm, but witness suggested it.

Mr. Wetney, bank manager at Hope Town, stated he had been there for five or six years. He had prepared statements of Goldstuck's accounts with the bank. They consisted of five accounts altogether, and were as follows: Adv. accounts 1 and 2, ordinary account, collateral security and bill account. Adv. account No. 1 was started on a £1,400 bond, and was a current account up to £1,400; No. 2 was in connection with Galowitz's bond for £500: the ordinary account gave the paid-in amounts and cheques; collateral security account was opened with regard to pledged bills the bank held. The bill account showed the position of bills at any time. Goldstuck gave the bank balance sheets for 1903-4-5 and 6. Witness kept all balance sheets. De Villiers and Scholtz witnessed the earlier ones, and witness the latter. He wrote down the figures. He often did so for farmers. The bank indebtedness was taken from the books. The farm Zaaidam was brought up in 194 as valued at £4,000.

His 1906 balance showed over £6,000 in his favour. Goldstuck owed the bank £3,240. Between June and July, 1906, Nieberg, who was a party with Goldstuck on bills for between £1,100 and £1,200, inclusive of £935 with Galowitz, became insolvent. After Nieberg's insolvency witness knew there was a loss of £1,600. Nieberg had been in difficulties for between 12 and 18 months. Witness did not know that it made Goldstuck's position precarious, but it made it less substantial. On June 15 Goldstuck called on witness and told him he would like to arrange to meet the bank and sell the farm to his children and give a bond to the bank. Witness did not suggest that plan to him. Witness told him he was perfectly satisfied, and said he would refer the matter to the general manager at Cape Town. A good deal of correspondence on the matter took place. Witness did not remain at Hope Town while the papers were drawn up. Witness had gone on a shooting trip to the Orange River Colony. Witness first saw the bond after the registration, and then noted the condition, and when Goldstuck visited Hope Town witness interviewed him on the subject. The bond was noted on December 29. On March 27 witness wrote to Goldstuck for his transfer. Witness had no idea the titles were with Hirsch, Loubser and Co. At that time there was no idea of another bond or sale to Goldstuck's sons. On August 8 the original cession was signed by Van Collier. Mr. Wege noted as Mr. Van Collier's name was already on the document as qq. for Goldstuck. Goldstuck also signed subsequently. The cession was not received as a collusive arrangement. It was a transaction in the ordinary course of business.

In cross-examination, witness stated he and Goldstuck were on very friendly terms. Witness wrote to him always as bank manager, not privately. He was always being requested to reduce his account. Early in 1906 Goldstuck told witness he would have to sell his stock to pay his liabilities. Witness did not insist on his reducing his liability. He allowed him to renew. Prior to 1906 he had a large liability to Nieberg. £1,400 was secured by overdraft. In 1906 Goldstuck owed the bank £1,466. The ordinary account was only opened in June, 1906. The bank held two bills as collateral security. In February, bills for £400 and £700 fell due. Witness was astounded at Goldstuck's insolvency. Witness knew the estate paid nothing to concurrent creditors. Witness did not know that Hirsch and Loubser had the deed till after he had got it. Goldstuck may have told him that that firm had a power to pass a bond. Witness did not know that Goldstuck's sons had no money. He thought that with the guidance and assistance of their father they would be



able to comply with the arrangements. Witness before he left instructed Van Colter to get the papers ready for an ordinary mortgage bond. Goldstuck sold the property to settle with the bank. Witness did not tell the head office about the £100 condition. The head office suggested a second bond, but witness did not like it as Goldstuck's proposal was better. Witness now knew that the sons could not pay. Possibly they might procure assistance. Witness did not enter the £1,000 guarantee, as it was not a debt.

Simon Goldstuck, one of the defendants, stated he was 23 years of age. He and his brother, who was 19, purchased the farm Zaaïdam from his father at what they considered a fair valuation. When witness purchased the farm, he did not know that his father was insolvent, or that there was any likelihood of his insolvency. It was not for that reason that he purchased the farm.

In reply to Mr. Burton, witness said he could not say the amount he had when he purchased the farm, but he had some money. Witness offered to pay the bond every month, but the first two months that it became due he did not send it, not because he had not got it, but because he could not get into town, as his father was absent from home. When witness's father returned, £35 was sent in by post.

Evidence of a corroborative nature having been given, Mr. Schreiner closed his case.

Mr. Burton said that the consideration of this matter naturally fell into two divisions. The first was the case of the trustee against the two sons of the insolvent to have the sale of the farm Vrouwpan declared null and void, under the 83rd section of the Ordinance, or as an alienation in fraud of creditors, and the second was the case against the Standard Bank to have a bond of £3,500 set aside as an undue preference. With regard to the first part of the case, they had the fact that in July and prior to the 1st August, 1906, there was in the estate of Goldstuck the farm Vrouwpan, valued at £2,500. There was also a certain amount of stock. Then the property was made away with and was no longer available, except that one of the creditors, the Standard Bank, had a mortgage bond for £3,500. Plaintiff said that the circumstances of the sale by the insolvent to his sons were such as to fall within the terms of the 83rd section of the Ordinance, and that the trustee of the insolvent estate was entitled to say that the sale and transfer to the sons should be declared null and void. He submitted that there was no clear proof that between July and August the insolvent's liabilities fairly calculated exceeded his assets fairly valued. For the sake of convenience he would take the date as the 9th July.

From the insolvent's statement, they were asked to believe that he had a balance of £6,450 in February, 1906, while his schedules showed a deficiency in December, 1906, of £1,900, and the realisation of the estate showed a deficiency of £4,919. On the 1st May insolvent showed a balance of £3,491, and in September he and Yule showed a balance of £418. Counsel contended that the insolvent greatly exaggerated the value of his assets. He submitted that the evidence as to improvements alleged to have been made by the insolvent on the farm Zaaïdam was unsatisfactory, and that what the Court had to consider was what was the proper value of the farm, not what had the insolvent spent on improvements. The whole transaction between insolvent and the first two defendants showed a want of *bona fides*, and a desire to benefit his children at the expense of his creditors. Coming to the second part of the case, Mr. Burton said that the power to cede the bond to the bank was dated the 9th July, and the bond was actually ceded on the 9th August. The insolvent sent in his schedule on the 17th December, and the surrender was accepted on the 17th January. The question arose whether, under Act 38, 1884 (sec. 8), this cession could not be set aside as a collusive arrangement. If the Court took the date of the actual cession, then the transaction would be within the period of six months, but, if the date of the power were taken, the transaction would be out by one week. The circumstances were such that, he submitted, the Court would take the date of completion of the transaction. Counsel cited *Sluiter's Trustee v. J. O. Smith and Co.* (8 E.D.C., 9), and *Cillier's Trustee v. Cilliers* (13, S.C., 68). Apart from the question of period, the insolvent when he entered into the transaction clearly contemplated the surrender of his estate, and he intended to prefer the bank to his other creditors. He cited *Van Reenen's Trustee v. Abrahams* (1, C.T.R., 329), and *Smith v. Carpenter* (1869, Buch., 214).

Mr. Schreiner said the Court required proof by the trustee of a collusive arrangement before a case of this kind succeeded. He cited in support the case of *Du Plooy v. Pluman* (7, Juta, p. 332), in which Mr. Justice Buchanan laid down that principle. He did not know how the trustee could expect to succeed under section 84 of the Insolvent Ordinance, when he had not shown undue preference. If plaintiff succeeded on part 1 of his case, then he could only succeed if it was proved that the bank was a party to a fraud. Counsel then proceeded to review the evidence. He argued that Goldstuck's evidence was extremely satisfactory, and such as to give favourable colour to his statement that at the time



of the transfer of the farm to his sons he had no idea of becoming insolvent. He maintained that there was no shadow of ground for impeaching the transaction on the part of the sons. They should not be stigmatised as parties to a fraud unless there was the clearest proof of it. He said that the insolvent had always been available to give an explanation of his transactions and books. The trustee who impeached the figures must prove that they are wrong, and he had produced no proof at all of the condition of the estate at the time of the transaction. He accounted for the large falling off in the insolvent's balance-sheet from £6,400 in February, 1906, to about £3,490 in May, 1906, by suggesting that between the two dates he had received an account from Hirsch, Loubser and Co., showing that, instead of his debt to that firm being £2,600, it was really £4,200. But even that large difference did not sweep away his assets, and make the result a deficiency. Mr. Schreiner said that a very strong case in his favour was that of *Goosen's Trustee v. Goosen* (1 Appeal Court, 414) and *Hugo's Trustee v. Lindenberg* (in 2 Juta), where if a man did not contemplate insolvency, although his position was an insolvent one, but did what he did to improve his position, his action could not be impeached. He said that Slater's case in the E.D. Court laid down that the old law was in no way altered by the Act of 1884, but that the new law merely shifted the onus of showing contemplation of insolvency. The same doctrine was laid down in our Court in the *South African Loan, Mortgage and Mercantile Agency v. the Cape of Good Hope Bank* (6 Juta, 163), in which the Chief Justice said that if the insolvent did not pass the bond in the view of supervening bankruptcy, and to disturb the proper distribution of assets under that bankruptcy, the Court would not consider it an undue preference. He also quoted *Du Plooy's Trustee v. Pluman* (7 Juta). He concluded by urging that there was no proof that the Court would consider satisfactory that the insolvent's assets, fairly valued, would not meet his liabilities, fairly estimated, at the time of the sale of the farm to the sons.

Mr. Burton, K.C., in reply, referred to *Jordaan's Trustee v. Fletcher* (11 S.C.R., 43). He said that the Act did not say that the decision of the matter hung upon the value which the insolvent placed upon his assets, but as to what their value was when fairly valued by others.

Buchanan, J.: At first sight this case bears a somewhat complicated aspect, but upon analysis the issues will be found to work out with tolerable simplicity. The plaintiff is the trustee in the insolvent estate of Benjamin Goldstuck; the defendants are the two sons

of this Goldstuck and the Standard Bank of South Africa, but the cases against the defendants are divisible. In the first place, the plaintiff seeks to set aside a transaction between the insolvent and his two sons with reference to the sale and transfer of the farm Vrouwpan. This transaction is attacked under the 83rd section of the Insolvent Ordinance. The evidence shows that the insolvent Goldstuck was a farmer and trader, carrying on his trading business upon his farm, and was supported by Hirsch, Loubser and Co., of Port Elizabeth. At the time he was so carrying on the business he had incurred liabilities to the Standard Bank who held a mortgage bond for £1,400 over one of the two farms belonging to Goldstuck, namely, Vrouwpan. The other farm (Zaaidam) had a bond upon it, due to a charitable institution, and held by a Mr. MacIntosh, a partner in the firm of Hirsch, Loubser and Co., for the sum of £1,800. The Standard Bank, judging from the accounts put in, had been in the habit of allowing Goldstuck to draw upon a general account up to £1,400, the extent to which they were secured by their bond. In July one Nieburg with whom Goldstuck had business transactions, became insolvent, or was in such difficulties that he was unable to take up his obligations, and some £700 of his promissory notes, endorsed by Goldstuck, were in the Standard Bank. The bank pressed Goldstuck for a settlement. Incidentally it was stated in evidence that Goldstuck was advised by a friend to sell Vrouwpan, and so relieve himself of his liabilities to the bank. He was unwilling to do so, but entered into the agreement now attacked. He suggested to his elder son Nicholas that he should buy the farm, and pass a bond over it for the purchase price. Nicholas Goldstuck was not willing to do this unless his younger brother would become a partner in the transaction. It was finally agreed between the brothers to enter into the transaction and become partners in the farm and in the new business to be carried on there. But the Standard Bank holding a bond over the farm, no such transaction could go through without its concurrence. The Standard Bank agreed to the sale, and the farm was transferred by Goldstuck to his two sons, together with some stock, and a mortgage bond for the amount of £3,500 was passed by the sons in favour of their father. This is the transaction which is attacked under the 83rd section. This section deals with *malafide* or gratuitous alienation. It enacts that every alienation of pledge of goods made at a time when it should be made to appear by proof that the liabilities of the insolvent, fairly calculated, exceed the assets fairly valued, shall, unless the same be made *bona fide* and for just and valuable con-

sideration, be null and void. The section then goes on to say that whenever the necessary effect of such alienation is to create an excess of liabilities over the assets, then such alienation shall be void to the extent of such excess. Under this section the plaintiff bringing an action must, in the first place, prove that the insolvent's assets fairly valued do not equal his liabilities fairly calculated, and it is this point in this case which, to my mind, causes the greatest difficulty. The onus is upon the plaintiff, and I have been closely following the argument to see whether I could not say that this point has been established. The evidence shows that from time to time, the insolvent for years past supplied the bank with balance sheets showing his position, and they show that up to February of last year the balance in favour of the insolvent amounted to over £6,000. In May of last year the insolvent seems to have taken stock, and the figures brought up in his books show a balance to his credit of £3,400—a considerable reduction on the previous balance. But, on looking at the details of the second valuation, it will be seen that, whereas in the statement given to the Standard Bank in February, he brought up his creditors Hirsch, Loubser and Company for the sum of some £2,000 only, subsequently this was increased by a considerable amount, and it is suggested that the increase has arisen from the fact that the accounts of that firm were not regularly rendered, and the amount of the interest charged upon the current account increased insolvent's liability considerably beyond what was stated in previous balance sheets. The next statement of assets and liabilities put before the Court was the one prepared in September, by the representatives of Messrs. Hirsch, Loubser and Co. After all the transactions with the sons had gone through and were known to the creditors, Mr. Yule went to Hope Town, where the insolvent was carrying on his business, and on behalf of his principals took stock, and made out a balance sheet in which he showed a balance of £500 still in favour of the estate. It is perfectly true that the books of the insolvent render the trustee very little assistance in his work in connection with the estate. That is an unfortunate circumstance which is to the disadvantage of the trustee, but it is not necessarily a matter which could be taken advantage of as against the two defendants, so as to do away with the necessity of proving the condition of the estate at the date the transaction now attacked was entered into. The defendants have pleaded to the claim to set aside the sale, that amongst other things, it was for just and valuable consideration, and in the ordinary course of business. I may say at once

that I do not think any Court would hold this transaction to be one in the ordinary course of business. To sell the property and to take a bond for the full amount of purchase price, is not what one would call a transaction in the ordinary course of business, but it must be borne in mind that the 83rd section does not require the transaction to be one in the ordinary course of business, but only that it must be made *bona fide* even when the liabilities fairly calculated exceed the assets fairly valued. Therefore, upon the very threshold of the case the state of the assets and liabilities is a matter which must be clearly established. Looking at the balance sheets, which have been produced, one may fairly say that where creditors like Hirsch, Loubser, and Company, who, after having been put upon their guard, take a balance-sheet with a knowledge of all the facts before them, some time after the event and find that the assets fairly valued did exceed the liabilities fairly calculated, the Court would not be justified in bringing the transaction under the 83rd section. It is true that in the balance-sheets there was no mention made of certain contingent liabilities of the insolvent. These contingent liabilities arose from the transactions insolvent had with Nieberg and the guarantee he had given for Gallowitz, but at that time neither of these transactions had altered the state of the balance-sheet of the insolvent. It is true that Nieberg had been considered to be in difficulties for some time before, but it was only about July that his affairs came to a crisis, and these contingent liabilities became immediate liabilities of Goldstuck's, and had to be met by him. Gallowitz became insolvent later on, and it was known to all the parties that since 1904 the insolvent had been guaranteeing him to the extent of £1,000. Goldstuck subsequently increased that guarantee without the knowledge, apparently, of his creditors, but still that liability did not fall due until the failure of Gallowitz, when it was found that the insolvent had become liable for a balance of £1,500 due to Dunell, Ebdon and Company. The insolvencies of Nieberg and Gallowitz, and the failure of other creditors to pay their debts, certainly brought down Goldstuck toward the end of that year, but at the time that the transaction now in question was entered into, I do not think it was contemplated by him that insolvency was either inevitable or probable. The transaction was made with a view to meet the liability with which he was faced in regard to Nieberg. Goldstuck rejected the proposal to sell the farm to pay this account, preferring rather to sell the farm to his sons in the manner which has been described. Another

difficulty which I have arises from the fact that for the farm and the stock sold for £3,500 a mortgage bond was passed for the whole of the amount over the landed property, with the general clause. I find difficulty in seeing how the estate was diminished or lessened in value by the transaction, except possibly to this extent, that the £1,000 of stock was an asset which could be used by the purchasers and against which they only gave the mortgage bond, whereas the landed property could not be alienated or dealt with in any way so long as the debt was upon it. The effect of the transaction was to keep the value of the farm an asset in the insolvent estate. Therefore, the transaction, although not in the ordinary course of business, was for a just and valuable consideration. It was entered into *bona fide* in this sense, that there was no secrecy about it, the insolvent informing the Standard Bank of the transaction, and obtaining their consent to its going through. Though holding this to be a transaction not to be cancelled under the 83rd section, that does not necessarily dispose of the whole case. After the bond was passed, it was ceded to the Standard Bank, and it was alleged that the cession to the Standard Bank was an undue preference under section 84 of the Insolvent Ordinance. Formerly in practice it was always difficult to prove an undue preference, because the intention to prefer and contemplation of insolvency was a condition of the mind of the insolvent. This contemplation of insolvency was formerly required to be proved by the plaintiff; but the Act 38 of 1884 shifted the onus of proof, and raised a presumption of this contemplation in any case in which the transaction challenged took place within six months of the insolvency, if it was proved by the person seeking to set aside the transaction that at the time the assets fairly valued were less than the liabilities fairly calculated. Hence the necessity in a case of undue preference, when it is desired to take the benefit of this presumption, of proving the condition of the estate at the time of the transaction. The question of the condition of the assets and liabilities of the insolvent therefore stands at the very threshold of an action under either of the clauses of the Ordinance. I cannot upon the evidence before me hold that the onus of proof which in this case lies upon the plaintiff, has been discharged. Even had the fact been proved, it would only raise a presumption. It has still to be considered whether there is otherwise sufficient evidence of contemplation of insolvency. A question has arisen whether, as the transaction was arranged in July, and Goldstuck's insolvency only took place in the subsequent January, the benefit of the Act of 1884 could be taken advantage of by the plaintiff.

But I think not only is that question doubtful, but also that he could not take advantage of the presumption, seeing that he has failed to prove that the assets were insufficient to meet the liabilities at the time of the transaction. In considering whether the transaction was an undue preference, the Court is bound, as has been frequently laid down, to consider all the circumstances in the case. The mere statement of the insolvent that he had not the expectation of insolvency in his mind is not necessarily conclusive, where the Court is satisfied that he ought to have had this expectation in his mind, or that, considering all the circumstances, he ought to have known that the necessary consequence of his act such as the giving of security to one creditor, would be to bring all his other creditors upon him and force him into insolvency. In this case it is remarkable that although the principal creditors knew of this transaction in August, they did not thereupon take proceedings so as to set aside the security given to the bank. On the contrary, they themselves in September took a mortgage for £2,500 in their favour upon the other property of the insolvent, and we also find that their representative, Yule, on visiting Hoptown and going through the insolvent's books, actually gave him £200 to enable him to purchase produce. Further, from the accounts put in, I find that these creditors continued to supply goods to the insolvent until very shortly before the actual sequestration. It was not the ceding of the bond that brought about the insolvency, it was the subsequent failures of persons with whom the insolvent had had business transactions that were the immediate cause of a sequestration of his estate. When the liability for Gallowitz had been changed from a contingent liability to an actual liability, owing to Gallowitz's failure. Goldstuck consulted his principal creditors, and on their advice he then prepared his schedules and surrendered his estate. It was therefore not in consequence of the cession of the bond to the bank that the sequestration came about, but in consequence of other matters—these other insolvencies falling about his ears, and other losses—that rendered the insolvent unable to perform his obligations to his creditors. As to the question of collusion it is sought to cause the Standard Bank to forfeit their claim under section 86, but if the sale is not to be set aside, and if the undue preference is not proved, the claim of forfeiture by reason of any collusive arrangement necessarily falls to the ground. Judgment will therefore be given for the defendant with costs.

Plaintiff's attorneys, Van Zijl and Buissinne. Defendant's attorneys, Fairbridge, Arderne and Lawton.

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

BAM V. BAM.

1907.  
{ Aug. 21st.

The plaintiff Amelia Johanna Bam (born De Villiers) sued her husband, Alfred Walter Bam, for a decree of judicial separation, on the ground of his intemperance and violence.

It appeared that the parties were married in 1881 at Darling. There are eight children of the marriage, the eldest being 25 and the youngest eight. Defendant denied the intemperance, and alleged that plaintiff had deserted him; he therefore claimed restitution of conjugal rights. Defendant was formerly secretary of the old Tramway Company, and had once been a broker and shipping agent.

Mr. D. Buchanan was for plaintiff, and Mr. Inchbold for defendant.

In evidence plaintiff alleged that defendant had never been temperate, and matters came to a crisis about four years ago. Apart from systematic intemperance, her husband used frightful language in her hearing and that of the children; in various ways he had humiliated them. He frequently cursed them, and expressed the hope that they would all be found dead.

Cross-examined: When he was half-drunk, defendant was most objectionable. Only once had she seen him really incapable. His cruelty consisted in the use of foul language, for he never struck her. Formerly she used to submit quietly to his abuse, but she discovered that if she retaliated a little he was more quickly subdued, but she never cursed him. To keep quiet under defendant's abuse one would have had to be made of blood and iron.

[De Villiers, C.J.: Is there any possibility of the parties agreeing upon some compromise?]

Mr. Inchbold: We are still willing to adhere to our offer—defendant to go away for a year, allow plaintiff £6 a month, and she to keep the children until he comes back about a year hence.

[Why not have a deed of separation altogether?]

In that case he would want the boys to live with him.

[Will he deny intemperance?]

Mr. Inchbold: Yes; we have witnesses who can prove that he was not intemperate.

Mr. Buchanan: My client feels that she cannot accept anything but a deed of separation.

Plaintiff, re-examined, stated that she was not willing to go back to her husband.

Defendant stated that he had never been addicted to intemperance, and had never used threatening language to his wife, or ill-treated her. There were words about the children, but he had never cursed her. The children treated him in an insulting manner, and they were the cause of the trouble—especially the two elder ones. The mother took their part, and that was how all the trouble had arisen. It was untrue that he did not contribute towards the household expenses.

Cross-examined: He was as fond of his wife now as he was on the day he married her, and he also loved the children, with the exception of the two elder children. Unfortunately, his wife had taken their part.

Maria Bam, the eldest daughter, said she had often seen her father the worse for liquor, when he was frequently violent. On one occasion he threatened to cut their throats and his own as well. She had heard him call her mother names.

Cross-examined: The defendant had thrown a joint of meat at her. He did not keep wine in the house.

Isaac Bam stated that he had frequently seen his father in an intemperate state, and had also heard him call his mother and sisters most insulting names.

Mr. Inchbold: Did your mother ever say anything back?

Witness: Rather.

Susan Elizabeth Bam said she had often seen her father under the influence of liquor. He had frequently cursed and swore at plaintiff, and on one occasion, he was going to raise his hand against her when witness's brother stopped him.

Jessie Alfreda Bam deposed that she had frequently seen her father the worse for liquor.

This closed the case for the plaintiff.

Mr. Inchbold called

A coloured domestic, formerly in the employ of the parties. During the three months of her service, witness said she had never seen defendant intoxicated nor had she heard him use strong language.

Frank Tyson Hopkirk said he had known defendant for about four years, and although he saw him almost daily, he had never seen him the worse for liquor.

Julius Heyneker stated that he had known defendant for a long time, having lived next door to him for years. He had never heard noises from the Bam's house as if the parties were quarrelling, nor had he seen defendant the worse for drink.

Counsel having been heard in argument on the facts.

De Villiers, C.J., asked plaintiff if there was any chance of their living together again?



Plaintiff replied that defendant had so frequently deceived her that she had lost faith in him.

[De Villiers, C.J.: Would it not be more satisfactory, the parties having come to such a state, that defendant should have his plea of restitution and there should be a divorce?]

Mr. Buchanan: It would be exceedingly hard on the wife that she should have to suffer the stigma of a divorce.

[I mean for her own sake. If you succeed in getting a judicial separation they are still husband and wife, and she is tied to him still.]

She has no objection to a divorce, provided she is given the custody of the children.

De Villiers, C.J.: This is in every way a painful case, and I was in hopes up to the last that the parties would come to some arrangement for living together again, and forgetting the past, but I gather from the evidence that it is hopeless to expect it. The test in cases of this kind is whether the general misconduct on the part of defendant has been so great as to make further living together insupportable to plaintiff. I am bound to say that the evidence in this case, although conflicting, has convinced me that the conduct of defendant has been very improper towards his wife in every way. Although he never actually struck her he used language towards her which no husband should use, and which she certainly never deserved. He has threatened to assault her, and although he might not have been serious in that threat, yet that threat—coupled with the fact that he did on several occasions show signs of intemperance—would justify the Court in granting a decree of judicial separation. It is true that others have not seen him intoxicated, and even a neighbour—Mr. Heyneker—has never seen him intoxicated. But that is not the test in cases of this kind, because a man would naturally prevent neighbours from seeing the condition in which he is, but he could not prevent his own people, living in the same house, seeing it. Mr. Heyneker speaks of what took place over a year ago, but as he never went into the house his evidence cannot be held to override the evidence of all the children of the parties who have been called. If it had been only one child who had given evidence, one might have understood that partiality for the mother might have induced that evidence, but three daughters and a son all agree that the father was continually intoxicated. I could not agree that these children had formed a conspiracy to give false evidence against their father. I believe their evidence to be correct—that there has been habitual intemperance on the part of defendant. He denies this; naturally he has not considered he has been so bad as others have made him out to be. But there

is the evidence of the children and the plaintiff that habitual intemperance has been continued, and the whole conduct of defendant towards his wife has been such that she cannot reasonably be expected any longer to live with him. For plaintiff is entitled to a decree of judicial separation, and is entitled to the custody of the minor children of the marriage, but, of course, defendant must have access to them at all reasonable times and places. Plaintiff does not press for costs, nor do I think it is likely that she would obtain costs from him, and under all the circumstances I think each party might pay their own costs. I am prepared to reserve leave to defendant to apply for the custody of the children on proof that they are not being properly cared for, or that reasonable access to them is not being allowed him.

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.

{ 1907.  
Aug. 21st.

Mr. Schreiner, K.C., moved for the admission of Percy Tyson Lewis as an advocate.

Application granted and oath administered.

### PROVISIONAL ROLL.

ESTATE HIDDINGH V. SHILLING.

Mr. Philipson Stow moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

MOSES V. GAUL.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,000, with interest from the 1st January, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable, and rents accruing to be attached.

Order granted.

### REHABILITATIONS.

Mr. Roux applied, under the 117th section of the Insolvent Ordinance, for the discharge from insolvency of Wm. Temple Nourse. Counsel pointed out that the first liquidation account and

plan of distribution was confirmed in December, 1906, while in the Master's certificate mention was only made of the fact that the second plan of distribution was confirmed in May, 1907.

Hopley, J., said that the matter had better stand over until the Master's certificate was corrected. The Master should look into the matter, and if he thought all the necessary steps had been taken by applicant, there would be no difficulty in the matter.

Later, Mr. Roux presented a corrected certificate by the Master, stating that the first liquidation account and plan of distribution was confirmed in December, 1906, and cited *ex parte Siebert* (17 C.T.R., 686).

Application granted.

Mr. H. G. Lewis applied, under the 117th section of the Ordinance, for the discharge from insolvency of Wilhelm Andreas Ole Wernberg.

Granted.

Mr. Ingram applied, under the 117th section of the Ordinance, for the discharge from insolvency of Francis Joubert Voster.

Granted.

#### GENERAL MOTIONS.

*Ex parte* BECHUANALAND { 1907.  
PRESS, LTD. { Aug. 21st.

Mr. M. Bisset moved, on the petition of J. P. Boyle and Wm. Dawson and Sons, for a winding-up order in the matter of the Bechuanaland Press, Ltd., and the appointment of an official liquidator. Petitioners stated that the company had carried on business at Vryburg, but that its affairs were at a standstill for want of control. The company owed Boyle £250, and Wm. Dawson and Sons £47 14s. 7d. The company was unable to pay its debts, and its assets exceeded its liabilities. Petitioners prayed that Mr. John Peter Frylinck, of D. Wessels and Co., Vryburg, be appointed official liquidator.

Ordered that the company be wound up as prayed, and that Mr. John Peter Frylinck be appointed provisional liquidator, rule to issue, returnable on the 24th September, calling upon all persons concerned to show cause why Mr. Frylinck should not be appointed official liquidator, with the powers under the 149th section of the Companies Act, publication once in the "Government Gazette," the "Diamond-fields Advertiser," and the "Bechuanaland News" (if still published).

#### BERGMANN V. COLONIAL GOVERNMENT.

[The above matter was standing over at the date of going to press.]

#### *Ex parte* SNELL.

Mr. De Waal moved for the rectification of a certain diagram attached to transfer deeds of ground at Yzerplaats, Cape Division. Counsel explained that petitioner first bought one piece of ground, and afterwards bought an adjoining piece of ground, but when a survey was made it was found that a narrow strip remained between the two pieces of ground. Petitioner now desired to have this strip included in his diagrams.

Ordered that the Registrar of Deeds be authorised to substitute the diagram as recommended in his report.

#### *Ex parte* PETERSE.

Mr. Louwrens moved for the amendment of petitioner's name in certain transfer deeds, mortgage bonds, and ante-nuptial contract.

Order granted as prayed.

#### STEPHENS V. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

This was an application upon notice to respondents to show cause why an order should not be granted declaring applicant to be alone entitled to the rights and benefits accruing from a certain policy of insurance, or the surrender, or lawfully deal with the same as applicant may think fit.

Mr. Benjamin, K.C., was for applicant, W. K. Stephens, of Stellenbosch; respondents did not appear.

It appeared that in 1891 applicant took out a life policy in the respondent company for £500. He purposed to give the policy to his wife for the benefit of herself and the family, but the gift was not accepted, and he claimed that it was revocable.

Order granted as prayed; no order as to costs.

#### *Ex parte* POTGIETER.

This was an application on behalf of the petitioner, Johannes Stephanus Frederick Potgieter, for an interdict restraining the respondents, Reuben Bresky and Marcus Hotz, from conveying to Frederick Matthys Christian Calitz certain land in the division of Oudtshoorn.

The affidavit of the petitioner set out that he was a farmer residing at Nooitgedacht, in the division of Oudtshoorn, and was 81 years of age. He was a creditor in the insolvent estate of Johannes Stephanus Frederick Potgieter, jun., whose estate was sequestrated on 1st August, 1907: his claim amounted to upwards of £4,000; the whole of which

was unsecured. On 22nd May, the insolvent purchased from his brother Her-class Petrus Jacobus Hermanus Potgieter, portions of the farm Nooitgedacht for £3,550. Deponent interposed, and bound the debtor to the extent of £3,000, and passed a bond for that amount. The deponent further bound himself as surety and co-principal debtor for the accommodation and the insolvent to the respondents, Reuben Bresky and Marcus Hotz to the extent of £1,250, being an amount alleged to be due to respondents by the insolvent, and a mortgage bond was passed for that amount by the insolvent and deponent. Deponent was further induced and persuaded to bind the debtor for the accommodation of the insolvent to the extent of £900, being for a debt alleged to be due to the respondent Reuben Bresky, and a mortgage bond was passed by deponent and insolvent jointly. On 14th May, insolvent sold to the respondents the land purchased by him for £2,050, and the respondents sold it to Frederick M. C. Calitz for £2,750. No transfer had yet been passed to Calitz. The remainder of deponent's claim against the insolvent consisted of items for cash lent and advanced, debts taken over, and promissory notes. Deponent had strong and cogent reasons to suspect that no proper or full consideration had been given by respondents in respect of the items of £1,250 and £900, and that an undue advantage had been taken of him in his old age and feeble state of health. A full and proper account had been demanded from the respondents, but no satisfactory account had been rendered. At the date of the alienation by the insolvent of his landed property to the respondents, his liabilities were far in excess of his assets, and his estate was hopelessly and irretrievably insolvent. Deponent submitted that this alienation of the most important asset to the respondents was irregular, contrary to law, and in fraud of creditors, and that, under the circumstances attending the sale, he was in effect unduly preferring the respondents, and seriously prejudicing deponent's position as a large creditor, for the ground was worth considerably more than the amount for which the respondents had secured the same. He contemplated challenging the transaction between the insolvent and the respondents, as the principal creditor of the insolvent. He therefore submitted to the Court his application for an interdict restraining the respondents from conveying to Frederick Matthys Christian Calitz, or to any other person, the land acquired by them from the insolvent, pending an action to test the legality of the sale by the insolvent to respondents.

Mr. Bisset moved,

A rule nisi was granted, calling upon the respondents and F. M. C. Calitz to

show cause why the respondents Bresky and Hotz should not be restrained from passing transfer to Calitz of the property purchased by Calitz from them, pending an action to be instituted by the applicant or the trustee of the insolvent estate when appointed.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

### PROVISIONAL ROLL.

MORSER V. HAURWITZ. { 1907.  
Aug. 22nd

Mr. Wallach moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### THOMPSON V. SEARLE.

Mr. M. Bisset moved for provisional sentence for £4,000, balance due on a bond of £7,500, with interest from the 1st January, 1907, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

### BUSSE V. ESTATE LATE BUSSE.

Dr. Rainsford moved for the final adjudication of the defendant estate as insolvent.

Final order granted.

### ILLIQUID ROLL.

### HOLZMANN V. MCKENZIE.

Mr. Gutsche moved for judgment under Rule 329d for £42, rent due from 1st February to 31st July, 1907, with interest and costs. Counsel explained that originally defendant entered appearance and declaration was filed, but the appearance was afterwards withdrawn.

Order granted.

## BRANDON V. BRANDON.

This was an action brought by Daisy Pauline Florence Brandon, of Cape Town, against her husband, Charles Edward Brandon, for restitution of conjugal rights on the ground of his malicious desertion.

Mr. Wallach was for plaintiff; defendant did not appear.

Defendant was sued by edictal citation. It was stated that efforts had been made to discover his whereabouts, but without success, and substituted service, as directed, had been given.

Wm. Thomas Birch, clerk in charge of the Marriage Register, Colonial Secretary's office, gave formal evidence of registration of the marriage.

Plaintiff said she was married to defendant on the 16th October, 1905. He came from England. She had known him for some years previously as a commercial traveller. They were married in community. There was one child of the marriage. After they had lived together for three days, he disappeared. She did not know where he went. She ascertained subsequently that he had been sentenced to seven months' imprisonment for forgery. In October, 1906, he reappeared, and stayed about two hours at her mother's house, where witness was living. He then went away, stating that he was going to see what he could do, and that he would write to her. She had not received any message from defendant since then. She had heard, in consequence of inquiries, that he had been sentenced to three months' imprisonment for housebreaking in Natal since she last saw him.

Defendant was ordered to restore conjugal rights on or before the 1st November, failing which, to show cause on the 14th November why a decree of divorce should not be granted, with custody to plaintiff of the child, and costs, service as before.

## GENERAL MOTION.

*Ex parte* MILLS AND SON.

Mr. Gutsche moved for the appointment of a provisional trustee in the insolvent estate of Wm. Filby, lately a baker, of Wynberg.

Order granted, appointing Thomas George Norton as provisional trustee, with powers to carry on the business, to collect the debts, and sell perishables.

## SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ERASMUS V. COLONIAL GOVERNMENT. { 1907.  
Aug. 23rd.  
„ 26th.

This was an action brought by Pieter Joshua Erasmus against the Secretary of Agriculture and the Colonial Government, in which he claimed a declaration of rights in respect of a portion of ground adjoining his farm, De List, situate in the district of Sutherland. The declaration stated that plaintiff bought the farm from P. J. Reynolds in 1899, and obtained transfer in 1900. Reynolds went over the ground with him, and pointed out the beacons. The piece of ground, which was now claimed as Government ground, he certainly believed belonged to the property. Plaintiff had used this land for his own benefit, as had all the other owners of the farm.

Defendant, in his plea, admits that the said piece of land has been fenced, but claims that it is Crown land, and refuses to acknowledge plaintiff's claim or to give transfer.

Mr. Close (with him Mr. Roux) was for the plaintiff; Mr. McGregor, K.C. (with him Mr. Nightingale) was for the defendant.

Pieter Joshua Erasmus, the plaintiff, said he was the owner of the farm De List, bought from Peter Reynolds in July, 1899. When he purchased the farm he went over the ground with the late proprietor, who pointed out the beacons. Shown the plan, witness said that it was correct. When the beacons were pointed out, the fence round the piece of ground was there; in fact, it was there now. This piece of ground was situated between the farms De List, Krans Kraal, and Vlakke Kraal. He had used that piece of ground ever since he bought the farm as his own, without recognising anybody else.

Cross-examined by Mr. McGregor: He purchased the ground on the condition that he received possession after one year. He could not tell whether he saw the diagrams before he got transfer.

When did you first see the diagram?—I cannot say.

You can see that this piece of blue ground on the map, which is the ground in dispute, is shown as distinct from your farm?—Yes.

[Maasdorp, J.: When did you first ascertain that there was a piece of ground not shown upon your diagram?—On January 23.

[Who made this discovery that the land was Government ground?]



Mr. McGregor: Well, my lord, two people have made application for it.

Cornelius Groenewald, one of plaintiff's attorneys, stated he had made a search in the Deeds Office. He handed in a list of the owners of the farm De List, which showed that F. A. Snyders, one of the former proprietors, owned the farms De List and Kranz Kraal. These farms were contiguous and included the piece of ground in dispute.

Peter Jacobus Reynolds said he formerly owned the farm De List, which he sold to plaintiff.

[Maasdorp, J.: I notice that your name is given as Peter James on the deed of transfer?]

Witness: Yes; that is a mistake.

[Did you not meet with some difficulty in effecting transfer?]

Witness: I don't recollect any, my lord.

In reply to Mr. Close, witness said that a neighbouring farmer, Bothma, did not use the ground in dispute during his occupation. Bothma did at one time want to make an exchange of a piece of ground for the ground in question, but witness did not agree to this. He never knew that there was Government ground there although Bothma said there was. Witness made investigations, and he was told by Mr. Bosman, of the Surveyor-General's office, that there was no Government ground between the farms De List and De Kranz.

Mr. McGregor: You did not get any letter from Mr. Bosman on the subject?—No.

What were his exact words?—As far as I recollect, he said, "Go and enclose the land, there is no Government ground between De List and De Kranz."

Did you sell the farm according to beacons or according to your title-deeds?—According to beacons. I pointed out the beacons as they were shown to me by Mr. Home, from whom I bought the farm.

Zachary Andina Swanepoel said she was one of the daughters of one of the former owners of the farm De List. The farm was sold in her father's estate to a Mr. Home. She was on the farm during Mr. Home's and Mr. Reynolds's occupation of the farm. Her first husband was manager. The farm De List she always understood, took in the ground which was now claimed as Government ground. She never heard anyone speak of Government ground in that particular part.

W. M. v. d. Westhuisen said he remembered when J. H. Snyders bought Government ground which he had already leased. People knew that there was Government ground round about. The piece of ground marked with blue was the ground in dispute. He did not know that it was a special ground until when he came down to Cape Town, and was desirous of buying certain land, he

was informed that the particular piece marked on the chart was Government ground.

Zacharias Andrius Snyders said he was a son of the late proprietor of the farm De List, and said he always considered that the piece of ground belonged to the farm. He certainly never heard anyone specially refer to that piece of ground as Government ground.

Johan Hendrik Snyders said he was living on the farm Buffels Vlei, adjoining De List. He was a son of one of the owners of the latter farm. Witness pointed out that the farm Buffels Vlei he bought from Government. This farm he had formerly leased. If he had known that the piece of ground in dispute was Government land he would have bought that too.

Mr. Close closed his case.

Peter Benjamin Reynolds Winterbach said he lived now in the Prince Albert district. He was manager of the farm De List during Mr. Home's occupation. The latter told him that the triangular piece of ground, shown on the map, was really Government ground, and that was why he did not extend his ostrich camp so as to include this ground. The ground was not fenced in 1894. When he first came to the farm his father-in-law, the last witness, told him that the ground belonged to Government.

Johan Hendrik Snyders (recalled) said that he had no recollection of telling his son-in-law in 1891 that the ground belonged to Government. He had heard statements that it belonged to Government, but these were disputed.

Huybregge Grebenhouw said that her late husband's employer, Mr. Bothma, told her that the ground was Government ground, and she could allow the sheep to graze there.

Gertrude Maria du Plessis said she lived on Bothma's farm; the latter's sheep used to graze on the ground in question. Other people's sheep grazed there also.

Daneel Johannes Grebenhouw corroborated the statement mentioned by the other witness for defendant, that this ground was generally considered to be Government ground. His father was shepherd under Mr. Bothma, and told Mr. Winterbach that he could beat him if he liked, but he would not remove his sheep from the piece of ground.

Cross-examined by Mr. Close: How old are you now?

Witness: Twenty-one years.

How old were you when your father told you this?—Eight years.

What sort of a day was it?—I can't say.

Franz Stephanus Bothma, farmer in the Prince Albert district, said in 1892 he bought a neighbouring farm to that of De List. He reckoned at the time he was on the farm that the ground was Government ground. When he went down to the Surveyor-General, with two

creditor against the defendant, and a writ of execution had been issued to which a return of *nulla bona* had been made. Defendant had thus committed an act of insolvency.

Mr. W. Porter Buchanan, K.C., appeared for defendant, and opposed the application. Defendant denied that he had committed an act of insolvency, as alleged by petitioner. His assets, if fairly valued, exceeded his liabilities by about £200. It would be of no benefit to the creditors or himself if the estate was placed under sequestration. Counsel cited *in re Reitz* (5 Searle 101), *Van der Poel v. Langerman* (3 Menzies, 307), *Marsh v. Makein* (2 Juta, 104), and *Dell v. Cairo* (1 H.C. 393).

Mr. Sutton said that petitioner proceeded on two acts of insolvency. One was that defendant had failed to point out sufficient goods to satisfy the writ. The other was the judgment of a competent Court against the defendant.

Hopley, J.: It is quite possible that had the whole of the facts in this case been set out in the petition upon which a provisional order was granted no order would have been made by the learned Judge before whom the matter came. Petitioner states that defendant is indebted to her to the extent of £100 on a mortgage bond, and that there is a small amount of interest overdue on this bond, but she goes on to say that on the 3rd May a writ of execution was issued on a judgment of the Resident Magistrate's Court at Cathcart, obtained by Elliott Bros. against defendant and one Brown, and on the 7th May the Messenger of the Court made a return on the writ of no property in respect of both debtors, and petitioner said that in failing to meet the amount of the execution aforesaid, Bright has committed an act of insolvency. The petition did not go on to say that thereafter the debtor was arrested, and that he is now making payments of £1 a month under such judgment, and to satisfy the same. Defendant has a trade: he has also property, and there is a dispute as to whether he is in insolvent circumstances, but, besides that, he has the great asset of his own energy and his own trade to fall back upon. and the Magistrate, considering all that, has granted a mode of satisfying this judgment, which is being carried out, and it seems that the act of insolvency ceased to be an act of insolvency when the satisfaction by means of monthly payments was arrived at, and that, therefore, when the petitioner in this case came and said he had not pointed out sufficient means of satisfying the judgment, she ought also to have been able to say "nor has he satisfied the same"; and I do not think she could have said that under the circumstances of this case. The judge, of course, presumed that defendant was not satisfying the same. It seems to me that

on the present proceedings petitioner must fail, and the provisional order must be set aside, with costs.

#### HEYDENRYCH V. LEVI.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### STANDARD BANK V. BENKWITZ.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £326 ls. 6d., balance of account due to the bank, with interest, and that the property, under two mortgage bonds, be declared executable, with costs.

Order granted.

#### GENERAL MOTIONS.

VAN WYK V. VAN WYK. } 1907.  
( Aug. 23rd.

Mr. Van Zyl moved for a commission *de bene esse* to take the evidence of the plaintiff, and other witnesses at Calvinia, in an action instituted by the plaintiff against the defendant (his wife) for divorce by reason of her adultery. The defendant had not pleaded to the declaration, and had no right now to appear to defend the action.

Order granted as prayed, the Resident Magistrate of Calvinia to act as commissioner, notice of the commission to be served on the defendant.

#### Ex parte COOTE, NOBLE AND CO., LTD.

Mr. Louwrens moved for an order confirming a special resolution of the shareholders, reducing the capital of the company from £60,000 to £43,000, and for the registration of the minute in the Deeds Office. In the articles of association, no provision was made for the reduction of the capital of the company. The only creditor, the Standard Bank at Mossel Bay, agreed to the proposal.

Order granted as prayed, the minute approved of, notice to be published once in the "Gazette."

#### WAGENAAR V. KLEINBOOI.

Mr. Roux appeared for the applicant in certain two matters to move in the first instance for an interdict against the respondent restraining him from selling or transferring a certain erf at Oudtshoorn, the property of her late husband, in whose estate she was executrix *dativo* pending an action. The second application was on notice of motion, calling upon the respondent (applicant's husband

and son of the first respondent) to show cause why she should not be granted leave to proceed for the transfer of the erf without his assistance.

The parties were married in community of property, and the respondent, with whom she was not at present living pending an action for divorce which she was about to institute against him, had refused to join her in the suit.

Hopley, J., taking the applications together, said, in the first case Mrs. Kleinbooi, executrix in the estate of her late husband, Solomon Wagenaar, asked that Hendrick Kleinbooi should be restrained from parting with a certain erf, of which she alleged she was entitled to one-quarter because her late husband, before his death, purchased and paid for it without getting transfer thereafter. The second application was for leave to institute proceedings against Hendrick Kleinbooi without the assistance of her husband, Nicholas Kleinbooi, who had refused to assist in the action against his father. The application to bring the action as executrix would be allowed without the assistance of her husband, but there would be no order as to costs against Nicholas Kleinbooi. An order would be granted restraining Hendrick Kleinbooi from parting with the erf in question pending an action in the ensuing Circuit Court.

*Ex parte* SCHOCHER.

Dr. Greer said that in this matter, which was an application to sue *in forma pauperis* for the recovery of £82 3s. 2d., alleged to be due for goods sold and delivered, he was unable to certify without fuller information.

The matter was referred to Dr. Greer.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

*Ex parte* GREEF AND ( 1907.  
OTHERS. ) Aug. 24th.

Constitution Ordinance—Voters' roll—Occupation—Grazing rights.

*A structure consisting of wooden frame-work attached*

*to poles fixed in the ground and covered on the top and on all sides with canvass or with iron, and used as a habitation held to be a house in terms of the 8th section of the Constitution Ordinance: but an ordinary tent held not to be such a house.*

*A male person who for twelve months lived in a house upon land occupied with such house under a lease of grazing rights held to be entitled to be registered as a voter where the value of the house, together with the grazing rights, is £75 or upwards.*

This was an application by Gabriel P. Greef and a number of others for an order directing the registration officer to place their names on the roll of Parliamentary voters for the division of Prieska.

Mr. W. J. van Zyl was for applicants; Mr. Wallach appeared to oppose.

Mr. Van Zyl said that in Greef and others, Wessels P. Germershuys and others, and Cloete and others, the issue was practically identical, the question being whether the places inhabited by the applicants were buildings within the meaning of the Ordinance. Greef and others inhabited buildings made of corrugated galvanised iron, while Germershuys and others inhabited frame tents with posts driven into the ground and covered over with canvas, and Cloete and others inhabited ordinary tents. In the case of Martinus le Roux, the question was whether applicant was in receipt of wages or salary, so as to entitle him to be registered.

De Villiers, C.J., said that, except in the case of Le Roux, the only question to be decided in these matters, as far as he could gather, was whether these people lived in houses. Did they or did they not occupy houses?

Mr. Van Zyl argued that in each case the applicants were occupying buildings fixed to the soil, that for their purposes they were occupying buildings which served as dwelling-places, and that they were entitled to registration under section 8 of the Constitution Ordinance. He cited *Kimberley Mutual Building Society v. Hughes and Others* (1, H.C., 241). As to Le Roux's case, he was a contractor, and the question was whether he was receiving salary or wages within the meaning of the Act. Le Roux had apparently earned more than £50 a year. It appeared that he had lived in a zinc house during the period.

[De Villiers, C.J.: But what is the value?]

Mr. Van Zyl: That does not appear from the record. Applicant says that he has earned between £400 and £500 during the last 2½ years. He is employed on a farm.

[De Villiers, C.J.: If he does not occupy a zinc house, valued at £75, and he does not receive wages, then he is not entitled to be registered.]

Mr. Van Zyl asked whether the Court would allow Le Roux's case to stand over for further information.

[De Villiers, C.J.: I am afraid we could not, as it is time the voters' lists were published.]

Mr. Wallach referred to the English Reform Act of 1832, and cited *Powell v. Boriston* (18 C.B.D. New Series, 175, and 34 Law Journal, New Series, Common Pleas, 73). Buildings within the meaning of the section should, he urged, be something substantial, and not temporary and removable. These people were bywoners living in buildings which, as described by the Magistrate, were wanting in permanency, and not of the necessary value. He cited *Watson v. Cotton* (5 C.B.D.).

De Villiers, C.J., asked counsel if he had read the previous case?

Mr. Wallach said that he had, and he admitted that the decision was rather against him.

Hopley, J., asked what had been the fate of the applicants in the present case?

Mr. Wallach said that the Civil Commissioner allowed the claims of Greeff and others occupying galvanised iron buildings, but disallowed the claims of those living in tents.

De Villiers, C.J.: I shall first of all deal with the tents, pure and simple. No doubt, in one sense, they may be called "houses," because they are used as dwellings by those people who have the grazing rights or the rights of occupation of the farms in question. But I do not consider that they can rightly be classed under the denomination of "houses or other buildings," because by no method of construction can a tent be regarded as a building. The use of the word building shows that the legislature required something more than an ordinary tent which may be put up or removed without much labour or trouble. A "building" may not require masonry, but the word implies some degree of trouble, skill and elaboration in fixing or removing the structure, and I therefore consider that the Revising Officer was quite right in holding that persons living in tents were not occupying "houses or other buildings." Then, as to frame tents, or, as I think, they should rather be called "canvas houses," I am of opinion that they may fairly be considered to be "houses or other buildings." A certain amount of building is required for the purpose of

constructing frame tents. They are structures consisting of wooden framework attached to poles fixed in the ground, and covered on the top and all sides with canvass. Considering the skill, labour and elaboration required for their erection, they may fairly be considered as having been built. As their value taken with the value of the land occupied therewith amounts to £75 and upwards, I am of opinion that all these people ought to be registered as voters. As to the cases of Wessel P. Germershuys, Dirk Human Jacobus, Germershuys, Philip Loots, John P. de Klerk and Nicolus G. Swart, the Court is of the opinion that their claims should have been allowed. The same remarks apply *a fortiori* to the case of the galvanised iron buildings. They are also structures which are erected by driving posts into the ground, and then covering them on all sides with iron, and also roofing them with iron. They are all, in my opinion, houses occupied as such by these people, and their claims were properly allowed by the Magistrate. An objection has been raised to one, that, instead of having his building covered with galvanised iron, it is covered with canvas, but for the reasons I have stated that will make no difference to his case. Therefore, the Revising Officer's decision as to the galvanised iron buildings will be upheld. Then there is the case of Le Roux. There is no evidence whatever as to the value of the house occupied by Le Roux. For aught the Court knows, it may be of the value of £75, but it does not appear whether he occupies any ground attached to that house, and, therefore, if he has any qualification at all it would be under the wages or salary qualification, but there is no proof whatever that he receives wages or salary. He had been a contractor for the previous year, and had drawn a certain amount of money, but the Court has in other cases decided that making money by means of contracts does not amount to receiving wages or salary. He was put on the list by the Magistrate. That must be disallowed. As to the remaining claimants, they for 12 months and upwards had lived in houses upon land occupied with such houses under leases of grazing rights, and the value of each of the houses together with the grazing rights clearly amounts to £75 or upwards. Their claim to be registered will therefore be allowed.

Buchanan, J.: I would like to add a few words supplementary to the judgment of the Chief Justice. Considering the circumstances of this country and the habits of the people, and the kind of buildings in which they reside and the kind of houses which they have, it is very difficult to lay down a hard and fast rule as to what should be considered a house and what



should not be considered a house but I think there is something as between the two extremes before us, the movable tent and the galvanised house. As far as the galvanised house is concerned, the Revising Officer has allowed those claims, and I think very properly. As far as the tent is concerned, it is not a structure of any kind, but a covering that cannot be considered a house or building in any way. It is very difficult to see where between those two you must fix a line, but I think if you allow a galvanised iron house on framework attached to the soil, and you have framework attached to the soil with a covering of other material it should be considered to be within the Ordinance. As to Le Roux's case, that has been settled by previous decisions.

Hopley, J., concurred.

Mr. Van Zyl applied for costs in the cases of Greef and others and Germershuys and others.

Mr. Wallach urged that no order should be made as to costs.

De Villiers, C.J.: In some cases only the applicants have been successful, and I think the parties had better arrange among themselves as to costs. The Court will make no order.

#### *Ex parte* DELPORT AND GROVE.

This was an application by Jurgens J. Delport and Stephanus Andries Grove, of the Kuruman district, to have their names placed on the list of parliamentary voters.

Mr. Pohl was for applicants; Mr. Wallach opposed.

The question raised in the one case was as to whether the applicant occupied premises of sufficient value to entitle him to be registered, and in the other as to whether he (Delport) was entitled to be registered as the occupier of a tent.

The Court decided against Delport's claim, and, as to the other, said that the Revising Officer, in taking into consideration the value of the premises occupied by Grove, appeared to have overlooked the rooms occupied by applicant in addition to his grazing rights. Grove's claim would be allowed.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

DUNBAR V. SMALE BROS. { 1907.  
AND CO. { Aug. 26th.

This was an appeal from the Resident Magistrate, Elliot, by the defendant Dunbar, in which the Magistrate had given judgment for the plaintiff. The question was whether the property in the partnership of Smale and Dunbar amounted to £190, or £250.

Mr. J. E. R. de Villiers appeared for the appellant; Mr. Gutsche appeared for respondent.

After argument on the facts, the matter was referred back to the Magistrate to clear up the evidence given by Mr. Kilbride when he stated that the cash was £147 7s. 6d. banked at June 19, to find out to whose credit was the money banked, and to know if the parties might consent to judgment upon this point, and so obviate the necessity of calling for further evidence.

#### DUNBAR V. SMAIL.

This was an appeal from the decision of the Resident Magistrate of Elliotdale.

Mr. J. E. R. de Villiers for appellant; Mr. Gutsche for respondent.

After argument, Mr. Justice Maasdorp ordered the matter to be referred back to the Magistrate to clear up the evidence of Kilbride, where he states that the cash book shows £140 7s. 6d. deposited in the bank on the 19th June—that is, to whose credit was the money deposited? The parties might consent to an admission on this point, and obviate the necessity of calling for further evidence. He wished to know if Smail got the benefit of the money. If it was put to the credit of Dunbar, he would take it that he never accounted for it.

## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BELL V. ESTATE DOUGLASS { 1907.  
AND ANOTHER. { Aug. 27th.  
" 28th.  
" 29th.

Partner—Partnership account—  
Managing partner—Remuneration.

*Independantly of a special agreement, a partner who devotes his services to a partnership is not entitled to remuneration.*

This was an action brought by John William Bell against (1) John Linden Bradfield and (2) Andrew Barclay Shand, in his capacity as secretary of the Eastern Province Guardian Loan and Investment Company, Arthur Wingfield Douglass, and Edward Wingfield Douglass, all in their capacity as executors testamentary of the estate of the late Hon. Arthur Douglass.

Mr. McGregor stated that a settlement had been made in the case of the first defendant, and the issue now was only as between the plaintiff and the second defendants.

The plaintiff's declaration was as follows:

1. The plaintiff, heretofore residing at Queen's Town in this colony, now resides at Nairobi, in British East Africa. The defendants are (1) John Linden Bradfield, of Dordrecht, in the division of Wodehouse, and (2) the executors testamentary duly appointed of the estate of the late Arthur Douglass.

2. In or about August, 1895, the plaintiff and the said John Linden Bradfield acquired certain rights to water and a site for electric power works on the farm of Glen Grey Reserve, on the White Kei River, near Queen's Town aforesaid, and had proceeded to establish works, construct buildings, and acquire rights in furtherance of a scheme (known as the Glen Grey Power Works) for supplying electric lighting and energy and otherwise promoting industrial enterprise in the vicinity; and, prior to September, 1896, a sum exceeding £2,000 had been expended on the undertaking.

3. Thereafter the said Douglass purchased a third share in the said venture or undertaking, and the further prosecution thereof for £780, under an agreement dated September 3, 1896, to which plaintiff craves leave to refer at

the trial. The said purchase included a share in a certain corn mill, the interest in which belonged to plaintiff alone prior to the said purchase by the said Douglass.

4. Thereafter the said undertaking was proceeded with for account of the plaintiff, the said John Linden Bradfield, and the said Douglass, and rights were acquired, works constructed, and moneys duly expended for the above purposes, and in furtherance of the said undertaking and the prosecution thereof.

5. Plaintiff, as manager of the undertaking (as hereinafter set out), personally advanced and paid out considerable sums of money for the furtherance of the said undertaking, for portion of which sums the said John Linden Bradfield and Arthur Douglass became and were liable; and, though they paid in certain moneys in reduction of their said continuing and increasing liability, the amount expended on their behalf and account exceeded the amounts paid in.

6. Thereafter in June, 1899, the said Douglass wished to have an account of expenditure, and thereupon, after plaintiff had rendered an account, one H. C. Lloyd, duly authorised by a power of attorney from the said Douglass, met plaintiff at Queen's Town and duly audited the accounts relative to the said undertaking and expenditure as agent for the said Douglass, and on the 21st July, 1899, transmitted to plaintiff a copy of the result of his audit, showing on a stated account a balance of £610 6s. 1d. as due to plaintiff by the said Douglass in respect of the moneys expended as aforesaid up to June 30, 1899, the said amount being money actually due, and plaintiff accepting as correct the balance shown.

7. The said £610 6s. 1d. represent the excess of the amount duly advanced by plaintiff on behalf of the said Douglass in furtherance of the said undertaking over the sums paid in by the latter, and his estate, represented by defendants, is liable to reimburse plaintiff in that sum, together with interest thereon (according to the usage obtaining herein between plaintiff and the said Douglass and Bradfield) at 6 per cent. from August 10, 1899, to date of payment.

8. Alternatively, plaintiff says that the said sum represents money paid and advanced by plaintiff on behalf of the said Douglass at his request, and is now owing by defendants, together with interest as aforesaid.

9. Or otherwise, alternatively, he says that in June, 1899, an account was stated between the parties, the said Lloyd acting for the said Douglass, and that on such stated account a balance of £610 6s. 1d. was settled to be due to plaintiff by the said Douglass, and that sum is now owing by defendants, together with interest as aforesaid.

10. On August 10, 1899, plaintiff gave his cheque to the said Douglass for a certain amount payable to him out of an amount paid by one Richard Barry not herein further mentioned) on the understanding that the said Douglass should give his cheque for the said stated amount, but the latter failed so to do, and accordingly plaintiff is entitled to claim interest at 6 per cent. on the said stated sum from the said 10th August.

11. (a) The defendant Bradfield had been cognisant of, and party to, the aforesaid audit of July, 1899, and accounts were duly from time to time rendered to and accepted, and acquiesced in by him, and thereafter, on or about September 30, 1901, plaintiff rendered an account to the said Bradfield, which was accepted and acquiesced in by him, showing as due to plaintiff by Bradfield aforesaid, in respect of the indebtedness set out in paragraph 5 hereof, in furtherance of the said undertaking, an amount of £393 13s. 1d., with interest due thereon (according to the usage obtaining herein between plaintiff and the said Bradfield and Douglass) from 30th September, 1901, to date of payment, less the sums of £34 10s. 1d. (received March 31, 1900) and of £49 3s. 3d. (received October 4, 1900), with interest on such sums from the respective dates of receipt. (b) Alternatively, plaintiff says that the said sum represents money paid and advanced by him on behalf of the said Bradfield, at his request, and is now owing by him with interest as aforesaid, less the aforesaid sums to be severally deducted with interest thereon respectively as aforesaid.

12. (a) On or about the 18th March, 1902, plaintiff, through his son Grahame Bell, acting as his agent, gave his promissory note for £200 to one Shearer, acting for and on behalf of the said Bradfield, for the purpose of enabling the said Shearer to take up certain promissory notes then in the African Banking Corporation, Ltd., Queen's Town, on condition that this sum, if eventually paid by plaintiff, should be deemed to be an advance by plaintiff to the said Bradfield, and also that an account should be made up, and the resultant balance paid by the party who was the debtor on such balance. The said note was to be, and was, utilised to discharge certain older notes on which money had been raised for the purposes of the said undertaking on account of and by agreement between plaintiff and Bradfield aforesaid. (b) On the due date, July 18, 1902, plaintiff was obliged to, and did, take up the said note, and paid the amount thereof, viz., £200; but, though an account having been duly made up, the said Bradfield on the said date was shown to be and was the plaintiff's debtor independently of the

said note, he failed on the said due date, and has since failed, to pay any part thereof, and now owes the said sum of £200 to plaintiff, with interest from the said July 18, 1902.

13. For a further count, plaintiff says that during the period from about August, 1895, to about September 3, 1896, he acted as manager in respect of the said undertaking, and the prosecution of the works thereunder on behalf of the said Bradfield and himself, and thereafter during the period from the 3rd September, 1896, to the 3rd August, 1899, he acted as such manager on behalf of the said Douglass, the said Bradfield and himself, and expended much time and labour thereon, by, *inter alia*, engaging engineers and others, framing indents for plans, engaging transport and superintending delivery, paying wages, keeping accounts, conducting negotiations with the Government and with owners of land, interviewing householders at Queen's Town, obtaining servitudes, visiting Cape Town, negotiating for a sale of leased land, and otherwise, and for his services as such manager—the sum of £1,000 is a fair and reasonable remuneration, and the said Bradfield and the said Douglass were, and the said Bradfield and the executors of the said Douglass, herein sued as the second defendants, now are liable each to pay plaintiff one-third thereof, viz., each of them, £333 6s. 8d.

14. All things have happened entitling plaintiff to be paid the said several sums, but defendants severally refuse to pay any part thereof.

Wherefore plaintiff claims: (A) As against the first defendant: (a) Judgment in the sum of £393 13s. 1d., with interest thereon from September 30, 1901, less the sum of £34 10s. 1d., with interest thereon from March 31, 1900, and the sum of £49 3s. 3d., with interest thereon from October 4, 1900; (b) judgment in the sum of £333 6s. 8d., with interest *a tempore morae*. (B) As against the second defendants: (c) Judgment in the sum of £610 6s. 1d., with interest thereon at 6 per cent. from August 10, 1899; (d) judgment in the sum of £333 6s. 8d., with interest *a tempore morae*. (C) As against both the first defendant and the second defendants, severally: (e) Alternative relief; (f) costs of suit.

The second defendants' plea was as follows:

1. They admit paragraphs 1, 2, 3, and 4, save that they say that the amount exceeding £2,000 spent on the undertaking prior to September, 1896, included expenditure on the mill, and that as to the alleged ownership by the plaintiff alone prior to the said date of the interest in the mill they have no knowledge, and save further that they say that the undertaking was pro-

ceeded with as a partnership venture for account of the partners aforesaid.

2. As to paragraph 5, they do not admit that the plaintiff was ever appointed manager of the undertaking, but they admit that he was in the position of managing partner. They admit that from time to time he paid out sums of money for the furtherance of the undertaking, for portion of which sums the said Douglass was liable, and that the said Douglass paid in certain moneys on account of his said liability, but they do not admit that the amount expended on his behalf and account exceeded the amounts paid in, and they put the plaintiff to the proof thereof. They say, further, that it was the duty of the plaintiff to keep proper books and accounts, and that he has never rendered to them, nor did he ever render to the said Douglass, a proper statement of the partnership account duly supported by vouchers showing *inter alia* the moneys expended by him on behalf of the undertaking, whereby they or the said Douglass could ascertain what sum, if any, was owing by the said Douglass.

3. As to paragraphs 6, 7, 8, and 9, they admit that in or about June, 1899, the said Douglass requested the plaintiff to render him a proper statement of account, and say that on divers occasions prior to the said date the said Douglass had requested the plaintiff to render him such account. They admit that in the said month the plaintiff did render an account, but say it was incorrect, and was not duly supported by vouchers. They admit that in July, 1899, the said Douglass appointed one Lloyd to investigate the affairs and account of the undertaking, to audit the accounts of the syndicate, and to report thereon, but they deny that the said Lloyd had any authority from the said Douglass to state an account between the plaintiff and the said Douglass, or in any way to bind the said Douglass, and they deny that on behalf of the said Douglass he purported to state an account so as to bind the said Douglass. They admit that the said Lloyd did, after investigation, report in writing on the accounts of the undertaking, and for the terms of the said report they crave leave to refer to the same when produced at the trial. They deny that the sum of £610 6s. 1d. represents the excess of the amounts expended by the plaintiff on behalf of the undertaking over the sums paid in by the said Douglass, and that the said Douglass owed, or his estate now owes, the said sum to the plaintiff. They have no knowledge of any excess as alleged, or of any sum owing by the said estate to the plaintiff, and put the plaintiff to the proof thereof. Save as above, they deny the allegations in paragraphs 6, 7, 8, and 9.

4. As to paragraph 10, they admit

that in or about August 10, 1899, the plaintiff gave his cheque to the said Douglass for £831 6s., being a sum payable to him out of an amount paid by one Barry into the plaintiff's hands for account of the syndicate, but they deny that there was any understanding that the said Douglass should give his cheque for the sum of £610 6s. 1d., or for any amount. They admit that the said Douglass did not give the plaintiff his cheque for the said amount, or any part thereof. Save as above, they deny the allegations in paragraph 10.

5. As to paragraphs 11 and 12, save that they admit that the defendant Bradfield was cognisant of the investigation of the accounts of the syndicate by the said Lloyd, they have no knowledge of the allegations therein contained, do not admit the same and put the plaintiff to the proof thereof.

6. As to paragraph 13, they admit that the plaintiff in his capacity as partner did expend time and labour on the undertaking, but they deny that he is entitled to the sum of £1,000, or to any remuneration therefor, and crave leave to refer to the agreement of the 3rd September, 1896, when produced at the trial for the terms of the partnership.

7. Save that they admit that they refuse to pay any sum to the plaintiff, they deny the allegations contained in paragraph 14.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

Mr. McGregor, K.C. (with him Mr. (lose), for plaintiff. Mr. Schreiner, K.C. (with him Mr. Sutton), for the second defendants.

John Wm. Bell, the plaintiff, was called. He said that until September of last year he was Master of the Supreme Court at Pretoria. He detailed the circumstances which led to the establishment of the electric power works, as stated in the declaration, and to the purchase of an interest by the late Mr. Arthur Douglass. Before the agreement was entered into, Mr. Douglass went out, and saw what had been done in connection with the enterprise. Very much less work had been done at that time than had subsequently to be done. Witness superintended the control of the work from the beginning, and continued to do so until Mr. Barry was appointed manager in 1899. Mr. Douglass was advised from time to time of what was being done, and of the expenditure that was being made. Witness went out weekly—often twice a week—to the place. He particularised the work he did in connection with the matter. After Mr. Douglass came in, about £5,000 was spent on the undertaking. The total cost of the work was about £7,000. The expenditure made from time to time was never questioned either by Mr. Bradfield or Mr. Douglass. There was a



proposal to admit one Barry as a partner in the syndicate, whereupon Mr. Douglass offered to retire from the concern on being paid back the £1,700 odd which he had paid in, plus interest. Mr. Bradfield said he was sure Mr. Douglass would consent to Mr. Barry coming in, and he agreed on Douglass's behalf, to Barry coming in. Bradfield and Douglass had been doing everything together in connection with the scheme. Douglass afterwards wrote refusing to agree to Barry coming in, and asking for a statement of accounts, which witness sent. This showed the expenditure from May, 1896, until 1899. Mr. Douglass sent up a representative (Mr. Lloyd) to investigate the accounts on his behalf. Lloyd went into the accounts very carefully, and took about three days over the auditing. Lloyd, after his return to Graham's Town, forwarded witness a copy of the balance he had drawn up, showing £610 due to witness. The plaintiff went on to give evidence at length as to the correspondence and accounts. He said that the scheme was not yet in operation, but it was in working order, and it was hoped the Queen's Town Council would shortly purchase it. Witness had the command of a corps during the war, and afterwards became Master of the Supreme Court of the Transvaal. He was kept very busy, but on coming to Cape Town in June, 1905, when Mr. Douglass was still alive, he instructed his attorneys to take proceedings. The claim for remuneration for witness's work was, he considered, a reasonable one. Mr. Barry received payment, but did nothing like the amount of work witness did.

Cross-examined by Mr. Schreiner: Douglas had withheld his consent to Barry coming into the syndicate, until he could get his account stated. He had not definitely told Barry that the amount put into the concern was £10,000, but had said that he could come into the syndicate at that figure. In 1899 he had accepted a requisition to stand for a seat on the Town Council, and meant to work in the matter of securing electric lighting for the town, but he was not doing so from personal interest. He had a perfectly clear conscience in adopting that attitude, feeling sure that electricity would be a great boon to the town. When admitting Douglass he had put £150 premium on to the purchase price of the mill machinery, because he had been able to secure it at half cost, and did not see that Douglass should benefit thereby. Douglass asked no questions about actual cost, when he joined the syndicate, but simply came in on Bradfield's representations, and his own inspection of the scheme. Witness had never agreed that his payment for management services should be by shares when the company should be floated. He

had not liked to sue Bradfield, because they were related by marriage. They had had an acrimonious correspondence, and finally Bradfield had settled his claim by payment of £300. Bradfield said that witness's actions had not been marked by a friendly spirit, but that was to be accounted for by the fact that when a man was asked to pay money he often "cut up rough." Douglass verbally never took up the position that he declined to pay either the £600 on the account or the £333 for the management charges, but only maintained that he was not satisfied as to the amounts. His letters were not in agreement with that attitude, but witness did not consider that remarkable in Douglass. In Cape Town, when witness paid over the share of Barry's entrance money to Douglass, it was only because he had been given to understand by Douglass that he would return his cheque for £600. Witness had kept no separate books of the syndicate's accounts. He had taken no credit in the syndicate's name. All the accounts were kept in his own business books. Douglass had come unexpectedly on the 15th March, 1899, to see the accounts, and had been shown everything, and then had paid a cheque for £466 3s. 4d. on account. He knew of other outstanding accounts to the amount of £880, and another item of £200 wrongly struck out of the reckoning. Witness was surprised at the calculation that the works should not have cost within £1,300 of what had been spent. He had got the work done extremely cheaply—natives at 1s. per day without food, masons 12s. per day, and overseers 5s. per day. He had bought the material exceptionally cheaply also. When he had stopped his cheque for £800, and Douglass had sued him in the Circuit Court, he had not defended it, because Barry thought it would spoil the prospects of the syndicate if its affairs were dragged into Court. He had been unaware until some time afterwards that the audit by Lloyd had been jointly paid for by Douglass and Bradfield. Bradfield had written a letter to him in connection with the monetary affairs of this transaction, which he had afterwards withdrawn, and witness did not now remember the contents. Douglass had declined to have any transactions with him after the Circuit Court matter, but Douglass was no gentleman.

Re-examined by Mr. McGregor, the witness said he had written at the time to Bradfield his reasons for not going on with his defence to the claim by Douglass for £800.

Mr. Harry Gibson, accountant, testified to having examined the accounts of the syndicate. He had copied the accounts press-copied into Mr. Bell's book, and the originals of which were stated to have been taken away by Mr. Lloyd.

He gave evidence in detail as to the accounts. Witness testified as to the manner in which plaintiff kept joint books as a usual practice.

In cross-examination, the witness stated that goods supplied to the syndicate were allotted by plaintiff to the accounts of the syndicate.

Mr. McGregor closed his case.

Mr. H. O. Lloyd, of Graham's Town, stated he went into Bell's accounts on behalf of the other partners in the syndicate. In his opinion, the plaintiff over-stated his claim.

Wm. James Tamlin, quantity surveyor, of Queen's Town, gave evidence concerning the survey of the works, and controverted the statement of plaintiff to the effect that the furrow leading to the works was driven for considerable distance through solid granite; whereas the plaintiff stated the cost of this excavation at 20s. per cubic yard, whilst witness estimated it as 3s. 6d., as the material consisted of boulders and gravel.

In cross-examination, the witness stated that he started quantity surveying at 18 years of age. He had never done any hydraulic works himself.

Mr. McGregor: Then what you know is derived from common-sense or other books?

Witness: What do you mean?

Mr. McGregor: Oh, never mind.

Witness (continuing) said that a charge of dynamite would move about 6 cubic feet of earth. Of the 325 yards blasted, two-fifths would be rock and three-fifths earth. Molesworth contended that a charge of dynamite would move 6 cubic yards.

Mr. McGregor: Well, I think we'll leave Mr Molesworth where he is. Of course, I quite respect Mr. Molesworth, but where does he hail from?

Witness: His is a recognised work on engineering.

Mr. McGregor: But where is he? Where does he hail from?

Witness: In England.

Mr. McGregor: He has not been out here, has he?

Witness: I cannot say.

Mr. McGregor: Well, we'll leave Mr. Molesworth where he is.

Robert Ed Atkins, employee of Peacock Bros., gave evidence as to articles being charged in his firm's books to Bell individually, and not to the syndicate.

James Robinson, bookkeeper, in the employ of Peacock Bros., said he had had the books of Tiffin and Sons in his hands since February, 1905. The items supplied to Bell were charged up to him, but there was no mention of the syndicate.

Charles Murray Ingledue, railway engineer, gave evidence with regard to the cost of blasting stone. The blasting of granite cost about 3s. 6d. per cubic yard—that was, for a large quantity. The cost of cutting a furrow with

granite in it would cost about 6s. per cubic yard. He never heard of 20s. a cubic yard being paid for such work. When making his estimate, he estimated labour at 3s. a day per head. Of course, if labour could be obtained for 1s. a day, the estimate would be less.

In cross-examination, witness stated he had been both an engineer and sub-contractor during the six years he had spent in South Africa. He had made furrows in Rhodesia. There was plenty of rock there. It cost him 3s. 6d. per cubic yard.

Mr. McGregor: What was the total cost?—I cannot say.

But you remember the cost per yard so well?—We do all work by yards. We think in yards.

Continuing, witness said the reason he was so confident of the cost per yard was because all work was tendered for by the yard.

Mr. Schreiner closed his case.

Mr. McGregor maintained in argument that after Lloyd made an investigation of the syndicate's affairs, Douglass did not throw any light upon the manner in which he took exception to plaintiff's claim. Hence defendants must be bound by Lloyd's report, upon which plaintiff based his claim. No suggestion of *mala fides* had been brought against plaintiff.

Mr. Schreiner said that any claim of the kind submitted by plaintiff must be subjected to a great deal of scrutiny. When a claim had been repudiated by defendant during his lifetime, and when he had lived for years unmolested by claimant, and when claimant after defendant's death preferred the claim—which he represented as being undisputed, but as to the amount of which there might be some dispute—then the ordinary principle of requiring close investigation was trebly fortified, and the Court would go rather narrowly into plaintiff's statements. When a claimant had had every opportunity for years to bring an action, and did not do so, then it was a matter for comment when the case was eventually brought into Court. Proceeding, counsel laid stress upon the contention that plaintiff did not keep proper books, as Douglass had complained, and Bell acknowledged in the correspondence.

Without calling upon Mr. McGregor to reply,

Maasdorp, J.: It seems that some time before September, 1896, the plaintiff and Mr. Bradford entered into a joint venture for the construction of certain buildings, machinery and plant, with the object of supplying electric light to Queen's Town. In September, 1896, certain expenditure had been incurred, properties had been acquired, and the works had made some progress. During that month Mr. Douglass came forward and entered into negotiations

with the joint venturers for the purchase of a third share in this venture of theirs. This purchase was made after inquiries had been made by Mr. Douglass, and after he had himself seen the work which had been done and the property that had been acquired, he purchased a one-third share in the concern for £700. I consider that when he did so he considered that he had received value for his money. That is to say, he entered into the partnership, being satisfied that the concern was worth at least £2,340. From that time the three joint venturers were only in the business, but it was wholly conducted by the plaintiff, who by common consent became the managing partner. Everything was left in his hands, and he carried on the whole business of purchasing the necessary material, paying the necessary expenses, and acquiring the necessary properties for this venture. From time to time his partners paid on account certain moneys to cover the expenditure made by him, and in the year 1889 a question arose between Mr. Douglass and the plaintiff with respect to the state of the accounts and Mr. Douglass's indebtedness. After certain interviews and after discussion of the accounts between the plaintiff and Mr. Douglass, it was found necessary to make an end to the differences that existed between them, and Mr. Douglass employed Mr. Lloyd to proceed to Queen's Town and inquire into the matter. The plaintiff now claims from Mr. Douglass's estate the sum of £610, and it has been satisfactorily proved that merely as a matter of bookkeeping, and an examination of the items alleged to have a bearing upon this business that the claim of the plaintiff stands at the figure of £610. In 1899 he rendered an account to Mr. Douglass, which, after allowing for an error which he subsequently admitted, the figure was brought by him close to the sum of £610. Mr. Douglass was not satisfied with this account, and he obtained the assistance of an accountant to inquire into the matter for him. Now, supposing that the case had come into Court without the assistance previously of inquiries made by accountants, the first thing that the Court would have done would be to have directed an accountant to make the necessary inquiries and report, and I think if that had been the position, the Court could have done no better than employ a man of the experience and position of Mr. Lloyd to proceed to Queen's Town, and make the necessary inquiry on behalf of the Court. Mr. Lloyd examined the books, and as far as the correctness of the items was concerned, he had to depend upon the statements made by the plaintiff. Accepting these statements and examining the books, he arrives at the figure

of £610. Again, after that, another accountant is employed to go into the matter thoroughly, and Mr. Gibson, a very able accountant, has told the Court that he found as a result of his inquiries the figure found by Mr. Lloyd to be the correct indebtedness upon the books as they stood, and he says there is nothing in the books to create any suspicion that they were not properly kept, and, to his mind, the entries were made in the ordinary course of business from time to time, and they seemed to him to be genuinely entered as items in this concern. So far only we have arrived at the indebtedness as shown upon the books, but that is far from concluding the matter, because the books do not prove the transactions alleged in them. It is now necessary for the plaintiff to produce evidence to show that the transactions which are entered in the books actually took place, and that the indebtedness is not merely a matter of figures upon the books, but of real transactions which of his own knowledge have taken place. The plaintiff has come forward to supply that evidence. The first inquiry is, did he possess the necessary knowledge, and the next inquiry would be, does he display the necessary honesty for the Court to rely upon his statements. As to his knowledge of this affair, he seems to have conducted this business in all its trivial details from the beginning to the end, and has had a full and accurate knowledge of every little transaction that took place from time to time. It was not a very complicated business. It was apparently very plain sailing. There is nothing very complex in the nature of the business. Materials had to be bought and paid for, and labour had to be employed and paid. That is an answer to the question of whether the plaintiff was likely to possess the necessary knowledge. It is probable that he should possess it, and he speaks positively. He is fully aware of all the transactions as they appear in the books that he has checked them from time to time, and that he saw the works from time to time, as they proceeded, and he has no doubt that what was entered in the books represents the actual business of this concern, and that the figures are correct with reference to these transactions. Now this is a bare statement made by the plaintiff, and, of course, it can be controverted. In the first place the inquiry might arise whether there is not something in the conduct of the plaintiff, which shows that his evidence cannot be wholly relied upon. And so his evidence may be impeached, and if impeached in some detail, in some trivial matter it may seriously impair the value of his evidence generally. Now, the way in which the defendants attempt to impeach

it is this: it cannot be a genuine claim, because in that case there would not have been this great delay. Now, that argument is not, I think, of very much force, because it is admitted that there is a very considerable sum due to the plaintiff. The whole amount is not admitted, but a large portion is admitted. It follows, therefore, that notwithstanding the plaintiff having an admitted claim of £200 or £300, he still lies by. That shows that there must have been some reason why he allowed himself to be kept out of his money for all this period, when undoubtedly he could have recovered it, when undoubtedly in some respects it would not have been disputed, and he delayed in what is admittedly a just claim on the grounds that it was a question for a Court to decide. Then another difficulty was raised in respect of the nature of the accounts kept in books in which the business of the plaintiff and that of the plaintiff himself is confused. Now, undoubtedly that raises an obstacle which the plaintiff has to surmount. Apparently there is nothing morally wrong in entering the business of the syndicate in his own books. Mr. Gibson says it is a very usual practice, but this case in itself shows that it is not a practice which can be commended, for the very reason that it now places difficulties in the plaintiff's way which he has to get over, and which, as very properly stated by Mr. Schreiner, would not have existed if the books had been kept in a different form. If there had been merely partnership books the plaintiff would not have had all this trouble. Certainly, he has to thank himself to some extent for the difficulties which have been placed in this way. All the same, it establishes no dishonesty on the part of the plaintiff, because it is a usual practice carried on according to Mr. Gibson's evidence by men certainly of good repute and with respect to the dealings in question he seems to have no suspicions. Then a third way of testing the plaintiff's figures is by inquiring into the value which he now shows for his expenditure. On the one side we have the plaintiff's evidence that upon the spot now there are works which have cost a certain amount, and there are assets upon the ground which are of a considerable value. He estimates the whole at £7,000. Upon that basis we will have a value of £7,000 shown for the expenditure, and that is, according to the figures, about the expenditure. In the plaintiff's opinion, he has so economically managed the business that there is full value for every penny. On the other hand, we have evidence which I must characterise as of a very meagre description. One witness, whose trade is that of house builder—a man who takes out quantities and does not pretend to be an engineer, and he speaks not only of the value of buildings, but of engineering works and plant. Such evi-

dence is unsatisfactory, and it would also be unsatisfactory because there is no necessary proportion between the results and the expenditure. It may be that the plaintiff paid more at times than they were worth for things *bona fide*, acting in the interests of his partners, but at the same time, dealing with people who got the better of him. There is no reason why he should suffer for that if he has done his best. And even if the expenditure has been more than can be shown for it upon the ground, it does not follow that the expenditure has not taken place. So that this third ground of attacking the plaintiff's position with reference to knowledge and honesty must, in my opinion, fail. But I want to point out this also with reference to the estimate of the property, that in August, 1899, when Barry came into the business the question arose between these gentlemen, partners in the concern, as to the footing at which he was to come in, and I have no doubt that Douglass discussed this matter with the plaintiff, and I am quite sure that when the partners took him in, it was upon a fair and reasonable basis. I do not think it was upon a desire to taken advantage of a stranger. The plaintiff does not say that it was, and I do not think that Mr. Douglass would have been a party to such a proceeding. And the basis upon which Barry came in—whatever may have been the discussion between the partners—was that Barry was to have a quarter share, and that quarter share was to be based upon a value of the property, at that time of £7,000. Now, I wish to say that the ground upon which the plaintiff bases his claim, being an account stated through Mr. Lloyd between the plaintiff and Mr. Douglass, has not been substantiated. There was no stated account, because Lloyd was not satisfied. When Lloyd left Queen's Town the account was not even completed. He stated at that time that some further inquiry ought to be made, and the inquiry which he wished to have made was one on the part of Douglass himself as to the value of this property. It struck me that that might be another ground upon which to raise objection to the plaintiff's accounts. That ground has now been raised. If Mr. Douglass had then gone into the business the matter might have been disposed of at the time, but he was so put out by the result of Mr. Lloyd's inquiry that he would do absolutely nothing. He neither raised objections to the account in detail, nor made further payments with respect to that account, but pointed out that as the result of the settlement of March it should have been confined to only special items that were mentioned at the time. Mr. Douglass was undoubtedly dissatisfied with the account, and did not accept it, but he did not make that clear to the plaintiff. Then the meeting took place



in Cape Town. I don't know that that meeting throws much light upon the present case, because undoubtedly Mr. Douglass wanted his share of what Barry paid in, and he was not going to discuss the plaintiff's claim, not being prepared to admit it. He put it to the plaintiff in a way which led him to believe: "If you give me your cheque, I will give you mine in return," but it does not follow that is what he meant to convey. Douglass might have insisted upon getting his cheque without absolutely positively saying that he would not pay the plaintiff. But I do not think he made it quite clear that the plaintiff should infer that he must necessarily get the cheque in return. There has been a long debate of the accounts, because counsel had to compare the different features of the case in order to draw their own conclusions, but it is not necessary now for me to go into all that. I merely say this, that it was necessary for the plaintiff to appear in court to substantiate the items of account, and I am satisfied from the way in which he gave his evidence that he is fully aware of the nature of the transactions, and that the entries that were made in the books do represent the transactions that actually took place. Upon that basis, the plaintiff is entitled to receive the sum of £610. He has a further claim for remuneration. Now, as a rule, a partner who devotes his services to a partnership is not entitled to remuneration, because he is expected to do his best for the partnership, unless there is some very clear understanding that there shall be remuneration, or, as Voet puts it, unless there are extraordinary services rendered, he is not entitled to remuneration. In this case I do not think there were extraordinary services rendered, and there has been no clear understanding proved that remuneration would be paid. That the plaintiff took a great deal of trouble, I think has been clearly proved. One way in which he wanted to establish his claim for remuneration was that he was out of pocket by expenditure on journeys made on behalf of the business. If the plaintiff had made a part of his account expenditure in travelling about on behalf of the syndicate, he might have been entitled to recover a part of the indebtedness of the partners to him, but that cannot be brought in as part of the remuneration. I merely wish to say that the plaintiff did take a lot of trouble with this business, and I think there is some evidence that he was out of pocket beyond what he now claims. But the items have not been proved, and have not been pleaded in the proper form, consequently he cannot recover them. Under the circumstances, judgment is given for the plaintiff for £610 with costs. I wish to mention this, that the defendants are not altogether unjustified in coming into

court, because as executors they had not full knowledge of Douglass's transactions and they might fairly doubt whether the claim was a good one, and insist upon its being proved in court. But it having been proved that the claim was a good one and that their doubts were not justified, they must necessarily bear the consequences and pay the costs of the action. Upon the question of interest, I may say that the account had been fully entered into by Mr. Lloyd, and under ordinary circumstances Mr. Douglass should have accepted it. It was at that time a fair demand for payment of moneys to which the plaintiff was entitled at that time. That demand having been made, interest began to run from that date, and interest will now be allowed as from the 10th August, 1899. I have considered the question of absolution from the instance upon the item of expenses in the claim for remuneration, but I thought it better to give a definite judgment, as I think it is better that this matter should be now settled. Upon the matters of costs in the motion for joining Mr. Bradfield, I have come to the conclusion that this matter was disposed of without regard to any transactions between Bradfield and the plaintiff, and that the account could have been fairly stated without bringing Bradfield into court. Following, therefore the line of the Chief Justice's reasoning, the judgment of the Court must be that the defendants must pay the costs of the exception. The defendant was further ordered to pay a fine of £1 on an unstamped receipt which was put into court. The expenses of the plaintiff as a necessary witness were allowed, such expenses only to run from the point of entry into the Colony.

[Plaintiff's attorneys: Fairbridge, Arderne and Lawton. Defendant's attorneys: Syfret, Godlonton and Low.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

BENNING V. CAPE TOWN } 1907.  
TOWN COUNCIL. } Aug. 27th.

Cape Town Town Council —  
Unauthorized expenditure —  
Promenade pier—Mole.

This was an action taken by the plaintiff, Anthony Fredrik Jacobus Benning, against the defendant, the Town Council of Cape Town, for an order to restrain the defendant from continuing the construction of a certain mole at the foot of Adderley-street, at the expense of certain funds amounting to

£30,000, for a promenade pier and bathing places.

The declaration was as follows:—

1. The plaintiff is a ratepayer in the City of Cape Town, in which he resides, and he sues in this action in his capacity as a ratepayer. The defendant is the Town Council of the City of Cape Town, of which the plaintiff is a member.

2. In or about the year 1901 a proposal was made to the Mayor of Cape Town for the construction of a pier, or sea promenade, from the Central Jetty, at the foot of Adderley-street, in continuation of such street, and for the provision of bathing accommodation in connection with the proposed pier. At a public meeting of the ratepayers of Cape Town, held on November 9, 1891, the sum of £20,000 was voted for baths and a sea promenade, in pursuance of the said proposals.

3. On July 20, 1907, the ratepayers of Cape Town, by a poll held on that date, sanctioned a loan, part of which, namely, the sum of £25,000, was voted for the construction of a sea promenade and pier, which sum, together with the sum of £20,000 above mentioned, was estimated to meet the cost of construction of a pier, and the necessary approaches thereto.

4. In or about the year 1905 the defendant entered into certain arrangements with the Table Bay Harbour Board whereby the defendant, on certain conditions, agreed to undertake the cleansing of Rogge Bay beach (adjacent to the old Central Jetty referred to), one of the said conditions being that the said Board should assist the defendant in promoting the passage of a Bill to vest Rogge Bay beach in the defendant, and to give adequate power for the control and regulation of the fishing industry in Rogge Bay.

5. On or about September 28, 1905, the defendant Council passed a resolution that it should arrange with the Colonial Government for the immediate extension of the Central Jetty aforesaid, in the form of a mole to be constructed by tipping stone for a distance of about 100 yards out in the direction of the Bay from the end of the then existing structure, and that the cost incurred in connection with the formation of the said mole should be debited to the loan funds authorised by the ratepayers on the ground that the formation of the mole would be the first step towards securing the means of access to any promenade pier which might thereafter be constructed at the foot of Adderley-street.

6. In or about February, 1907, the defendant, purporting to act under the resolution of September 28, 1905, proceeded to construct from the foot of Adderley-street a rubble mole composed of ground and stones, the composition being supported for a considerable distance on the west side by a concrete

wall some 3½ ft. in thickness, and about 340 ft. in length (which length may be increased), and the Council intends to extend the mole for a distance of some 600 ft. into Table Bay, including 300 ft., the distance previously occupied by the old Central Jetty, from which the defendant removed the wooden decking prior to filling in the jetty with ground and stones. The work, the estimated cost of which is £5,400, is still proceeding, and is being conducted at the expense of the loan funds in question.

7. The avowed object of the defendant in the construction of the mole is that it shall form part of certain harbour works contemplated by the defendant for the purpose of protecting the fishing industry of Table Bay and rendering the harbour of Rogge Bay more suitable for the accommodation of fishing, pleasure, or other vessels, and the mole is in no way connected with and cannot in any sense be found necessary for the erection of a sea promenade or pier and bathing places, authorised by the ratepayers.

8. The plaintiff says, further, that the Colonial Government and the Table Bay Harbour Board are, to the knowledge of the defendant, engaged in carrying out a scheme of reclamation of the foreshore in the immediate neighbourhood of the mole, the work of reclamation in connection with which scheme is already closing in upon the mole, which is being constructed upon part of the area embraced in the scheme, and will eventually be completely absorbed by the reclamation. The plaintiff says the mole is in effect only a portion of such reclamation work, and the defendant has actually proceeded to fill in the space intervening between so much of the mole as has already been constructed (some 500 feet), and the reclaimed ground to the east thereof, at the cost of the loan funds.

9. The defendant has sought the permission of the Harbour Board to erect a turpentine pile pier at the extension of the Central Jetty as at present being carried on by means of the mole, but the Board has refused its permission thereto, and the defendant has accordingly resolved not to proceed further than the 600 feet of mole already undertaken.

10. The plaintiff says that the mole is not a sea promenade or pier such as was contemplated by the ratepayers in sanctioning the raising of the funds, that its construction is not connected with the erection of such sea promenade or pier nor necessary thereto, and is not authorised by the sanction of ratepayers according to law, and that the action of the defendant in constructing the mole at the cost of the said loan funds is *ultra vires* and illegal.

In his plea, defendant admits that one of the objects in view in construct-

ing the mole is correctly set forth in paragraph 7 down to the words "other vessels," in line 6, but the remainder of the paragraph is denied. The construction of the said mole out of the moneys voted by ratepayers as aforesaid is within the authority conferred by the ratepayers. As to paragraph 8, the defendant admits having information that the Colonial Government and the Table Bay Harbour Board have had in contemplation the further advancement of a scheme of reclamation along the foreshore in the immediate neighbourhood of the Central Jetty, and says that the contingency of absorption of the said mole in future reclamation is not relevant to the matter now in suit. A very small portion of the space left, the 500-foot mole and the reclaimed ground to the east has been filled in, this having been done as a necessary adjunct to the mole in question.

Save, as aforesaid, paragraph 8 is denied.

The defendant also says that paragraph 9 is irrelevant to this suit. Certain negotiations were carried on with the Board for the erection of a turpentine pile pier as alleged therein, and the Board did not agree thereto, but other arrangements were provisionally arrived at, and the defendant does not at present intend to proceed further than the 600-foot of the mole already undertaken.

The allegations in paragraph 10 are denied.

Mr. Burton, K.C. (with him Mr. Van Zyl) for plaintiff. Mr. Upington (with him Mr. D. Buchanan) for defendant.

Frank Robb, secretary of the Table Bay Harbour Board said in 1902 the records of the Harbour Board showed that the Board adopted a scheme for the extension of certain harbour works in the neighbourhood of the Central Jetty. This involved an extensive scheme of reclamation works. That scheme he had a plan of. It was submitted by the general manager, Mr. Hammersley Heenan, and the Town Council had knowledge of it. The scheme was authorised by Act of Parliament, and a sum of £500,000 was to be raised for the purpose. The reclamation scheme was proceeding slowly on account of lack of funds. It was provided in an agreement that the Harbour Board should support the efforts of the Town Council to provide proper accommodation for the fishermen at Rogge Bay, and if anything were put there the Harbour Board would compensate them, or, as an alternative, give the fishermen a harbour elsewhere. There were negotiations between the Town Council and the Harbour Board last year about the construction of a pier. He requested the Council to furnish a plan of the work before anything could be done. It was resolved afterwards to submit the scheme to the City Engineer and

the Government Engineer. On the 24th July, 1906, the Town Clerk wrote witness asking whether the Harbour Board were prepared to pay for the expense of the construction of the mole. Witness wrote back stating that when the reclamation scheme swallowed up the mole the Board would pay for the work simply as so much reclamation work, but they would not bear the expense of roadways or ornamentation of any kind.

Mr. Burton: What is the position of the Harbour Board with regard to the promenade pier?

Witness: The position is contained in the last minute you read.

Cross-examined by Mr. Upington: How long will it take before this reclamation scheme is completed?

Witness: About 11 or 12 years.

How much money have you raised so far?

We have raised £600,000 against the £1,000,000 mentioned in the schedule of the Act.

As a matter of fact, I take your evidence to be this, that early this year a proposal was submitted by the Town Council for a pier to be erected at this mole?—Yes.

In the event of such promenade pier being constructed, the mole would form part of the pier?—I don't know.

Did you go into the matter for yourself?—No.

Geo. Taylor Nicholson, M.I.C.E., engineer of the Table Bay Harbour Board, said the rate at which the reclamation was proceeding was slow. A pier should start from the beach and not from the end of a mole. The mole he did not think was substantial enough to be used as an approach to the pier.

Mr. Upington: There is nothing on earth to prevent this mole being an admirable approach to the pier. Is this not a substantial structure?

Witness: No; I don't think so.

Is it not strong enough for people to walk upon?—As it is made of rubble, I don't think it would be strong enough.

You think that the pier should start from the beach?—Yes.

Does not the pier at Dover start from the end of a mole?—That mole is solid.

Mr. Burton closed his case.

Hyman Liberman, Mayor of Cape Town, called, said he was fully acquainted with the history of the scheme for the construction of a pier at the bottom of Adderley-street.

Mr. Upington: The construction of such a pier. Mr. Liberman, has been before the citizens for many years?—Yes.

The report of one of the committees of the Town Council has been put in which authorises the construction of the work proceeding now at the bottom of Adderley-street?—Yes.

This mole would form an approach to the pier at the bottom of Adderley-street?—Yes.

Prior to the construction of this work, had the old Central Jetty been used as a promenade pier?—Yes.

The Central Jetty has become very dangerous?—Yes.

In fact there is a letter from the Attorney-General calling attention to that point?—Yes.

The Town Council has been advised by their engineers that this mole could be used for a pier?—Yes, it forms a pier in itself.

Then there is an alternative scheme proposed by the Harbour Board that you should extend this work for a certain distance into the Bay?—That was a matter of discussion.

Cross-examined by Mr. Burton: Your Council is very anxious to protect Rogge Bay and to assist the fishermen?—Yes.

For this purpose you entered into an agreement with the Harbour Board?—Yes.

That agreement contains the provision for a rubble mole, which is to form one side of the fishing harbour?—That is it.

You intend to get the necessary powers to improve the present harbour?—Yes.

The agreement you entered into only provided that the Harbour Board would in certain eventualities compensate you for this mole or provide a harbour elsewhere?—That is quite right.

They did not say that they would compensate you in any case?—They were to compensate us or give us an alternative.

Now, in that case, what becomes of the money spent on the mole should the reclamation scheme cover it?—It will never cover it in the next fifty years.

You don't agree with the time set down by Mr. Robb and Mr. Nicholson?—I don't.

It may be that the country will become prosperous again, and the reclamation scheme would proceed faster?—In any case, Cape Town will have had full value in pleasure and profit from the scheme.

Witness (continuing) said the Harbour Board had no objection to erecting a mole. The Town Council had decided to go on with the pier, because they had authority from the ratepayers. There would be no trouble in getting the Harbour Board's consent to the erecting of this pier.

Re-examined by Mr. Upington: He was performing his duty in going on with this work. The position that the Council took up was that if they waited till this reclamation ground was completed, they would have to wait about 50 years, it was much better to spend the money now, and give the people all the facilities for recreation and entertainment which is usually associated with piers.

[Buchanan, J.: This mole will answer

the purpose of promenade and protection to the fishermen.]

The Mayor: Yes.

Mr. Upington closed his case.

Buchanan, J.: The plaintiff in this action says he sues as a ratepayer of this city and also a member of the Town Council. He bases the action upon an allegation that the Town Council are committing an illegality in constructing certain works and charging the expenses so incurred against an amount authorised to be spent in other ways. I will not rest my decision in this case on the judgment recently given in this Court in the case of *Bagnall v. The Colonial Government*, because the question of *locus standi* has not been raised on the pleadings; but I will rather consider the question of the legality or illegality of the action of the Town Council. Looking then at the merits, it appears that as far back as 1891 the ratepayers authorised the amount of £20,000 to be spent by the Town Council upon the construction of a sea-wall and promenade. Subsequently, in 1897, another vote was submitted to the ratepayers for sanction. There was no definite plan of the scheme prepared at that time or specifically approved of in these votes. The Town Council were prepared at that time, or specifically authorised to expend first £20,000, and then £25,000 for the construction of a promenade and baths. The Town Council were now constructing a mole at the foot of Adderley-street. From the Mayor's minute, which was submitted to the ratepayers when the authorisation was first asked for, it appears that it was proposed that the promenade should be constructed from the foot of Adderley-street. Accordingly, with the permission of the Harbour Board, the Town Council are now constructing a rubble wall from the coast line at the foot of Adderley-street. The question is whether this work is within the authority given by the vote of the citizens. It is contended that it is not the work authorised by the ratepayers. That is a matter of opinion. The plaintiff himself has not been called, and consequently did not give his opinion. Engineers, however, have been called. One, the Harbour Board Engineer, states that the mole is not substantial enough for the purpose intended, whereas the City Engineer says that it is. This Court, however, does not sit as a Court of Appeal to review the Town Council resolutions as to the manner in which the work authorised should be carried out. The objection taken on the pleadings seems to me to be that this work is not intended as carrying out the mandate of the ratepayers, but that it is being done for the purpose of providing a harbour for fishermen. Evidence, however, goes to prove that this mole can be used both as a promenade, and also as a protec-



tion for the fishermen. It is also contended that where the mole is now running will eventually be dry ground. The Mayor says that may be so in fifty years time, while others think that from twelve to fifteen years hence the land will be reclaimed where the mole is now being built into the sea. Well, both parties are entitled to their conjectures. It is very curious that this scheme was authorised as far back as 1891, and sixteen years have already elapsed, but the reclamation work has made very little progress. The question is, can this mole in any way be found necessary for a pier or promenade, and, if necessary, can it be used as an approach to a pier. The Court cannot say therefore whether the Town Council were acting illegally in carrying out this work, and in that case I am of opinion that there is no ground for granting the order as prayed by the plaintiff. Judgment will therefore be for the defendant, with costs.

[Plaintiff's Attorneys: Centlivres and De Villiers. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### PROVISIONAL ROLL.

ALBOW BROS. V. ISSEROW. { 1907.  
Aug. 27th.

Dr. Greer moved for the first adjudication of defendant's estate as insolvent.

Order granted.

#### VAN DER SPUY V. CARTOULIS.

Mr. Pohl moved for provisional sentence on a mortgage bond for £3,300, with interest from the 1st July, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

#### BACON V. HANSLO.

Mr. Conradio moved for provisional sentence on a mortgage bond for £350, with interest from the 1st January last, bond due by reason of non-payment of interest; counsel also applied for the

property hypothecated to be declared executable.

Order granted.

#### EDWARDS AND OTHERS V. DISTRIBUTING SYNDICATE FOR COLD STORAGE.

Mr. Roux moved for provisional sentence on two agreements of lease for two sums of £40 and £17, due by way of rent.

Order granted.

#### REHABILITATIONS.

Mr. Palmer applied, under Act 38, 1884 (section 14, sub-section 1), for the discharge from insolvency of Isaac Perl.

Granted.

Mr. Long applied, under section 107 of the Ordinance, for the release from insolvency of the estate of Susannah Mary Baker, formerly of Queen's Town. The estate had been sequestrated in 1904, and the creditors had all been paid in full.

Granted.

#### KENNEDY V. KENNEDY.

This was an action brought by Andrew M. Kennedy, of Cape Town, against Margaret Anton Mary Kennedy for restitution of conjugal rights, on the ground of malicious desertion.

Mr. Struben was for plaintiff; defendant did not appear.

Evidence having been given of service of set-down upon defendant,

Mr. T. Birch (clerk in charge of the marriage register at the Colonial Secretary's Office), gave proof of the registration of the marriage.

Plaintiff said that he was married by ante-nuptial contract to defendant in Cape Town, on June 25, 1907. Defendant left him on June 28. He had known her about two years. They were married on the day of her arrival from England. They went and resided at Green Point. On the day after the marriage she informed witness that her feelings towards him had changed; but, thinking it her duty to go through with the marriage, she had not said anything to him. She then said that she had fallen in love with a man on board. She seemed wretched and miserable. She requested to be allowed to spend the week-end with her brother. Witness consented, and his wife went on June 28 to her brother's, and she had since declined to return to her home.

Defendant was ordered to restore conjugal rights to plaintiff on or before September 30, failing which to show cause on October 15 why a decree of divorce should not be granted, with forfeiture of rights under the ante-nuptial contract.

## GENERAL MOTIONS.

*Ex parte* DUTCH REFORMED } 1907.  
CHURCH, DARLING. } Aug. 27th.

Mr. Payne moved for a rule nisi under the Derelict Lands Act to be made absolute, except as to certain four lots, which applicants craved leave to withdraw.

Rule made absolute as prayed, and rule discharged so far as Lots 147, 148, 149, and 150 are concerned.

*In re* CAPE MINERALS, LTD. (IN LIQUIDATION).

Mr. Watermeyer moved for confirmation of the official liquidators' report. He also applied for an order settling the list of contributories and fixing the official liquidators' remuneration.

Report confirmed, list of contributories settled in terms of Annexure "A" to petition, and liquidators' remuneration fixed at five guineas.

*In re* BRITISH STEAM LAUNDRY (IN LIQUIDATION).

Mr. Wallach presented the first and final report and account of the official liquidator.

Usual order granted, report to lie 14 days for inspection, and to be published once in the "Cape Times."

*Ex parte* ESTATES OF THE LATE THOS. BARRY AND JOHN BARRY.

Mr. H. S. van Zyl moved for an order authorising the issue of a certified copy of a certain mortgage bond for £72 odd, hypothecating certain property at Bredasdorp. A purchaser had been found for the property, but he declined to take transfer unless the bond were cancelled. The bond had been lost, and efforts to find it had failed.

Rule nisi granted, returnable on the 3rd December, publication in "Ons Land" and the "S.A. News."

*Ex parte* REFORMED CHURCH OF ALIWAL NORTH.

Mr. Long moved on the petition of the minister of the Reformed Church, at Aliwal North, and chairman of the Kerkeraad of the Church, for the amendment of certain two transfer deeds, so as to set out the correct name of the Church.

Order granted authorising the Registrar of Deeds to amend the deeds by the addition of the words, "now known as the Reformed Church of Aliwal North."

*Ex parte* VAN BENSBURG.

Mr. Watermeyer moved for leave to petitioner to sue one Cornelis F. Vermeulen by edictal citation on a mortgage bond for £300 and a promissory note for £50, and for the attachment of defendant's half-share of certain property at Britstown *ad fundandum jurisdictionem*. Defendant when last seen was on his way to German South-west Africa.

Leave granted to sue by edict, citation returnable on the 26th November, and property attached, personal service, if possible, failing which, one publication in the Dutch language in a paper circulating in the district of Christiana (Transvaal), and also in the "Windhoeker Zeitung."

*Ex parte* VAN HEERDEN (BORN JOOSTE).

Mr. M. Bisset moved, as a matter of urgency, upon notice to the attorneys of Francois Daniel Jooste, to show cause why the action brought by petitioner against Jooste should not be set down for hearing on the 29th August, and, failing that, why a commission should not issue to take petitioner's evidence. It was stated that the case would not now be defended. Defendant was sued individually, and in his capacity as executor of an estate in which plaintiff claimed an inheritance.

The case was ordered to be set down for the Third Division on the 29th August, costs of the present application to be costs in the cause.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

EATON, ROBINS AND CO. v. } 1907.  
SCHREUDER. } Aug. 28th.

Removal of case to another division.

Mr. Buchanan moved, as a matter of urgency, in the case of Eaton, Robins and Co. v. Schreuder, listed for the First Division, now to have the case removed to another court. He explained that the case would be a default case.

The solicitor of the defendant had withdrawn from the case, and he understood the defendant would not appear. As there was little likelihood of the case being taken in the First Division, he asked as an alternative that the case be removed to the Third Division. The Registrar had stated that as the case was not on the list, he would not call it. The plaintiffs were a business firm, and if they had to stay in the Court, it would be a detriment to the firm.

Maasdorp, J., said he would grant the application, but, of course, it would have to be subject to the judge in the Third Division consenting to take it.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

EHLERS V. ESTATE LOUBSER. { 1907.  
Aug. 28th.

This was an action for an interdict restraining the defendant from paying to any of the plaintiff's said daughters during the lifetime of the plaintiff, and without her consent, the sum of £1,000, or any portion thereof, and from dealing with the said joint estate in contravention of the terms of the said will.

The plaintiff, in her declaration, says that her name is Jacomina Hendrina Ehlers, born Van Tubergh, that she is the surviving spouse of Andries George Hendrik Loubser, the defendant is Marthinus Christoffel Fourie, secretary of the Malmesbury Board of Executors, and as such the executor testamentary of the estate of the plaintiff's late husband, to whom she was married in community of property in July 21, 1904. On the 10th of May, 1901, the plaintiff and her said late husband executed a mutual will, copy whereof, together with a true translation, is hereunto annexed marked "A," and the testator died leaving the said will of full force and effect, and also leaving the plaintiff and the six children mentioned in the will surviving him. The plaintiff duly adiated under the will. By the terms of the said will the testators bequeathed to their three sons by way of prelegacy certain farms, for which legacy the said sons were jointly to pay to the survivor during his or her lifetime interest reckoned on a capital of £3,000, and to each of their three daughters the testators bequeathed the sum of £1,000. After making the said bequests the testators proceeded to nominate, as heirs of all their estate not bequeathed as above, all their children in equal shares. They also provided that nothing need be paid to their heirs during the lifetime of the survivor, un-

less the survivor should otherwise desire. A first liquidation account has been filed in the said estate, copy of which is hereunto annexed marked "B." Two out of the testators' three said daughters are married, namely, Catherina Maria, married to Albert van der Westhuizen, and Rykie Hester, married to Hendrik Schalk Bester, and the defendant has intimated to plaintiff his intention forthwith to pay to each of the two said daughters, at their request, the sum of £1,000, as bequeathed to them under the said will. Apart from the said farms bequeathed to the testators' sons, there are not sufficient assets in the said estate from which to pay the sum of £2,000, proposed by the defendant to be paid to the testators' said daughters. The plaintiff has not consented to the said payments or either of them being made during her lifetime, and she contends that, without such consent, the defendant is not entitled to make the proposed payments, the true construction of the will being that the testators intended their said daughters to be paid the sum of £1,000 each out of the money for which the said farms were bequeathed to their said sons, and that the said sums are not claimable by the daughters until after the death of the survivor, unless the latter should otherwise desire.

Defendant, in his plea, states that the available funds, apart from the farms referred to, are sufficient without the realisation of any bond to pay to each of the three daughters her legacy of £1,000 (i.e., £3,000 in all). He admits plaintiff has not consented to the daughters' legacies being paid to them, but defendant states that according to the true construction of the said will, to which defendant craves leave again to refer such consent, is not necessary.

Mr. Burton, K.C. (with him Mr. Inchbold), appeared for the plaintiff; Mr. D. Buchanan (with him Mr. Lewis) appeared for the defendant.

After formal evidence and argument were heard, the Court reserved judgment.

*Postea* (September 24th).

Hopley, J.: The plaintiff, now married to Ehlers, was formerly married in community of property to Andries Loubser, now deceased, and on May 10, 1901, she and her late husband executed a mutual will disposing of their joint estate. Andries Loubser died on July 21, 1904, leaving the will of full force and effect, and the plaintiff adiated and took benefits under it. The will itself, after the usual clause revoking all previous testamentary writings, goes on to say that before proceeding to the election of heirs the testator and testatrix bequeath and devise by way of prelegacy, their immovable property to their three sons—to wit, the farm

Witteklip to Johannes Tobias, Zandheuvcl, part of Philipskraal, and part of Byzandersklip, to Andries, and Byzandersklip (presumably the part not bequeathed to Andries) to Jacobus, on the condition that the said three sons should pay jointly to the survivor, interest reckoned on a capital of £3,000 during the lifetime of such survivor, and upon a further condition which need not be herein referred to. The spouses then proceed to bequeath as a prelegacy to each of their three daughters the sum of £1,000 sterling. As to the remainder of their joint assets they will that the same shall be sold by public auction after the death of the first dying of them, but in a further clause they ordain that mortgage bonds need not be called up till after the death of the surviving spouse. As heirs of all of their estate not bequeathed as above, they nominate all their children in equal shares. The will proceeds to say: "It is, however, our wish and desire that nothing need be paid to our heirs herein before mentioned during the lifetime of the survivor unless the survivor wishes so to do." The further terms of the will need not now be referred to. Upon the death of the testator the farms were handed over to the sons, who have paid the interest on the sum of £3,000 to the testatrix, but no payment of any sum was made to any of the daughters. Two of them have, however, been married, and are demanding the prelegacy bequeathed to them. The executor wishes to pay to each of them the sum of £1,000, and the present action is brought by the survivor to obtain an order interdicting him from paying such sums during her lifetime without her consent. It will be observed that the survivor's rights to benefits under the will, save as to the interest from the sons, are not specifically defined; but I think that it was clearly the intention of the parties that such survivor should have a usufruct for life over such property as belonged to the joint estate, which was not specifically disposed of and payable to the beneficiaries upon the death of the first dying. Now, it clearly was the intention of the testators to benefit their sons immediately upon the death of the first-dying by giving them possession of the farms at that date, so that if the survivor should elect to abide by the terms of the will it would not be in his or her power to postpone the date of their coming into possession of the farms to a later date. Was there any different intention with regard to the prelegacies to the daughters? The testators throughout their will benefit only their children, but they distinguish the benefits bequeathed to them into two classes, making them as to certain specified farms and sums of money prelegatees, and as to the residue

of the estate heirs or residuary legatees. The plaintiff now contends that all benefits of any kind must depend as to the payment of them upon her pleasure during her lifetime, with the exception of the possession of the farms; and the defendant contends that the true meaning of the will is that the only benefits which depend upon the survivor's pleasure are the residuary rights to which the children were instituted as heirs. I am of opinion that the latter is the correct view to take. The testators intended that upon the death of the first-dying, the farms should forthwith pass to the possession of the three sons, as directed, upon the conditions laid down, and that the survivor should have the benefit of the annual income of £180 derived from that source; they intended that each of the daughters should forthwith have the sum of £1,000; that of the residue of the estate, the survivor should have the usufruct for life, unless such survivor should elect to pay any portions thereof away to any of the heirs during her lifetime, and that after the death of the survivor, such residue should be equally divided between the children as heirs or residuary legatees. The plaintiff's claim must therefore be dismissed, and the costs may be paid out of the residuary estate.

#### RICHARDS V. VAN BREDA.

This was an action to recover the purchase price of a certain house.

In her declaration the plaintiff says her name is Susie Jessie Richards, and she resides in Graham's Town; the defendant is Dirk Cynbert van Breda, a general dealer, residing at Simon's Town. On or about April 26, 1907, the plaintiff sold and the defendant bought, through one Clifford Hoole, a broker, of Cape Town, the house and premises situated at Wynberg, known as Garwood, for the sum of £1,500, it being agreed that the said purchase price should be paid against transfer of the said house and premises. The defendant has failed and neglected, and still fails and neglects, to take transfer and to pay the said purchase price or any part thereof, although repeatedly requested to do so.

Defendant's plea states that he did agree to purchase the property for £1,500, through one Clifford Hoole, a broker, but says at the time the property was mortgaged for £1,250, and it was a special and essential term of the agreement that the sale should only take effect if the said Hoole obtained the consent of the then bondholder to allow the said bond of £1,250 to remain upon the property, and to give the defendant the benefit thereof as mortgagee for a period of three years certain, defendant agreeing further to pay plain-



tiff the remaining £250 upon completion of the sale. The sale was never completed, as the said Hoole never obtained the aforesaid consent from the bondholder. Defendant refuses to take transfer of the said property and to pay the said purchase price because no sale had actually taken place, although he is willing to do so provided that the conditions he insists upon are complied with.

Mr. Roux was for the plaintiff, and Mr. Van Zyl for the defendant.

Benjamin Clifford Hoole said he was a broker in Cape Town. The plaintiff placed the property Garwood in his hands to let. He wrote to the defendant, Van Breda, with reference to an inquiry he made for a house. He received no reply, but Van Breda called personally and stated he wanted to buy. The question of the purchase of the house was discussed, and defendant agreed to purchase the house for £1,500, provided the bond remained. Witness sent a telegram to plaintiff to that effect, stating also the amount of the commission. There was no condition made by the defendant that the bond should remain for three years. Defendant visited him again, but he made no mention of the condition that the bond would remain for three years certain on the property. Mr. Breda and witness went across to Messrs. Findlay and Tait's office, the latter stating that the bond could not remain on for three years. The mortgagee, however, was still willing to let the bond remain on the property. The bond was the usual bond, subject to three years' notice on either side.

Cross-examined by Mr. Van Zyl: This was the first property he had sold: he was brokering more in produce than in property. He did not take up the attitude that the property was to be paid for at £1,500; the condition of sale was briefly set forth in the telegram sent to plaintiff.

Geo. Marquard Findlay, of the firm of Findlay and Tait, said that when he was first informed of the sale by Mr. Hoole, there was no idea then that the bond was to be guaranteed to remain on the property for three years. The bondholder said that he was quite willing that the bond should remain at 5 per cent., but he was not going to tie up the bond for three years. Witness said that in his opinion there was little probability that the bond would be called up, as in his opinion the bondholder had no need of the money.

Cross-examined by Mr. Van Zyl: He knew nothing about the actual terms of the sale. If it had not been for this new condition introduced by Mr. Van Breda, it would not have been necessary to consult the bondholder at all, as he (witness) had full power to act. The bondholder

would not consent to the bond being tied up for three years, especially as the bond was given at a low rate of interest. He wrote to that effect that they were prepared to take Mr. Breda as a mortgagee, but they could not agree to tie up the bond for three years. There was nothing said in his office to the effect that if these three years were not guaranteed there would be no sale.

Dirk C. van Breda, the defendant, said that at first Hoole, the broker, asked £1,650, witness saying that he could not give that amount. He offered £1,500 on the condition that the bond remained on the property for three years, and that his (witness's) wife approved of it. If those conditions were guaranteed, he was still willing to take up transfer.

Counsel were heard in argument on the facts.

Hopley, J.: The matter seems to me upon the pleadings to be a very simple one. It is whether the Court will grant specific performance of a contract of sale. It appears that Mrs. Richards, who resides at present in Graham's Town, had a house called Garwood, Wynberg, and had instructed Mr. Hoole to let this house or sell it if possible. That the house was to let or for sale Mr. Hoole had advertised upon a board, and it is perfectly clear that the defendant had his eye upon it. He left a letter at Mr. Hoole's chambers, saying he had called about the house, and would like to know the lowest price. Mr. Hoole concluded that he meant the rent, and quoted £8 as the lowest figure, and wrote to him to that effect. The defendant then wrote that Mr. Hoole had misunderstood him, as he wanted to buy the house, not to rent it. Mr. Hoole saw Mr. Van Breda, and a conversation took place between them. Now, although Mr. Hoole had not had many transactions as a property broker, still he has been for a couple of years a broker in produce, and has had a great deal of experience in the making out of brokers' notes. I take it, therefore, that Mr. Hoole, being a careful business man, would know what he was doing, and he says that when he drew out the telegram to his principal, and Mr. Van Breda does not deny that he saw the telegram, his wording of the telegram was in keeping with the facts. The telegram simply conveyed to his principal in Graham's Town information that he had sold the house at £1,500 for £250 in cash, the bond for £1,250 to remain at 5 per cent. If Mr. Breda said then that he could not buy the property unless his wife approved, or unless the bond remained for three years at 5 per cent., it seems impossible that a business man could have sent such a telegram as this. The fact that these conditions do not appear on the telegram strongly incline me to the idea

that the evidence of Mr. Hoole as regards the interview and conversation is correct. Thereafter Mr. Breda received a telegram from Mr. Hoole that his offer had been accepted, and this telegram I consider concluded the bargain. But Mr. Breda wrote at once: "I don't want you to consider the matter closed, don't let my offer prevent you letting or selling the property. I am going to look at the property on Sunday, so as to let my wife see it." I am of opinion that it was then too late for the defendant to recede from his contract. It is probable that immediately after his interview with Mr. Hoole the defendant went home and discussed the matter with his wife, and that something emanating from her had induced him to endeavour to import a new condition, viz., that the bond of £1,250 should be fixed for three years. Mr. Van Breda in his evidence attempted to show that he had offered to purchase this property for £1,500, provided that the bond should remain for three years and that his wife approved. If that was so it is impossible to understand the telegram and the letter. Mr. Breda, all through, does not take up the line that he was being bounced into the contract. He is not a man in any way deficient in natural ability, and he did not take up this line and repudiate the contract indignantly. Moreover, to show that Mr. Hoole considered the bargain closed, he encloses in a letter two inquiries from persons who were desirous of hiring the house. Mr. Findlay, the agent of the bondholder, saw Mr. Breda, and there was a conversation about the bond remaining on the property. He asked Mr. Findlay that the bond should be fixed for three years. Mr. Findlay informed him that this imported a new condition which he must see Mr. Trill, the bondholder, personally upon. I cannot believe that in this matter Mr. Findlay's memory of the proceeding is at fault. Mr. Findlay says that he is quite certain that Mr. Van Breda did not say: "Oh, no, this is not a new condition, it is the only condition upon which I bought the property." Again, Mr. Hoole knew how careful he had to be in setting out the terms in the broker's note, and the broker's note states definitely the terms upon which the property is to be sold. There is nothing in the note about a three years' guarantee for the bond, and from the evidence it appears that it was not necessary to get the consent of the bondholder before the sale was completed. The bondholder has stated that he is willing that the bond should remain as formerly upon the property, and the plaintiff asks the defendant to fulfil his contract, and to pay £250 and take transfer. I think that the documents and the evidence show that the contract was as alleged, and that it was in subsequent correspondence that Mr.

Breda asked for the three years' guarantee. Judgment must be for the plaintiff with costs.

[Plaintiff's Attorneys: Mostert and Son. Defendant's Attorneys: Centlivres and De Villiers.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### ILLIQUID ROLL.

WALKER AND JACOBSON { 1907.  
V. BADENHORST. { Aug. 28th.

Mr. P. T. Lewis moved for judgment under Rule 329d for £20 18s. 2d., for professional services rendered and moneys disbursed, and costs.  
Order granted.

### REHABILITATION.

Mr. P. T. Lewis applied under Act 38, 1884 (section 14, sub-section 1) for the rehabilitation of Jacobus L. J. van Heerden.  
Granted.

### WOODMAN V. WOODMAN.

This was an action brought by Mary Jane E. Woodman, of Rosebank, Cape Division, against her husband, Wm. A. Woodman, for restitution of conjugal rights, on the ground of his malicious desertion.

Mr. De Villiers was for plaintiff; defendant, who was sued by edictal citation, was in default.

Plaintiff said that she was married to defendant in September, 1896, without community of property. They lived for some years in the suburbs, and at times the defendant deserted her without giving any reason, but eventually returned to his home again. In May, 1905, he left her without stating any reason. She subsequently saw him once or twice in the street, but he declined either to return to her or give her any money. In 1906 she ascertained that the defendant had gone to England. She was informed that he had been seen somewhere in the neighbourhood of Southampton, and she had communicated with his relatives. Defendant had been employed in Cape Town as an insurance clerk. She was not aware of his present whereabouts.

Decree of restitution granted, with costs; defendant to return to or receive plaintiff on or before the 31st October, failing which, to show cause on the 14th November why a decree of divorce should not be granted as prayed, with costs; rule to be published in the same manner as directed in regard to citation.

EATON, ROBINS AND CO. V. SCHREUDER.

Mr. W. Porter Buchanan, K.C. (with him Mr. Howes), appeared for plaintiffs, and asked leave to mention this matter, which had been set down in the First Division. Defendant's attorneys and defendant himself had, he said, withdrawn, and the case was now one of default.

De Villiers, C.J., said that he would hear the matter.

Mr. Buchanan read the plaintiffs' declaration, from which it appeared that in November, 1904, defendant engaged himself to plaintiffs to give security on behalf of one Marthinus Johannes Kirsten, of Riebeeck's Kasteel, district of Malmesbury, for goods supplied, and signed a document binding himself as security *in solidum* and joint principal debtor to the amount of £75. In April last Kirsten was indebted to plaintiffs for goods supplied in the sum of £81 14s. 5d., which sum he failed and neglected to pay. Plaintiffs prayed for judgment for £75, with interest *a tempore moræ* and costs. Defendant, in his plea, said that he was ignorant of the English language, and that he was induced to sign the document by false representation, and that he signed it in *bona fide* ignorance of its contents and without agreeing thereto. In reconvention, he prayed for an order declaring the document to be null and void, and of no effect.

Formal evidence was led in support of the plaintiffs' claim.

John L. C. Commaile, a bookkeeper in plaintiffs' employ, said that he knew Kirsten. The plaintiffs had been supplying him with goods, but they stopped supplying him in November, 1904, until he got security. Subsequently the firm received a letter from the defendant, and finally they got a document from Kirsten signed by Schreuder. Goods were thereupon supplied to Kirsten from time to time, and an amount of £81 had become due. Defendant came to plaintiffs and admitted his liability for the debt. Kirsten was the defendant's brother-in-law. On Monday last Schreuder called, and said that he was liable and wished to withdraw from the case.

Judgment in terms of plaintiffs' declaration, and absolution from the instance on the claim in reconvention, defendant to pay costs.

*Ex parte* TSHONA AND OTHERS.

Mr. Benjamin, K.C., moved, on the petition of Elijah Tshona and others, of Fort Beaufort, for the appointment of a *curator ad litem* to represent a certain minor in an action to be instituted by petitioners to have the will of their mother, Sarah Bobi Tshona, declared null and void. The minor concerned, Alvin Tshona, was one of the heirs under the will, and was without parents. The case would probably be heard in the Circuit Court at Fort Beaufort.

Order granted appointing Richard D. Henry, Inspector of Locations, Fort Beaufort, as *curator ad litem* of the minor, failing Mr. Henry's acceptance, the Rev. Thomas Major to be appointed, costs to be costs in the cause.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. POLEVNICK. { 1907.  
Aug. 29th.

Liquor licence—Native—Proclamation 64 (British Bechuana-land) of 1889.

*Proclamation 64 (B.B.) of 1889 prohibits the giving or selling of liquor to natives. One N., a white man, sent B., a Bastard, on several occasions to P., a hotel-keeper, with a note, requesting P. to supply him (N.) with liquor per bearer. On one of these occasions B., not having been supplied with the money to pay for the drink, borrowed it from a native constable, who followed him, saw him served with the liquor and arrested him. P. was thereafter convicted of selling drink to B. It appeared, that on receiving liquor, N. was in the habit of giving some of it to natives.*

Held on appeal, that P. had not contravened the proclama-

tion, though N. might have done so.

This was an appeal from the judgment of the Resident Magistrate, Gordonia, fining appellant, a hotelkeeper in Upington, £25, or in default, six months' imprisonment, for contravening Proclamation (British Bechuanaland) 64 of 1889. The accused Polevnick was charged with selling wrongfully and unlawfully to a Bastard named Daniel Beukes a bottle and a half of brandy. By the terms of the Act, this Bastard was not entitled to be supplied with the liquor. The case had been remitted to the Magistrate for sentence.

Appellant pleaded that the offence he was convicted of was not proved. The liquor was supplied by appellant to Beukes upon an order given by a European, who was entitled to be supplied with liquor.

Mr. Schreiner, K.C. (with him Dr. Greer), was for the appellant Polevnick; Mr. Nightingale was for the respondent.

Dr. Greer, in the course of his argument, quoted the terms of the Act bearing upon the case. The accused Polevnick had no doubt of the genuineness of the note received from the native, as he had supplied liquor on former occasions upon the production of similar notes. Counsel quoted the case of *Rex v. Francis* (11 "Cape Times" Reports, p. 76), *Queen v. Wright* (11 Supreme Court, p. 84).

Mr. Nightingale quoted *Rex v. Robertson* (9 Juta, p. 303), *Rex v. Mathetus* (13, C.T.R., p. 646), in support of his argument for respondent. He contended that the word "giving," as printed in the section of the Act 2 B.B., Proclamation No. 64 of 1889, actually meant the manual handing over of liquor, and this was the interpretation put upon it by the Magistrate. The whole wording of the section was designed to keep liquor from natives under any circumstances.

Hopley, J.: In this case the appellant is an innkeeper at Upington, and he appeals against the sentence of the Magistrate of that place on a conviction of contravening the sub-section of the Proclamation No. 64, British Bechuanaland, 1889, in that he wrongfully and unlawfully sold or gave to one Daniel Beukes, a Bastard, in the said district, a quantity of spirituous liquor. Now the things that he is charged with here are selling or giving brandy to Daniel Beukes. The section of the Act says that whoever sells, exchanges, gives, or procures liquor for any native in British Bechuanaland shall be liable to certain penalties. From the evidence it appears that there was a white man of a low class called Newhoek, who sent notes to the hotel at Upington.

The notes are in this man's handwriting in pencil, on slips of paper written by an apparently quite sober man, and they are all practically in the form as follows:—"Upington Hotel.—Mr. Polevnick,—Please send for me by the bearer of this note a bottle of pale Cognac brandy." Now the selling of brandy to white people is not prohibited in that district, and it seems to me a pity that it is not, more especially where black and white are mixed up so much. However, there is no such restriction. In this case a white man takes advantage of his white skin to procure liquor for himself and his coloured associates. The question is: whether the accused has contravened the section of the Act by supplying the liquor to Beukes? Now it is clear that in two of the first notes that went in on May 29, the money was actually sent by Newhoek, and so I can only think that the sale was conducted with Newhoek through the agency of Beukes. When the brandy got to Newhoek he undoubtedly contravened the Act by sharing it with Bastards. He brings liquor into his own house, and there distributes it among his coloured associates. Beukes, having got the liquor for Newhoek on the two previous notes, asks for a note so as to procure liquor for himself, and he got a note written exactly in the same terms as the other. Now, if Newhoek was under the influence of liquor at the time, certainly his handwriting does not show it, and there is nothing to show that the hotel proprietor, Polevnick, knew that Newhoek was carrying on a carouse at this time. All he knew was that Newhoek had sent these notes and that the money had come with the notes in each case. In this particular case, Beukes had not got the money himself, and so he borrowed it from a native at the location. This native happened to be a native policeman, who followed Beukes to the hotel, and saw him get the liquor. The policeman tackled him, and arrested him. Beukes became somewhat violent in going to the police station, and undoubtedly he had had some drink that night. The question is, however, did the hotelkeeper contravene the Proclamation when he sold the brandy? If he had actually sold the liquor to Beukes he certainly would have contravened the Act, but upon production of the note he was certainly entitled to consider that he was selling to Newhoek through the agent. There is nothing in the section which says that a white man could not purchase liquor through an agent. In handing this bottle to the Bastard, the barman undoubtedly thought that he was not contravening the section of the Proclamation. This is a penal section, and one should not construe it more widely than its natural meaning warrants. At the same time, one must look into



the policy of the law and see if it goes as far as is contended in the present instance. Without taking the extreme illustration of whether a man who sends a bottle of liquor to someone by his native servant, who draws the cork and drinks the spirit, is guilty of contravening the Act, it seems hardly possible to prevent the handling of bottles of liquor by natives. In the case of *Mathebus*, Mr. MacGregor argued that his client was not guilty, because he had not given the liquor for a consideration; but the Court ruled that "giving" must be taken in its ordinary sense. In the case of *Francis* it seems that a native purchased liquor upon a note signed by a certain person, who swore that he had given the native the money so that the liquor might come to him, and that the native in appropriating the liquor had acted unjustifiably. The Court however held that in terms of the law which it was then construing the only way the native could really get the liquor was by a note from the Magistrate, and that the liquor had been supplied to the native upon a note signed by a man not a Magistrate. Mr. Nightingale, in the present case, argued that the policy of the law was to keep liquor from natives in Bechunnaland, but the law does not say that it prevents a native handling liquor in any way. Supposing that everything had been proper in this case, and that the hotelkeeper got a note like any of those in court, and supplied brandy, he would think he was sending it to the man Newhook, and he was in that case not giving it to the native. It seems to me that the words "supplying or giving" must be confined to the meaning of supplying or giving for the use or disposal of the person to whom the liquor is handed. Therefore, if you supply liquor in such a way that it may be used by a native for its own consumption, then that undoubtedly would be a contravention of the section of the Act. It seems to me, however, in this case that the hotel proprietor was within his rights in handing over the liquor to the native upon production of the note, there being no reason to suppose that it would not reach the writer of the note. The appeal is, therefore, upheld, and the conviction quashed.

REX V. MYBURGH.

This was an appeal from the A.R.M., Maclear. Appellant, Johanna Elizabeth Myburgh, was charged on June 18 with the theft of a ring, the property of Mrs. Katrina Wilkinson, thereby contravening section 198 of Act 24 of 1886. Accused pleaded not guilty, but was convicted and sentenced to pay a fine of £1, or in default three days' imprisonment. The appeal was brought up on

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the ground that the verdict of the Magistrate was against the weight of evidence. The complainant, Mrs. Wilkinson, said she missed her ring, which she had in a box, and informed Mrs. Myburgh that the ring was missing. Afterwards she saw it on the finger of a neighbour, Mrs. Biljoen, who said she had received it from Mrs. Myburgh in exchange for another. Complainant said she recognised this ring as the one she had lost by its general appearance. Appellant said that the ring was given to her by her daughter.

The Magistrate held that the complainant had identified the ring as her property. The husband of the accused, called for the defence, stated that his daughter did possess a similar ring, but he was unable to say whether the ring produced was the same. The daughter, Miss Myburgh, marked her ring on the inside with an awl, so as to be able to distinguish it from the complainant's ring, but he was convinced that the mark spoken of was absent, as the mark on the inside of the ring in question seemed to be simply a join.

Mr. Upington was for the appellant, and Mr. Nightingale for the respondent.

Counsel for the appellant contended that undoubtedly there were two rings of a similar nature, and that the mark on the ring produced was actually that made by appellant's daughter. There seemed to be a good deal of jealousy on the part of complainant towards accused, and he contended that the Magistrate had not taken this, as well as the other evidence, sufficiently into account.

Hopley, J., after reviewing the evidence, in the case, said: "I am convinced that the Magistrate has not given due weight to the fact that complainant had failed positively to identify the ring, and that the whole circumstances of the prosecution were such as to have raised doubt in the mind of the Magistrate in the accused's favour. The appeal was upheld, and the conviction quashed."

THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.),

ADMISSION.

{ 1907.  
{ Aug. 29th.

Mr. P. S. T. Jones moved for the admission of Cecil J. St. J. Pattle as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Butterworth.

## PROVISIONAL ROLL.

## MALCOMES AND CO. V. WIBORG.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

## PINNOY V. DRISTIG.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £110, with interest from the 12th October, 1892, not to exceed £110, and for the property hypothecated, situate at Molteno, to be declared executable. Defendant was sued by edictal citation. Counsel said that the amount of interest due was £123 4s. 7d., but he could not, of course, ask for an amount of interest exceeding the capital of the bond.

Order granted.

## ILLIQUID ROLL.

## AHLBOM, GULLANDER AND CO. V. WIID.

Mr. D. M. Buchanan moved for judgment, under Rule 319, in default of plea, for £123 4s. 7d., for goods sold and delivered.

Order granted.

## VAN HEERDEN V. JOOSTE.

This was an action brought by Anna Elisabeth van Heerden (born Jooste), of Krugersdorp, Transvaal, against her brother, Francois Daniel Jooste, of Murraysburg to recover a certain inheritance.

Mr. M. Bisset was for plaintiff; there was no appearance for defendant.

Mr. Bisset stated that the hearing had been postponed from time to time at Jooste's request. The defendant's attorneys had now withdrawn from the case, and, although the defendant had filed a plea, he did not appear to defend. Counsel proceeded to read the pleadings.

Plaintiff, in her declaration, said that she was married out of community of property to Petrus Johannes van Heerden, and by him assisted as far as need be. The defendant resided at Murraysburg, in this colony, and was sued individually and in his capacity as executor testamentary in the estate of the late Roelof Alwyn Jooste. Plaintiff and defendant were children of the latter. Under the joint will of their parents it was provided that certain landed property in their ownership (to wit, one-sixth share of the farms Bloemfontein, Klipfontein, and Lilyfontein) should be sold to Frans Daniel Jooste (meaning defendant) for £500. Testatrix died about 1891, and the testator died about 1902. The latter appointed plaintiff and

defendant as heirs, and defendant as sole executor. Defendant thereafter took out letters of administration, and proceeded to administer the estate, and thereafter filed an account wherein he wrongfully and unlawfully brought up as an asset in the surviving testator's estate the said land at a valuation of £500 (being the bequest amount), and wrongfully and unlawfully awarded the same to himself without paying into the joint estate £500, or paying over to plaintiff any part thereof. Plaintiff said that she had, in consequence of his wrongful action, been damaged, and that as co-heir she was entitled to £250. She prayed for judgment for £250, or, alternatively, that the defendant pay into the joint estate for the benefit of herself and defendant, the said sum of £500.

Defendant, in his plea, entered at some length into the position of the estate. He said that the sole asset in the testator's estate was the landed property, and that the liabilities thereof comprised the sum of £500, being portion of a bond for £700, also £40 9s. 6d., funeral expenses, the cost of liquidating and administering the estate, and sundry petty accounts, and £35, medical charges. He said he took over the aforesaid liability of £700, and thereupon the landed property and the bond thereon were transferred to him. In the testator's estate. The net balance of the of £150, whereof £50 was due to plaintiff, £50 to defendant, and £50 to the testator's estate. The net balance of the testator's estate, including the £50 mentioned, showed a liability in favour of defendant, and there was nothing due therefrom to the heirs. Defendant also said that plaintiff was indebted to him in the sum of £57, moneys lent between 1899 and 1905, and £79, price of seven horses sold by defendant to plaintiff in or about 1897. He prayed that the claim be dismissed, with costs. In reconvention, defendant (now plaintiff) prayed for judgment for £136, moneys lent, and the price of horses sold and delivered, with interest and costs.

Plaintiff, in her replication and plea in reconvention, said that a bond of £200 which had been mentioned by defendant, had been discharged out of the movables. The other bond of £700 was passed by testator after his wife's death, and did not constitute a debt of the joint estate. The proceeds of the bond were devoted to paying certain debts of the defendant, with his knowledge and consent, or by his acts or agency, and defendant acted unlawfully, improperly, and negligently in treating the bond as a liability of the joint estate. She denied any liability in regard to the alleged loans and purchase of horses.

Formal evidence having been given by plaintiff.

Mr. Bisset said that he had to ask for judgment for £83 6s. 8d., being one-

third of the sum of £250. That was the amount of inheritance to which plaintiff appeared to be entitled.

Judgment for plaintiff for £83 6s. 8d., with costs, including costs of application to set down the case, plaintiff to have her expenses as a witness, and absolution granted on the claim in re-convention.

### GENERAL MOTIONS.

*In re* BUFFALO SUPPLY AND COLD STORAGE, LTD. (IN LIQUIDATION). { 1907.  
Aug. 29th.

Mr. Burton, K.C., moved for confirmation of the official liquidators' report. Report confirmed.

*In re* GOOD ROPE FUNERAL ASSOCIATION, LTD. (IN LIQUIDATION).

Mr. P. S. T. Jones moved for confirmation of the first and final report of the official liquidator. The report stated that the company was established in 1886, with a nominal capital, according to the deed of partnership, of £1,000, with power to the directors to increase the capital to £2,000. The actual issued capital was £1,350. The assets of the company consisted of landed property, situated at the corner of Wale and Bree streets, Cape Town, and also movable assets. The latter had realised £450, and the former £1,500. This result enabled the liquidators to discharge the preferent as well as all concurrent liabilities, and provided for a refund to shareholders of 4s. 8d. per share. All the capital had been fully subscribed, and all calls had been paid. The failure of the company was entirely due to the excess of expenditure over receipts for the last three years, during which period there was a loss of about £300 per annum. The liquidators added that as the liquidation would be finally completed after the confirmation of this report, they desired authority from the Court to destroy all books, documents, and papers of the company now in their possession, and to pay all unclaimed dividends and refunds due to shareholders to the Master. They prayed for an order, (1) confirming the report and accounts; (2) as to disposal of books, accounts and documents of the liquidation; (3) to deposit with the Master one month after confirmation of this report all unclaimed dividends and refunds to shareholders; (4) to dissolve the company.

Order granted confirming the account, and authorising the destruction of the books, accounts, and documents on a certificate by the Master that the liabilities have been met and a dividend paid.

### FINKELSTEIN V. FINKELSTEIN.

Mr. Benjamin, K.C., moved, in terms of consent paper, for removal of trial to the Circuit Court at Oudtshoorn.

Order granted, costs of the application to be costs in the cause.

### *Ex parte* DUCKITT.

Transfer—Mistake—Amendment of title.

*Two sisters jointly purchased certain cottages; but, by the mistake of the conveyancer, transfer was effected in favour of only one of the sisters. After the death of one of them, the survivor applied for leave to rectify the transfer by adding her name as one of the transferees, and no objection being raised by the executor of the deceased sister or by the Registrar of Deeds, the order was made.*

Mr. D. M. Buchanan moved for leave to have transfer passed of certain property free of duty. From the petition, it appeared that petitioner and her late sister acquired certain six lots of ground at Wynberg, and had twelve cottages erected thereon. Petitioner's sister was a better business woman than deponent, and she managed their affairs. Subsequently to her sister's death, petitioner discovered that the whole of the property was registered in the name of her sister alone. As indicating that she had a half-share of the property as acquired, petitioner stated that in her last will her sister gave her a life interest in her six cottages. Petitioner asked for leave to have the error in the transfer amended by transferring one-half of the property to herself free of duty. Application had been made to the Treasury, but the Government officials referred the applicant to the Court. The matter had previously been before the Court, and counsel now put in a consent paper, signed by the niece of deponent, who was the only person interested in the deceased's estate.

De Villiers, C.J.: It is clear that there has been a mistake, and the party concerned consents to this amendment. The cottages which are in question were bought with monies supplied by both sisters, and by some mistake transfer of all the cottages was made to one of the sisters now deceased. It would not be right that the other should have to pay transfer duty over again in order to have the half transferred in petitioner's name. Transfer duty has

been paid upon the whole. A mistake was made, and I think that mistake should now be rectified in the manner asked for in the petition. The Court will therefore grant the order as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

CARLYLE V. BARSDORF AND { 1907.  
ANOTHER. { Aug. 30th.

This was an action in which the plaintiff Carlyle sought to effect transfer of certain property purchased by him from the defendants, or, in the alternative, to recover the sum of £70 purchase money paid, and £30 damages, and costs of the suit.

The plaintiff, in his declaration, said he was a carpenter, residing at Kitchen-er-road, Woodstock. The defendants are (1) Edward Barsdorf, and (2) Alfred Theodore Hemmessy, Thomas Herbert Hazell, and Edward W. McLachlan Thomas, in their capacity as trustees of the insolvent estate of Philip John Porter, of Claremont. All the defendants reside and carry on business in Cape Town. In or about October, 1903, the said Barsdorf and Porter entered into a transaction in co-partnership in and about the purchase, and subsequent sale for their commission profit, of certain landed property situated at Plumstead, in the Cape Division, and known as the Heatherhurst Estate. Thereafter, on or about the 9th December, 1903, the said Barsdorf and Porter caused the said estate, which had been purchased by them, to be put up for sale on their behalf in lots at public auction, under certain printed conditions. Plaintiff at the said sale purchased for the sum of £70 certain lots in the estate. It was provided in the conditions of sale that upon payment of the whole of the purchase money, transfer would, if the purchaser so desired it, be effected in favour of the purchaser. Plaintiff paid the whole of the price to the said sellers, or their duly authorised agents. Plaintiff demanded transfer, but the defendants failed to effect this. Subsequently Porter surrendered his estate as insolvent,

and the second named defendants were duly appointed trustees in the insolvent estate.

Defendants deny that they ever purchased the estate, or put it up for sale, as alleged. They say that one Hackenberg is still the registered owner of the said estate referred to as the Heatherhurst Estate. They entered into an agreement with Hackenberg by which the latter should put up for sale at public auction the estate under the condition that should the estate, when so sold, realise a sum in excess of £4,500, the said Barsdorf and Porter should be entitled to receive all sums of money so realised over and above that sum, in consideration of which the said Barsdorf and Porter agreed to pay, and did pay, the said Hackenberg the sum of £500. Defendants say that no payments were made to them by the plaintiff, and that if any payments of amounts as alleged therein were made, they must have been made to Hackenberg or his duly authorised agents. They deny that the refusal to give transfer was wrongful or unlawful, and they deny that they were in law bound to effect transfer.

Mr. Murray Bisset was for the plaintiff. The defendant Barsdorf appeared in person; Porter, the other defendant, did not appear.

Henry Carlyle, called, said he was a carpenter, residing at Woodstock. In consequence of certain advertisements, he attended a sale of land in Plumstead in 1903. It did not appear from the conditions of sale who the actual sellers of the property were. He signed certain conditions of sale, but the copy produced he could not swear to. He paid for several lots, and had asked transfer from defendants, but could not get it.

John Thomas Carlyle, son of the plaintiff, said he also purchased lots in the same property from I. and J. Hermann, the auctioneers. He did not know for whom they were selling the property. Afterwards he paid the instalments to Mr. Porter, the second defendant. He asked Mr. Barsdorf to give him transfer. Barsdorf promised to give transfer in a month or two, but failed to do so.

Samuel Chapman said he was son-in-law of one Hackenberg, now in Australia. Hackenberg sold the estate in question. Barsdorf and Porter were considered the actual purchasers. In reply to his lordship, witness said that if Hackenberg had received all the money got from purchasers, it would have amounted to over £3,000. For the past three years he had been pressing Barsdorf and Porter for the money, but could get no settlement.

The defendant Barsdorf stated that Porter and himself did not actually take transfer of the property until £4,500 had been paid,



[Buchanan, J.: What became of the money received from the purchasers?]

I believe Hermann got £1,600, but personally I received nothing.

Buchanan, J.: The defendant Barsdorf has not surrendered his estate like the other defendant, Porter, and he personally is liable. It appears that the defendants were partners, and agreed to purchase the property for £4,500. They expected to make a profit out of the sale. The unfortunate purchasers, of whom the plaintiff is one, have already been defrauded out of their money, and I sincerely hope the plaintiff will be able to recover the amount owing. The defendants are ordered to give transfer within 14 days, failing which they are ordered to repay the sum of £70, purchase money, together with £10 12s., damages and interest, *a tempore morae* and costs of suit.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

#### PROVISIONAL ROLL.

MAXWELL AND EARP AND { 1907.  
ANOTHER V. ZIEPER AND { Aug. 30th.  
ANOTHER.

Mr. D. M. Buchanan moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

Mr. Buchanan moved for the appointment of Wyndham Bishop and J. B. Levine as provisional trustees of the estate.

Order granted.

VAN DER BYL AND CO. V. KLAASEM.

Mr. H. S. van Zyl moved for the final adjudication of defendant's estate as insolvent.

Order granted.

HOFFMAN V. BRUYNS.

Mr. D. M. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SIEPKER V. VAN NIEKERK.

Mr. H. G. Lewis moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Gordonias, for £10 10s. 11d., and for £6 6s. 5d. and costs, and for certain

property mentioned in the summons to be declared executable. Counsel also asked for interest, which had been ordered when provisional sentence was granted on certain promissory notes, but which was not included in the writ of execution.

De Villiers, C.J.: If you sue on a judgment, you cannot get more than the judgment gives you. Judgment will be given in terms of the summons.

LANGE V. VAN NIEKERK.

Mr. H. S. van Zyl moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Gordonias, for £7 15s. 4d., with interest and taxed costs, and for certain property mentioned in the summons to be declared executable.

Order granted.

LENHOFF BROS. V. VAN NIEKERK.

Mr. H. G. Lewis moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Gordonias, for £19 7s. 10d., with interest and costs, and also for £1 11s. 1d., with interest and costs, and for certain property mentioned in the summons to be declared executable. Counsel also applied for costs of a certain interdict obtained against the defendant, restraining him from parting with the property pending judgment in this matter, and also the action by Siepker.

Order granted as prayed, with costs, including costs in both cases of application for interdict.

HYDE V. JOUBERT AND ANOTHER.

Mr. P. T. Lewis moved for provisional sentence on a promissory note for £830, with interest from the 18th June, 1907, and costs.

Order granted.

SHASKOLSKY V. FISHER.

Mr. Wallach moved for a decree of civil imprisonment upon an unsatisfied judgment of the Resident Magistrate's Court, Wynberg, for £10 11s. 6d. and £10 2s. 4d. costs. Counsel also applied for provisional sentence against the defendant, who had removed from the Magistrate's jurisdiction.

Defendant said that he was a building contractor, and was without means. He declared that he had made a payment of £3 to Attorney Steer, with which he had not been credited.

The application for provisional sentence was ordered to stand over until Tuesday next, and the application for civil imprisonment was refused.

## DU TOIT V. ROUX.

Mr. Pohl moved for provisional sentence on a mortgage bond for £470, less £120 paid on account, with interest, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Counsel explained that the case had not been set down owing to the neglect of the plaintiff's attorney.

De Villiers, C.J., said that he would grant an order as prayed in this case, but it must be clearly understood that it should not be quoted as a precedent where there had been neglect in not setting down the case in the ordinary course.

## SCHMITT V. SCHMITT.

This was an action brought by Heinrich Schmitt, of Claremont, against his wife, Auguste Schmitt, for restitution of conjugal rights, failing which a decree of divorce, on the ground of defendant's malicious desertion.

Mr. De Villiers was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Heinrich Schmitt (the plaintiff) said he was married to defendant in Glasgow, Scotland, on the 23rd August, 1895. There were two children of the marriage, both boys, living with witness. In 1903, witness came to this colony, arranging with his wife to join him in the following year. In March, 1904, he received a letter in German from the defendant, in which she said that she could not live with him again, and that she had found she loved somebody else, whom she named. She also said that she was going to live with the other man. Witness asked her to reconsider her decision, and told her that he would forgive her, and asked her to join him, but she did not do so. He had arranged with the steamship company that she should have a free ticket to the Cape. The children were brought to witness by a friend. He had since heard that his wife had gone to live with the other man. He desired to have his wife's interest in an insurance policy on his life to be declared forfeited and to have custody of the children. Witness was employed as a confectioner.

By the Court: Under the terms of his engagement his wife could at any time obtain a ticket from his employers to come out to the Cape.

Decree of restitution granted, defendant to return to the plaintiff on or before November 1, failing which, to show cause on November 14 why a decree of divorce should not be granted, and defendant to have declared to have forfeited all benefits of the marriage, including the insurance policy and custody

to plaintiff of the children, service by registered letter addressed defendant's sister, Mrs. C. E. Dittrich, of Elgin, Scotland, also to make it clear to the defendant that a free passage is provided for her from Scotland to Cape Town, to enable her to obey the decree of restitution of conjugal rights.

## GENERAL MOTIONS.

GRANT V. GRANT. { 1907.  
Aug. 30th.

Mr. Toms moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Order granted.

*Ex parte* HEUER.

Mr. Sutton moved for a certain rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* SPANGENBERG.

Dr. Greer moved to have a rule nisi made absolute calling on all interested to show cause why there should not be a distribution of a certain inheritance. Counsel also asked that there should be an order authorising a meeting of next-of-kin for the appointment of an executor dative.

Rule absolute, and an order granted authorising the Master to call a meeting of next-of-kin of William Charles Roberts for the purpose of appointing an executor dative to his estate.

*Ex parte* MCBEAN.

Mr. Sutton moved to have a rule made absolute calling on all persons to show cause why the death of Robert McBean should not be presumed.

Rule made absolute.

*Ex parte* WILKINSON.

Mr. Sutton was for the petitioner, and Mr. J. E. R. de Villiers was for respondent (the husband). Mr. De Villiers applied for a postponement until next Tuesday, so that the husband would be able to file replying affidavits.

Mr. Sutton said he was instructed not to consent to this. The rule was served on 15th August, calling on Petrus Wilkinson to show cause why £50 should not be paid to the petitioner to institute an action for divorce.

De Villiers, C.J., said the case could not be heard this term, and it had to be postponed, the question of costs to stand over.

*Ex parte* SOUTH AFRICAN CO-OPERATIVE DAIRY CO., LTD.

Mr. Roux moved to have a rule nisi calling on all concerned to show cause why the provisional liquidators should not be appointed official liquidators made absolute.

Rule made absolute.

*Ex parte* LYON.

Mr. De Waal moved for an order authorising the amendment of a certain order of Court in the description of certain property.

Order granted.

*Ex parte* WALT.

Mr. H. J. Lewis moved for an order authorising the amendment of the petitioner's name in the Debt Registry from Morris Walt to Morris Phillip Walt.

Order granted in terms of the Registrar of Deeds' report.

MASTER V. TRUSTEE INSOLVENT ESTATE DICKER AND MEIRING.

Mr. Nightingale moved for an order of contempt of Court against the trustee in the respondent estate, John O. Walter. An order was made by the Supreme Court on the 2nd July calling on the trustee to file the dividend receipts in the insolvent estate. That order was duly served on the trustee on the 6th July, and according to the Master's affidavit he had failed to furnish these receipts or to give any evidence of the payment of the dividends in the insolvent estates. He had failed to prove that the creditors had been paid the amounts that had been awarded them in the account. The order had been served on him, and had not been complied with.

A wire had been sent that morning asking for a postponement of the matter, but Counsel was informed that this trustee on prior occasions had given a great deal of trouble. There had been previous orders of the Court against him. He also moved for costs against the trustee.

De Villiers, C.J., said there was no reason for suspending the order. The respondent had had ample time to abide the order of Court, and he must be committed for contempt of Court. The order granted as prayed, with costs against the defendant.

MASTER V. TRUSTEE INSOLVENT ESTATE MORRIS.

Mr. Nightingale moved for an order compelling the trustee, John Hope Simpson, in the insolvent estate of Frederick D. Morris, to file an account within one month, with costs against the trustee personally.

Order as prayed, with costs.

*Ex parte* BRUMMER.

Mr. J. E. R. de Villiers moved on behalf of the petitioner for an order declaring certain property free from *fidei-commisum* on the ground that it was impossible for the petitioner, who was now 68 years of age, to have issue.

Order granted.

*Ex parte* KOTZE AND ANOTHER.

Mr. Roux moved for an order authorising the registration of an antenuptial contract. The petitioner and his wife were married in the Orange River Colony on the 6th August, 1907. It was their intention to be married out of community of property, but previous to their marriage they instructed a notary public at Aliwal North that it was not convenient for them to appear before him in person, and they executed a power of attorney, but the power of attorney, although posted in time, only reached Aliwal North on the evening of 6th August, 1907.

Order granted.

*Ex parte* MEINTJES.

Mr. Watermeyer moved for leave to the petitioner to be examined for admission as a notary. The petitioner also wished to be examined in Pretoria, which, however, was not in the petition, in order to save expense.

Order in terms of petition, but no further order as to examination in the Transvaal until notice had been given to the Law Society.

## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

COLLISON LTD., V. VAILE. { 1907.  
Sept. 2nd.  
" 4th.  
" 5th.

This was an action brought by Henry C. Collison, Ltd., to recover an amount of £4,440 0s. 9d. from Reginald Francis St. Frere Vaile.

The plaintiff's declaration was as follows: By a resolution of the plaintiff company, confirmed on June 10, 1904, the defendant Vaile was appointed a director of the company and vice-chairman of the Board, he to be allowed such salary or emolument as the company might think fit and proper. In accordance with the above resolution, it was agreed that the defendant should come to South Africa in order to take the chief control of the company's business, and he did so; and thereafter, in or about the year 1904, he proceeded to Johannesburg, in the Transvaal, and established and took charge of the branch business of the plaintiff company there; the salary or emolument of defendant was fixed at £1,200 a year whilst holding the office of director and vice-chairman in chief control of the whole South African business. During the period from which the defendant took charge of the Johannesburg branch business as aforesaid, up to the present date, the defendant mismanaged the plaintiff company's business, acted illegally in incurring liabilities in the name of the plaintiff company, and himself incurred large liabilities to the plaintiff company, and is now indebted to the plaintiff company in the sum of £4,440 0s. 9d. in all. The amount of £2,092 8s. 7d. is the balance on the Johannesburg current account as between plaintiff company and the defendant as at November 30, 1906; the defendant from time to time drew monies and obtained goods from the business, and from time to time paid sums into the business; the details of the said account have been rendered to the defendant. The amount of £1,729 4s. 2d. is the balance of the purchase of certain landed property at Johannesburg, styled the City and Suburban Hotel; this property was purchased by defendant for £17,000, and transfer passed into his own name and a bond of £15,000 passed upon the property; the defendant wrongfully and unlawfully obtained the said amount of £1,729 4s. 2d. from the plaintiff company's branch business as aforesaid, and utilised the same in paying for the said property. The amount of

£776 17s. 6d. is in respect of sums illegally obtained by the defendant from the said branch business, and wrongfully and unlawfully expended in and about a property at Johannesburg styled the Standard Brewery, between December, 1905, and October, 1906. Particulars of the said account have been rendered to the defendant. The sum of £263 19s. 3d. is the balance due by defendant in respect of interest at 8 per cent. upon advances from time to time made to him out of plaintiff company's business, after deducting interest due on advances made by him; particulars of the said account have been rendered to the defendant. The sum of £25 18s. 6d. is in respect of an account for personal accommodation of the defendant at Rosebank Hotel in November, 1906, disbursed on his behalf out of the plaintiff company's business. The sum of £1,026 19s. 2d. is the balance due by defendant upon a debit and credit account with the Cape Town business of the plaintiff company, in respect of moneys advanced and goods supplied from time to time to defendant, and sums from time to time credited to him in respect of salary, fees, and travelling expenses; particulars of the said account have been supplied to defendant.

Defendant in his plea says he admits paragraphs 1 and 2 of the declaration, and also paragraph 3, save that he denies that he took charge of the branch business of the plaintiff company at Johannesburg. He says that one Edward W. Collins was appointed by the company, who gave him a plenary power of attorney as managing director of that branch, and that the said Collins continued to act as such until his services were dispensed with by the plaintiff company in or about November, 1906. Defendant admits that there has been financial transaction both on the debit and the credit sides of the account between him and the plaintiff company, but otherwise denies the allegations in paragraph 4 of the declaration. He specially denies that the account marked "A" correctly shows the position between him and the company, or that he owes the company any portion of the sum of £4,440 0s. 9d., as claimed. Defendant says that on a proper statement and debate of accounts as between him and the plaintiff company, the position will be as shown on the account herewith annexed and marked "B." The City and Suburban Hotel referred to was *bona fide* and legally bought for and on behalf of the plaintiff company for £17,000. It was arranged that defendant should take transfer of the property in his name, and should pass a bond for £15,000 to one Nicholson, with the contemplated object of preventing such bond prejudicing the preference of the preferent shareholders of the company, and that the company should pay



the balance of £2,000. The company sold the goodwill of the licensed premises to one Levison for £3,000, let the premises to him for £85 per month, and also tied him down to purchase all the liquors he required for his business from the company. The said Levison paid the company in respect of goodwill £1,000 in cash, and gave promissory notes for the balance of £2,000. The whole of the financial aspect of the said transaction was entered in the books of the Johannesburg branch, and was known to the company, who also adopted the entire transaction. Subsequently on its appearing that the transaction did not prove the financial success it had at first promised, the directors sought to repudiate it, and the defendant agreed to adopt the purchase as his personal transaction, and it was agreed that the entries in the books should be adjusted accordingly. In making such adjustment the company has wrongfully failed to credit defendant with the sum of £491 16s., being an amount paid by the said Levison in account of the promissory notes given by him for goodwill. The proper debit against defendant in this item should be £1,237 8s. 2d., instead of £1,729 4s. 2d.

Defendant admits that the sum of £25 18s. 6d. became due from him for board and lodging at Rosebank Hotel in November, 1906, but says that after plaintiff company took over the hotel from Mrs. Roberts he paid for account of the company in respect of the said hotel various sums of money totalling £23 0s. 6d. for sundry articles, as per detailed list marked "C" annexed hereto. He claims to set this off against the £25 18s. 6d.; otherwise, he denies paragraph 9. Defendant says that on the 31st January, 1906, he advanced to plaintiff company the sum of £2,501 16s. 4d. in connection with a liability of the company, which arose out of an agreement between the company and the Standard Brewery, by which the company took over the management of the brewery and the sale of the output thereof, and undertook to pay for wages and goods and general expenses of management, on the condition that out of the proceeds of the sales the company should be reimbursed its outlay, and should receive a commission of 15 per cent. on such proceeds. This transaction resulted in a loss to the company, and the defendant, by agreement, advanced the aforesaid sum to the company to cover this loss of cash, and is entitled to be credited therewith on account. At divers times between the months of March, 1904, and December, 1906, the defendant, at the special instance and request of the company, and for the furtherance of its business and interests, made several special journeys in Africa, England, Scotland, and on the Continent of Europe generally, and

expended various sums of money on such journeys and visits, and he is entitled to charge the company on this account the sum of £1,800, which is a fair and reasonable charge for such special services rendered and moneys expended.

Defendant refuses to pay the sum of £4,440 0s. 9d. which plaintiff company has demanded. He says specially that he was justified in resigning his office and ceasing to take any further part in the management by reasons which need not be set out herein.

For a claim in reconvention defendant (now plaintiff) says: (1) He craves leave to refer to the several matters and things in the above plea set out. (2) He is legally entitled to, and does claim, formal judgment for the sums of £23 0s. 6d., £2,501 16s. 4d., and £1,800 for the reasons set forth in his plea, and that the said items shall be credited to him in account, and says that on a proper statement and debate of accounts between him and the company it will be found that there is a balance due to him by the company of £1,417 8s. 10d., as shown on the account annexed marked "B."

Wherefore he claims: (a) Payment of the sum of £1,417 8s. 10d., due to him as aforesaid in a proper statement and debate of accounts; (b) interest thereon *a tempore morae*; (c) alternative relief; (d) costs of suit.

Mr. Schreiner, K.C. (with him Mr. Upington) for plaintiff. Defendant in person.

Jno. Ed. Paul Close, called, said he was an accountant, carrying on business in Cape Town. He was an inspector under H. Collison and Co. The company was not in liquidation at all. It was a going concern, and a good going concern. In June, 1906, as auditor of the company, the balance-sheet for 1906 was sent to him for examination. Certain items in the account he queried and made inquiries into. He wrote defendant upon the matter, and got two replies. Witness was examined at considerable length as to the details of the items set forth in the pleadings.

Further evidence having been heard on both sides.

*Postea* (September 5th). Counsel and Defendant were heard in argument on the facts.

Buchanan, J.: The plaintiffs who are a limited liability company carrying on business in South Africa under the title of H. C. Collison and Company, have as one of their members Mr. Henry Collison, of London, who is very largely interested in the affairs of the company. He appears to be a large holder of preferent securities in the company, and he to a great extent controls or directs the operations of the company in South Africa, where the business is carried on by a board of directors.

Mr. Collison and the defendant, Mr. Vaile, met in London, and Mr. Vaile takes up the position that certain inducements were held out to him to join the company, to accept shares, and to give financial assistance to the company. As a result of negotiations with Mr. Collison, defendant came to this country early in 1904 with credentials from Mr. Collison. At a meeting of the board of directors out here he was appointed vice-chairman and managing director at Johannesburg, where the company carried on a large branch business. Whilst the defendant was such vice-chairman and manager certain transactions were entered into which are in dispute in this case.

The defendant's association with this company has now terminated, and he is being sued on an account which contains several large items, some only of which are in dispute. The first claim in the account annexed to the declaration is for £2,092 8s. 7d. stated to be the balance on current account. This amount is not disputed, and therefore the plaintiffs are entitled to be credited with this amount of £2,092 8s. 7d.

The next item in the account is a claim made in connection with the City and Suburban Hotel. It is for an amount of over £1,700, of which defendant admits the sum of £1,237 8s. 2d. This amount as far as it is admitted must be awarded to the plaintiffs. But in connection with this claim an amount of £491 16s. is in dispute. This hotel, situated in Johannesburg, was bought by the defendant while he was the company's manager there. I think it is proved from the documents put in that this hotel was bought by the defendant personally and on his own account, although in making the purchase he was acting to advance the interests of the company of which he was vice-chairman by endeavouring to secure business for his company by making the hotel what is called a "tied house."

There is no doubt that the statements placed by Mr. Collins, the local manager of the company, before the defendant, who was then in England, when Mr. Collins was endeavouring to induce the defendant to make the purchase, were of a glowing nature, and described the transaction as a good investment, out of which much could be made. Whether the defendant was misled by Mr. Collins' very roseate estimates, or whether he was a little sanguine himself, the defendant purchased this hotel property on his own account. He secured the business of the hotel for the plaintiff company, and made advances to keep the business going out of the company's funds. Had the amount so advanced still remained on the company's books the question might fairly have arisen whether defendant should be regarded as personally lia-

ble, or whether the transactions in connection with the business of the hotel should not be regarded as those of the company. But after the question had been raised between the parties the plaintiff agreed that all items connected with the business of the hotel in regard to the purchase thereof should be eliminated from the account in Collison's books, and the defendant himself should only be liable for them. The defendant originally bought the hotel for £17,000, of which purchase amount £15,000 was allowed to remain on bond, the balance of £2,000 having to be paid to the vendor. Mr. Collins, in urging the purchase, represented to defendant that a lease of the hotel could be made to one Lewison, who had offered to pay £3,000 for the goodwill, and to pay a monthly rental of £135 for the hotel. This £3,000 was to have provided the £2,000 necessary to be paid to the vendor, leaving a profit of £1,000 over, while the £135 per month would have paid the interest upon the bond. Therefore, if Lewison had carried out the contract, there would have been no call on either defendant or the company. Upon paper this looked a very good transaction. What seems to have been done was this, the £2,000 to pay the vendor was taken from the plaintiff's funds at the Johannesburg branch, and the property was transferred to the defendant, who passed his own bond for the £15,000 unpaid. Lewison paid the plaintiff company £1,000 and gave bills to Collisons for the balance of £2,000. He also passed a general covering bond in favour of the plaintiff company to secure this £2,000. Now this all shows, I think, that the defendant acted in the transaction with perfect *bona fides*. The original transaction was initialled by the company's manager and all payments made appeared in the books of the firm, and defendant believed he was acting in a way which would very largely benefit the company. But after the matter came into dispute he himself agreed with the company that all the items in connection with the purchase of the property should be eliminated from Collison's account and passed to defendant's private account. The transaction turned out a failure, and a disastrous one, and the defendant undertook to bear the loss. It may be unfortunate for the defendant, but there was a distinct agreement entered into by him as to what was to be done in connection with this account.

Mr. Close, an accountant of standing in Cape Town, was sent to Johannesburg by the directors to report and to adjust accounts. Acting upon instructions received from the directors and in pursuance of the agreement come to with the defendant, Mr. Close eliminated from the accounts in the books of the company the items connected with

the hotel, and debited them to the defendant. He left, however, the sum of £491 16s., which had been paid by Lewison off his promissory notes, and which ought to have been, in my opinion, eliminated with the other items in the account. But, on the other hand, as Lewison's promissory notes had been renewed from time to time there were discounts and stamps paid upon their renewals, which Mr. Close seems to have allowed to stand in the account as against the £491. The proper course to have adopted under the agreement, I think, would have been to have eliminated both amounts, the £491 on the one side and £196 on the other side. If he had done that there would have been a debit against the defendant beyond the amount admitted by him of this £196 which will have to be added to the plaintiff's account.

The next item in dispute is a small one. There was a claim for hotel expenses and a counter-claim, both of which are now admitted, and setting one against the other there is a balance of £2 18s., which will also have to be debited against the defendant.

The next item in the account is a debit balance upon the defendant's account in Cape Town of £1,026 19s. 2d. This amount is not in dispute, as the defendant agrees that this ought to be debited against him.

The other two items in dispute, one on each side of the account, are connected with the Standard Brewery Co. of Johannesburg. This company was a limited liability company, the chairman of which was Mr. Collins, plaintiff's manager at Johannesburg. Collins had thus two capacities, one connected with the brewery company and one connected with the plaintiffs. It has been stated that the fact of his connection with the brewery was not objected to by Collisons. The brewery company was getting into difficulties, and the defendant, to keep the company afloat, made certain proposals on his own behalf, quite apart from his position as vice-chairman and managing director of Collisons at Johannesburg. The proposals were to re-float the company or obtain financial assistance for the company by means of debentures. This proposal, made by the defendant, I take it from the evidence, was not made on behalf of Collisons, but on his own account.

It became necessary to keep the brewery going while these negotiations were in progress and to do so defendant made certain advances to the brewery company out of Collisons' funds. Even after the brewery company was placed under liquidation, defendant on the authority of the Transvaal Supreme Court, made a further advance which was to be a preferent charge in the liquidation. This

last amount has now been paid into Court and awaits the result of this case, but as a matter of account between the parties this £776 17s. 6d. advanced by the defendant from the plaintiffs' funds must be debited against the defendant personally.

There was a further sum of £2,501 standing in the plaintiffs' books as a debit against the brewery company. This was the money previously advanced by the defendant out of the plaintiffs' funds in the course of business. Defendant had obtained for Collisons a very favourable contract, by which Collisons would have the vending of the whole of the brew of the company on certain terms, and out of the returns they were to get a commission of 15 per cent. Had the brewery company gone on well there would have been no dispute, as then this money would have been paid off. But unfortunately, like the City and Suburban Hotel, the brewery failed, and the company has gone into liquidation. The defendant while vice-chairman and director of the plaintiff company in Johannesburg made these advantages admittedly on behalf of Collisons to the brewery company. Had the matter rested there, there might have been a great deal to be said why Collisons should have borne this loss and not the defendant. But the defendant, instead of leaving this amount on the books, has taken this amount out of the case. When the company's balance-sheet was prepared at the end of January, 1906, the defendant admitted his personal liability for these advances, and gave a cheque to Collisons for the total amount of the amount due by the Standard Brewery to Collisons, and closed the account in the books. The defendant was able to do this because he had at that time £2,500 to his credit on loan account with Collisons. By giving cross cheques he paid out his own credit balance; and, as between the brewery company and Collisons, he paid off the debt due by the brewery to Collisons, taking it over entirely on his own account. Had he not done so there might have been considerable argument adduced to show that the loss suffered in connection with the brewery should be borne by Collisons and not by the defendant.

The defendant had in reconvention sought to recover back this £2,501. But he has not shown any agreement to repay it or any just cause why, after taking over the debt, he is now entitled to repayment. I have not the slightest doubt that the defendant in all these transactions acted for the best of all parties, and with the full intention of benefiting Collisons as well as himself. There is no imputation of fraud against him, or of misappropriation of funds, or anything of that kind. But he voluntarily took this liability upon his own

shoulders and, much as I regret that he should suffer this loss, he has no legal claim to have the amount refunded by the plaintiff company.

The only other item which the plaintiffs claim and which has not been disposed of is an account of £263 for interest. I have looked at the interest account which has been put in by the plaintiffs. There was no agreement between the parties that the current account should bear interest, although the defendant was receiving interest upon the capital which he advanced to Collisons. I do not know whether it is usual to charge interest in regard to such current accounts. I think as a matter of practice it is rather unusual to charge interest on such accounts. At the same time the defendant very fairly says that he does not wish to dispute the right to make the charge. But the account, as an account, cannot be passed as it stands, both as regards the rate of interest and the items on which it has been charged. As the plaintiffs have left it to the Court to say what would be a fair amount to allow, and have also said I may deal generously with the defendant, I have decided, rather than leave this one item open for further adjustment and thus incur further expense, to allow the plaintiffs £150 as the balance of interest due to them. In so doing the amount will be within the mark, and the defendant will not be overcharged.

There is another item claimed in re-convention, and that is a sum of £1,800 claimed by the defendant for travelling expenses. The defendant when he first took up his duties claimed certain expenses incurred in travelling to Johannesburg and elsewhere on behalf of this company. The plaintiff company admitted this claim, and paid the amount to that date, and then, at the defendant's suggestion, the company agreed to pay from the 15th June, 1904, a sum of £100 per month to the defendant for his services. Since then up to the time of the action no question of travelling expenses was ever raised between the parties. The £1,200 a year was paid, and no claim was made for any other expenditure incurred by the defendant. The defendant now says that he has expended a great deal more than the £100 per month which was allowed him, but I think he must be considered to have accepted this £100 per month as an equivalent for any expense which he may have incurred in his position as vice-chairman of the company. He himself had shares in the company, and was largely interested in its success. His services as director have been paid for with those given by the other members of the Board. He may not have been compensated for all his outlay, but he has been drawing a fair amount; and I think that, under the circumstances, he

is not entitled in addition to charge travelling expenses.

The various amounts for which I find for the plaintiffs are as follows: £2,092 8s. 7d., £1,237 8s. 2d., £2 18s., £1,026 19s. 2d., £776 17s. 6d., £196 3s. 9d., £150. Against which there is admittedly the items of £1,075 6s. 5d., the balance to the credit of defendant's current account, and £400 salary, making a total of £1,475 6s. 5d. This subtracted from the total of the other amounts leaves £4,007 8s. 9d. in favour of the plaintiffs, for which amount judgment will be given with costs.

*Postea* (September 6th).

Buchanan, J.: In giving judgment in this case yesterday, I am afraid I took the wrong figures in connection with the item £491, which is in dispute. I have given plaintiffs credit, not for £1,729, which they claimed, but for £1,237, which the defendant admitted. Then I said the principle was that the £491 ought to have been omitted by Mr. Close on the one side, but the company ought to have credit for £196 for stamps and discount. In adding up the amounts, instead of debiting £196, I took the difference between the two, £295, so the amount of the judgment will have to be reduced, and instead of allowing plaintiffs £295 12s. 3d., I should have allowed them £196 3s. 9d. Judgment will therefore be given for plaintiffs, not for £4,106 17s. 3d., as stated yesterday, but for £4,007 8s. 9d., with costs.

Mr. Schreiner, K.C. (for plaintiffs) asked whether the Court would be prepared to make any order in regard to the amount of £260 in the hands of the attorneys?

Mr. Justice Buchanan: I may state formally that I consider that the £260 is part of the £776 which is in dispute between the parties. It has been awarded to plaintiffs, and consequently the money is the plaintiffs'.

[Plaintiff's Attorneys: Van Zyl and Buissinne. Defendant's Attorney: J. F. De Kock.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

*Ex parte* KAHN. { 1907.  
Sept. 2nd.  
" 17th.

Jurisdiction of Supreme Court—  
Charter of Justice—Attachment to confirm jurisdiction

1929 L.D.L.A



—Non-resident defendant—  
Cause of action arising abroad.

*The petitioner, a resident in this Colony, applied for an order to attach certain goods of the respondent, who resided in German South-West Africa, in order to found jurisdiction in an action for damages for the respondent's breach in German S.W. Africa of a contract there made by him with the petitioner.*

*Held, that as the cause of action did not arise in the Colony, the petitioner was not entitled to the order.*

*Case of Einwald v. German West African Co. (5 Juta, 86) commented upon.*

*The petitioner also applied for the attachment of two mules, which he claimed as his property and which the respondent claimed and detained in this Colony.*

*Held, that as the respondent claimed the mules as his property, the Court would be justified in ordering an attachment thereof, in order to fortify its jurisdiction over a non-resident in respect of a cause of action alleged by the petitioner to have arisen in this Colony.*

Dr. Greer moved, as a matter of urgency, on the petition of Paul Kahn, transport driver, of Steinkopf, district of Namaqualand, for the attachment of certain movables belonging to one Jhannes P. Mostert *ad fundandam jurisdictionem*, pending an action to be brought by petitioner to recover a balance of £684 10s. 4d. for transport riding, etc., in German South-West Africa. Petitioner said that Mostert had paid him £375 17s. 3d. on account of a total indebtedness of £990 7s. 7d., but had ignored all requests for payment of the balance. Mostert had hitherto resided at Warmbad, German South-West Africa, but, on account of a fresh outbreak of hostilities, he had removed to Homansdrift, Cape Colony, and had brought movables to the value, petitioner believed, of about £500.

De Villiers, C.J.: There is not sufficient information before the Court to justify this attachment by the Court.

As far as I can gather, Mostert is domiciled in German South-West Africa, the contract was entered into there, and the action should be brought there. The breach took place in German South-West Africa. If you can give me further information as to Mostert's domicile, I might reconsider the matter.

Dr. Greer asked the Court if leave would be given to mention the matter again upon further information being obtained as to domicile.

*Postea* (September 17th).

De Villiers, C.J.: The petitioner, who is domiciled in this colony, asks for an order to attach certain cattle and other property in this colony belonging to the respondent, in order to establish the jurisdiction of this Court. The action which the petitioner proposes to institute is for damages for the respondent's breach of a contract which was entered into and was to be performed in German South-west Africa. The petitioner admits that the respondent resides and is domiciled in German South-west Africa, and the question must now be definitely settled whether a resident of this colony is entitled to an order for the attachment *ad fundandam jurisdictionem* of property locally situated of a non-resident in respect of a contract which was neither entered into nor is to be performed in this colony. The jurisdiction of this Court is defined by the Charter of Justice, the 30th section of which enacts that the Supreme Court "shall have cognizance of all pleas and jurisdiction in all causes, whether civil, criminal, or mixed, arising within the Colony, with jurisdiction over the King's subjects, and all other persons whomsoever residing and being within the said colony, in as full and ample a manner, and to all intents and purposes, as the Supreme Court of Justice now existing within the said colony now hath or can lawfully exercise." The Charter took effect on the 1st of March, 1834, and there can be no doubt that the then Supreme Court, as well as the Supreme Court created by the Charter, always exercised the power of attaching the person or property of non-residents, in order to fortify the jurisdiction of the Supreme Court in respect of contracts entered into or torts committed in this colony. In the year 1839, this Court, in the case of *Duall v. Van der Plank* (3 Menz., 112) exercised the power in order to found jurisdiction in respect of two bills of exchange drawn on the defendant in England, and by him there accepted, and thereafter by the drawer and payee indorsed to the plaintiffs in this colony. Unless the indorsement of a negotiable instrument to a holder in this colony makes a difference—a point which need not now be decided—the case is an authority for the proposition that an attachment to found

jurisdiction can also be granted in respect of a contract entered into in England, and there to be performed. I am not, however, aware of any other case, certainly none has been cited, in which this Court has attached the property of a non-resident for the purpose of enforcing a contract neither entered into nor to be performed in this colony. On the contrary, in every case that I can remember in which the question was raised, the Court refused an order of attachment under such circumstances. In 1876 the Court refused the order in the case of *Wilhelm v. Francis* (Buch. Rep. 1875, p. 216), where the plaintiff and defendant resided out of the jurisdiction and the contract had been entered into out of this colony and was not to be performed here. This decision was followed by the Supreme Court of the South African Republic in *Cloete v. Benjamin* (1 S.A.R., p. 191), Kotze, C.J., correctly stating in his judgment that this Court by its decision in 1876 had departed from the position laid down in 1839. In 1887 this Court again considered the question in *Einwald v. German West African Company* (5 Juta, 86), and I then took the opportunity, in view of the great importance of the matter, to enter into a full examination of the grounds upon which the assistance of the Court should be invoked for the purpose of establishing a jurisdiction which without such assistance would not exist. The applicant in that case was a foreigner, but every one of the grounds stated by me for refusing to attach the goods of the then non-resident respondent would equally apply to a case in which the applicant is a domiciled citizen. In the subsequent case of *Springle v. Mercantile Association* (T.S. for 1904, p. 163), the Transvaal Supreme Court followed Einwald's case, Wessels, J., saying: "The case of Einwald gives us the Roman Law as it existed in Holland, and as it to-day obtains both in the Cape and here." I would, therefore, have had no hesitation in refusing the present application, which is made by a person domiciled in this colony, were it not that the Supreme Court of the Transvaal has distinguished between the rights of residents and non-residents, and has decided that an *incola* of the Transvaal is entitled to attach *ad fundandam jurisdictionem* the property of a *peregrinus* locally situated, and that no *ratio jurisdictionis* other than the attachment is required to found jurisdiction. The case is that of *Le Comte v. W. and B. Syndicate* (T.S. for 1905, p. 696), which was decided in 1905. The learned Judge (Solomon, J.), who delivered the opinion of the Court, fully approved of the judgment of this Court in Einwald's case, saying emphatically that to the question raised in that case, "there could be only one answer upon

the Roman Dutch Law authorities, and the Court naturally refused to make an order attaching the property." He then proceeds to quote previous decisions of the Supreme Court of the Republic, as well as of the present Supreme Court. In one of them, *Cloete v. Benjamin*, Kotze' Reports, 1881-4), Kotze, C.J., is reported to have said: "It appears from Voet (2.4.22) that only at the request of a person residing in this country can an arrest be granted against the property of a stranger found within the Republic." The translation of the words actually used by Voet is that the practice had been introduced "in order that greater facility might be afforded to creditors to sue their debtors residing in another jurisdiction, and litigate in the place of their own domicile with less trouble and expense," and so on; but he does not say that when once the practice was introduced only residents could avail themselves of it. It is true of every civilised country that Law Courts are established therein in order to enable its inhabitants to enforce their legal rights, but it is equally true that when once such Law Courts were established they were open to non-residents, the only condition generally being that they shall give security for costs. In another passage, Voet (2, 4, 33) states that every one who has a *legitima persona standi in judicio* is entitled to obtain an attachment for good cause, and the same statement is repeated in most other text-books on the subject. According to Bort (van Arresten, p. 3, par. 14) the Sheriff, in executing an order of attachment *ad fundandam jurisdictionem*, was bound—where the plaintiff was a foreigner and unknown—to demand security for any damage the defendant might sustain by reason of the attachment. The inference is obvious that, subject to this provision, which is analogous to the provision that a *peregrinus* shall give security for costs when demanded by the defendant in an ordinary action, non-residents had the right to obtain an order of attachment to found jurisdiction equally with residents. The only further limitation to this right that I can find is that in some of the provinces of the Netherlands it was a special rule that one *peregrinus* could not arrest another *peregrinus* if they were both fellow-citizens of the same country, but this rule was introduced because these fellow-citizens would not be allowed to arrest each other *ad fundandam jurisdictionem* in the country of their own mutual domicile. This exception to the general rule, which is fully treated by Voet (2, 4, 45), and by Van Leeuwen (Cens. For., p. 2.1.1, c. 15, s. 16), would show that the general practice was not to withhold the right from non-residents. With all due deference, therefore, to the learned Judges of the Transvaal Supreme Court, I am unable

to concur in their view that under the Dutch law residents enjoyed any greater rights than non-residents to obtain the assistance of the Courts by attachment to found jurisdiction. If, under the Dutch practice, a non-resident could not attach the property of another non-resident to found jurisdiction in respect of a contract entered into or to be performed, or a tort committed abroad, I am satisfied that the same disability would have attached to a resident plaintiff. In regard to the question whether, under the Dutch practice any plaintiff, resident or non-resident, was entitled to an order to attach, *ad fundandam jurisdictionem*, the property of a non-resident, it is by no means clear that he was so entitled. According to Groenewegen (Ad. Cod, 3-18), a person could not be sued in the country where he committed a tort or entered into a contract, or had to fulfil the contract unless he was there found, and the learned commentator adds: "I have no manner of doubt that it was this custom of ours, which gave occasion to the modern attachment of debtors than which no practice is more prevalent." From this statement it might fairly be inferred that he considered the right of attaching property *ad fundandam jurisdictionem* only to arise where the defendant had committed a tort or made or broken a contract, as the case might be, in the country in which his person or property was sought to be attached. Voet (2, 4, 22) refers to the practice as one established for the purpose of strengthening (not of founding), jurisdiction, and he says that it was introduced, not only for the benefit of commerce, but because the jurisdiction of the Dutch Courts was so limited that no one could be sued in the country where the contract had been entered or was to be performed unless there found. "It was," he adds, "to remedy this inconvenience that the Magistracy of each territory adopted this right of arrest, in respect of the person as well as property, more especially as they bore in mind that it would greatly widen the extent of their jurisdiction." I cannot agree with the view that it is the duty of Courts of Law to seek to widen their jurisdiction, even if it be done in disregard of the statutes by which they have been called into existence. A practice may have been so long and firmly established, and may have been attended with such beneficial results, that it could not be abandoned without grave detriment to the due administration of justice. The practice, for instance, of attaching the property of non-residents in order to give the Court jurisdiction in respect of causes of action, which arise in the Colony, has been in almost daily use for 80 years, and even if it be inconsistent with the Charter of Justice, it is so firmly grafted in our system, and has

been so useful in the administration of justice, that it could not now be discontinued. The power of extending the right to actions arising abroad has been once exercised, and may possibly have been more than once exercised *per incuriam*, but its legality has been repeatedly questioned by this Court, and it certainly has never been so firmly established as to form an acknowledged part of our system. There is every reason why a defendant should be sued for breach of contract in the country where he entered into the contract, or for a tort in the country in which he committed the tort, and if he does not reside there, that he or his goods, if found in the country, should be attached in order to confirm the jurisdiction of the Courts thereof. There appears to me, however, to be no reason whatever why a Court of law should attach the goods of a defendant who does not reside within the territory, and has not made or broken a contract, or committed a tort therein, for the purpose of founding a jurisdiction which, without such attachment, would have no ground for existence. In the present case the proper forum in which to sue the defendant is in German South-West Africa, where the contract was entered into, and had to be performed, and where the Judges must be presumed to be conversant with the law applicable to such contract. We have several seaports in this colony from which there is a large passenger and goods traffic to the Transvaal and Orange River Colony, and it surely is not reasonable that inhabitants of this colony, who choose to enter into contracts in either of the two sister colonies, should have the right to claim this Court as their forum in respect of the breach of such contracts, merely because the defendant happens to be passing through this Colony on his journey to or from Europe, or is the owner of goods, however insignificant in value, passing through. Although the laws of the different British colonies in South Africa are founded upon the same system, there is a considerable tendency to divergence, and where they so diverge the Courts of the Colony in which the cause of action originated are in every way the most competent to adjudicate thereon. Take the case of a contract made in the Transvaal by a resident of this colony, in which the defence is raised that there is no consideration for the defendant's promise. If the contract had been entered into here it would be a good defence unless it was clear that a donation had been intended, in which case the contract would require registration in the Deeds Office if the amount exceeds £500. If the contract was entered into in the Transvaal, the result, if I understand the case of *Rood v. Wallach* correctly, would be different, but in either case the Court of the Colony in which the con-

tract was entered into would be the best tribunal to decide as to the law applicable. Without the evidence of legal experts from the Transvaal, this Court could not decide whether a contract there made, but not there registered, for the payment of more than £500, without consideration for the promise, would be enforceable, and if it was found to be enforceable, the question might still arise whether and to what extent the contract could be here enforced, if not registered here as a donation. Similar difficulties might no doubt arise if the action were brought here by reason of the defendant being domiciled in this colony, but that is no reason for creating such difficulties by attaching property merely for the purpose of creating a jurisdiction which would otherwise not exist in respect of cases which the able and experienced Judges of the Transvaal are more competent than this Court to deal with. Independently, however, of all questions of expediency. I am of opinion that the order of attachment should not be made in the present case. Where a cause of action has arisen within this colony or where the defendant resides within this colony, one of the alternative grounds of jurisdiction mentioned in the Charter of Justice is forthcoming, but where the cause of action has arisen elsewhere and the defendant does not reside here, I can find no provision in the Charter of Justice or any other statute empowering this Court to obtain jurisdiction over him by ordering that his person or his goods happening to be here be laid hold of. One of the most salutary powers conferred on this Court is that of checking the abuse of their powers by inferior courts of law, and by corporations, and it should take care not to exceed its own powers, especially in cases like the present, where the widening of its jurisdiction would diminish and not increase its efficiency in the administration of justice. Acting upon the principles laid down in Einwald's case, I am of opinion that the application should be refused, so far as it applies to the claim for damages for the respondent's breach of contract abroad. It appears, however, that the respondent is detaining two mules in this Colony, which he claims as his own, but which the petitioner also claims. If the petitioner is the owner, such detention would give rise to a cause of action in this Colony, and the attachment would have a twofold effect, for it would prevent the removal of the mules from the Colony, and it would confirm the jurisdiction of this Court. It would have been quite competent for the Court to order an attachment of the respondent's person to confirm the jurisdiction, but as the petitioner is satisfied with an attachment of the mules detained by the respondent and

claimed as his property, the Court will order such attachment for the purpose of confirming its jurisdiction.

[Applicant's Attorneys: Not on record.]

MARAIS V. MCKENZIE. { 1907.  
Sept. 2nd.

#### Resident Magistrate's jurisdiction —Counter-claim.

*The plaintiff sued the defendant in a Magistrate's Court for £13, and the defendant, while admitting the claim, filed a counter-claim for £25. The plaintiff objected to the counter-claim as being beyond the jurisdiction, whereupon the defendant reduced his counter-claim to £20.*

*Held, that after such reduction no objection existed to the jurisdiction.*

This was an appeal from a decision of the Acting Resident Magistrate of Indwe in an action brought against appellant (Pieter Schalk Marais, of Doornkop) by respondent (Wm. Charles McKenzie) to recover £13, balance of an open account for goods sold and delivered and cash paid.

It appeared from the record that at the hearing in the Court below appellant admitted the claim, but raised a counter-claim for £25. Respondent's agent excepted that the counter-claim was beyond the Magistrate's jurisdiction, being for damages. Appellant's agent applied for a postponement until later in the day to enable him to look up the authorities. This was granted. Later on, however, he applied for leave to reduce the counter-claim to £20, so as to bring it within the Magistrate's jurisdiction. This was refused by the Magistrate, on the ground that defendant had already pleaded, and that he had filed his counter-claim. Judgment was given for plaintiff as claimed, with costs, and the counter-claim was dismissed.

Mr. M. Bisset was for appellant; Dr. Greer was for respondent.

Mr. Bisset submitted that the Magistrate should have heard the counter-claim, and cited *De Wet v. Theron*, (9, C.T.R., 452), *Kerdell v. Bam* (12 S.C.R., 13), and *Collett v. Crooks* (11 E.D.C. 75).

De Villiers, C.J., remarked that defendant might have brought his action instead of appealing. He did not see how defendant was going to obtain much advantage from his appeal. At



the same time he could not understand why the Magistrate refused the application, it seemed such an absurd thing not to hear the case. Some confusion appeared to have arisen, because the Magistrate thought that the counter-claim could not be pleaded in compensation.

Dr. Greer submitted, on the authority of *Colonial Government v. Sterens and Hollingsworth* (10, Juta, 140), that defendant could not set up by way of compensation a counter-claim in excess of the claim. It was now sought to have the Magistrate's decision upset on a point that was never raised in the Court below. The counter-claim came before the Magistrate in the form of a claim for unliquidated damages.

Do Villiers, C.J.: In this case there was a claim by plaintiff for £13. The defendant admitted the claim, but put in a counter-claim for £25 3s. Then the plaintiff's agent objected to his claim as exceeding the Magistrate's jurisdiction, whereupon the defendant's agent asked for time to consider the matter, and, after consideration, rightly or wrongly, he admitted that the plaintiff's objection to the jurisdiction was correct, and, consequently, he reduced the amount claimed by him from £25 3s. to £20. If the defendant had not so reduced his claim the question might have arisen whether the admission by the defendant that he owed £13 to the plaintiff debarred the plaintiff from objecting to the jurisdiction in the absence of any tender of the £13 by the plaintiff. In the case of *Colonial Government v. Sterens* (10, S.C.R., 139), the defendant's claim was for £37 3s. 8d. as unliquidated damages, and as he neither reduced his claim to £20 nor tendered £17 3s. 8d., the Court held that his claim could not be adjudicated on in the Magistrate's Court. In the subsequent case of *Kerdel v. Bam* (12 S.C.R., 13), the objection to the jurisdiction was taken by the defendant, but as he had admitted the plaintiff's claim for £18 the Court held that he could not object to the jurisdiction of the Magistrate on the ground that he had a counter-claim for £23. In point of fact, after his admission, his claim was for only £5. But the only question in the present case is whether the Magistrate ought to have dismissed the appellant's claim altogether, and refused to hear it merely because he had originally claimed £25 3s. instead of £20. It seems to me that the Magistrate wholly erred in this matter. As soon as the defendant reduced his counter-claim to £20, there could no longer be any possible objection to his counter-claim being raised, and the Magistrate ought to have heard it. It seems a wholly unnecessary proceeding to dismiss the counter-claim altogether after it has been reduced, and to put the defendant to the expense of having a fresh action in order to have

his counter-claim decided. The Magistrate ought to have decided on the reduced claim of £20. The Magistrate seems to have thought that, because the defendant's counter-claim is an unliquidated demand, he would not be allowed to reduce it, but the fact that it was an unliquidated demand cannot affect the right of the appellant to reduce his claim to £20, and claim an amount which was clearly within the jurisdiction of the Magistrate. The case will, therefore, be remitted to the Magistrate for the purpose of trying the defendant's counter-claim for £20, the judgment for plaintiff for £13 will stand, with costs of the day in the Magistrate's Court, but further and other costs will abide the judgment of the Magistrate, plaintiff to pay costs of appeal.

KING V. GREY.

1907.  
Sept. 2nd.  
" 10th.

Contract—Public interest—Illegality—Matrimonial agents.

*Contracts made with a matrimonial agent for the payment of a commission or reward upon the completion of a marriage brought about by his agency will not be enforced, being prejudicial to the public welfare.*

This was an appeal from a judgment of the Resident Magistrate of Wynberg in an action brought by appellant against respondent to recover fees on certain contracts.

Appellant (Thos. H. King) appeared in person; Mr. Close was for respondent, Clement Gray, who is a chemist, of Wynberg.

Mr. Close, at the outset, pointed out that in the Court below appellant sued the present respondent and Mrs. Gray (nee Hunter) for sums of £10 and £12 2s., alleged to be due to him in connection with the marriage of the respondents. Appellant said that he was the editor of the "Matrimonial Post," and he claimed that it was owing to his services in introducing the parties that the respondents were married. The parties were sued separately in the Court below. They were married out of community of property. The Magistrate found that marriage brokerage contracts were illegal, and dismissed both cases. The plaintiff then noted an appeal as against Clement Gray, and paid the noting fee, and gave notice on that occasion to Mr. Gray. Since then, however, he had sent notice to Mrs. Gray that he was appealing in her case also, and that the matter would be set down for to-

day. Counsel submitted that, so far as Mrs. Gray's case was concerned, the appeal had gone by default, and the Magistrate's judgment must stand.

Appellant said that he sued both the defendants in one case, and it was his intention to appeal so far as the decision affected both the defendants.

Mr. Close (in answer to the Court) said that he was prepared to appear for both defendants.

De Villiers, C.J., said the appeal would be treated as one in which both defendants were concerned.

The Magistrate, in his reasons for judgment, relied upon the case of *Hermann v. Charlworth* (93 L.T., 284), which was cited, and held such contracts to be against public policy, illegal, and that they could not be enforced.

The appellant proceeded to read letters which he had received from Miss Hunter, in which she finally reduced the prospective husband's salary from £600 to £300, adding that she knew times were bad. The appellant urged that the lady knew very well what she was doing. He then proceeded to read an extract from a Paris newspaper to the effect that a man who did the work he did was a benefactor to the human race. If the Magistrate had said each party should pay its own costs, he would not have appealed.

Mr. Close said the question of law was the one which he proposed to put before the Court. It was curious all the text-books one looked at concurred in showing these marriage brokerage contracts were invalid in law. Recently the Court of Appeal had dealt with the case of *Hermann v. Charlworth* (93 L.T., 284). The case was considered at some length, and it was held that the contract was illegal, being a marriage brokerage contract. Counsel also referred to Voet (2, 14, 16), Storey on Equity-Jurisprudence (sec. 260), Pollock (6th edition, sec. 879), which reprobated these forms of contracts, as also did Bell's Principles of the Law of Scotland (sections 37-39).

[De Villiers, C.J.: What is the pernicious tendency?]

Mr. Close: I suppose, as suggested by Storey, the idea is that marriage brought about by mutual affection arising in the ordinary way has the greatest chance of happiness. Counsel submitted it was one of these cases in the interests of the public that persons should be protected even against themselves. He could conceive of a case of persons being badgered into marriage because certain preliminary expenses had been incurred.

The appellant having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (September 10th).

De Villiers, C.J.: The plaintiff, by

his summons in the Resident Magistrate's Court of Wynberg, claimed from the first defendant the sum of £10, and from the second defendant the sum of £12 as commission for his services rendered to both of them in giving them introductions with the view to their marrying each other. His scale of fees for such introductions varied with the incomes of the persons to whom his clients were introduced. For introduction to a lady or gentleman with an income not exceeding £50 per annum the fee was only a guinea, but the fee gradually increased up to 50 guineas for introduction to a lady or gentleman with an income of £5,000 per annum. In addition to such fees a sum of £10 was payable in all cases upon marriage, but where the fortune of the lady wedded exceeded £400, a further 2½ per cent. was payable on the excess. It would appear that both the defendants paid the preliminary fees, and that the second defendant, upon receiving the introduction to the first defendant, promised the plaintiff to pay the commission usually charged by him. It is not clear that the first defendant knew that he was liable to pay more than the preliminary fee, and, in the absence of any promise on his part to pay the commission, the summons against him was properly dismissed. As to both defendants, the Magistrate held, on the authority of the English case of *Herman v. Charlesworth* (93 L.T., 284), that the contract was contrary to public policy, and could not be enforced, and he consequently gave judgment for the defendants, with costs on the higher scale.

The case relied upon by the Magistrate was decided by the Court of Appeal as recently as 1905. It had been agreed between the plaintiff and the defendant in that case that the defendant should introduce gentlemen to her with a view to matrimony, and that she should pay him £52, which was to be repaid to her if a marriage did not take place within a specified time. The plaintiff paid the defendant £52, and he brought about some introductions, but before the expiration of the specified time, the plaintiff repudiated the contract and reclaimed payment of the £52, no marriage having then taken place. The County Court Judge held that the contract was illegal, but the Divisional Court held that there was marriage brokerage only when there was a contract to bring about a marriage with a particular person. On appeal, however, the Court of Appeal held that the principle of the law relating to marriage had been violated, and that the plaintiff was entitled to recover the money which she had paid under the contract. There can be no doubt, therefore, that under the English law a contract such as that now in question would not be enforced, and the question re-

mains whether under our own law the plaintiff is entitled to relief.

It is not quite clear whether under the Roman law before the time of Justinian, a promise to pay a person a reward for bringing about a marriage could be enforced, but judging by a constitution of that Emperor, it would appear that in his time considerable business of that kind must have been carried on. He seems to have considered that a trade of that kind was liable to great abuse, but instead of repressing it altogether he limited the amount which a marriage broker (*prozeneta nuptiarum*) was entitled to receive for his services when successful to 5 per cent. on the amount of the *dos* obtained on the marriage. In no case, however, was the amount to exceed ten *libra* of gold, and if more was paid the marriage broker could be compelled to repay it in addition to forfeiting the sum of ten *librae* as a penalty (Cod. 5, 1, 6). In his commentary on this constitution, Groenewegen says that it must be confined in its operation to the Italians, among whom it was the duty of fathers to find suitable matches for their daughters, and the fathers were in the habit of employing marriage brokers for that purpose. Voet (23, 1, 1) briefly mentions the terms of the constitution without expressing any opinion as to whether it held good in the Netherlands. In another passage he states that agreements interfering with the liberty of marriage are invalid, as for instance, where two persons mutually agree that whichever of the two first enters into a marriage shall pay to the other a certain amount of money. This passage shows that in his time questions affecting marriage were regarded as matters of public right, and that any interference with the freedom of marriage was treated as an injury to the public. The principle is well established in our law that the Court should not enforce agreements which are contrary to public policy or prejudicial to the public welfare (see Voet, 2, 14, 16). Agreements, for instance, in general restraint of trade will not be enforced, because they are opposed to the public policy, which requires that the freedom of legitimate commerce shall not be unduly hampered. Now, at first sight, it would appear as if the practice of employing matrimonial agencies for finding suitable matches rather deserves encouragement, as tending to promote lawful wedlock and legitimate increase of population, and if marriage could be regarded as a contract, and nothing more than a contract, I should see no objection to the employment of brokers to bring about engagements, or to give introductions with a view to such engagements. But over and above the contract of marriage is the status which the contract confers on those who have entered into it. That status is a mat-

ter of important public concern, involving as it does the relations of the parties, not only to each other, but towards the offspring of the marriage, and even towards the State. So important is the maintenance of that status considered by the law that the parties themselves cannot by agreement put an end to it. In bringing about an ordinary contract between two parties, a broker has only to consider the advantage of the one who employs him, and if unsuitable or ill-advised contracts are thus made, it is generally the parties alone who suffer, and it is competent for them to agree upon annulling such contracts. If the broker is the means of bringing about an ill-assorted marriage, the act is irrevocable unless the State intervenes, and by means of a judicial decree puts an end to the contract and its consequent status on special grounds allowed by law. By making the possession of wealth the only consideration, the broker would naturally lose sight of the still more important matter of mutual regard and affection, which are so essential to the peace and happiness of family life. Then there is the temptation for the broker to use illegitimate means to attain his end. His sole object is to bring about a match, and earn his commission. Few people would care to confess that they owe their marriage to the intervention of a matrimonial agency, and the consequence is that even if a person were entrapped into an ill-advised marriage by the most glaring falsehoods on the part of the agent, his mouth would generally be kept closed as to the real cause of his misfortune. The recognition of contracts such as that now in question would tend to expose the guardians of wealthy wards to great temptation at the hands of unscrupulous matrimonial agents, and would, in my opinion, prove generally prejudicial to the public welfare. For these reasons I am of opinion that the Court below rightly refused to enforce the contract, and that the appeal must be dismissed, with costs.

[Appellant in person. Respondents' attorneys: Van Zyl and Buissinne.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. } 1907.  
} Sept. 3rd.

Mr. Benjamin, K.C., moved for the admission of Horace F. A. Yeld as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Aliwal North.

### PROVISIONAL ROLL.

#### SHASKOLSKY V. FISHER.

This was an application for judgment upon an unsatisfied judgment of the R.M.'s Court at Wynberg for £10 11s. 6d. and £2 2s. 4d., taxed costs.

Mr. Wallach (for plaintiff) said that since the case was last before the Court he had ascertained that the defendant had paid £2 10s. to plaintiff's former attorney. Defendant had now agreed to pay 10s. a month.

Defendant said that he had agreed to pay 10s. a month. The amount claimed now was correct.

De Villiers, C.J., said that the Court had already refused the application for a decree of civil imprisonment.

Mr. Wallach said that if the order were now made by consent it would no doubt save future proceedings.

Judgment was given for plaintiff for £10 3s. 10d., with costs, no further proceedings by way of execution or otherwise to take place against the defendant if he shall pay 10s. per month, beginning with the 1st October, until the debt and costs have been paid.

#### LOUW V. WESSELS.

Mr. Marais moved for provisional sentence on a mortgage bond for £1,200, with interest, and for the property hypothecated to be declared executable.

Order granted.

#### MATHEW V. EXECUTRIX ESTATE YULE.

Mr. Toms moved for provisional sentence upon certain mortgage bonds for £350 and £1,000, with interest, less £163 2s. 6d. paid on account, bonds due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted, subject to production of executor's appointment.

#### SUBERSKY V. FRIEDGOOD.

Mr. Toms moved for provisional sentence on an unsatisfied judgment of the R.M.'s Court, Cape Town, for £20, with interest, and £1 14s. 1d., taxed costs.

De Villiers, C.J., said that a letter had been received from the defendant denying that he had had any previous knowledge of the matter until he received the summons in the present case. He also denied indebtedness.

Mr. Toms said he could not understand that, as there was a return of *nulla bona* to the writ in the Resident Magistrate's Court.

De Villiers, C.J., said that the defendant was at present at Kimberley, and he denied that he had been served with the summons in the Resident Magistrate's Court.

Order granted.

#### MORUM BROS. V. HERSELMAN.

Mr. P. T. Lewis moved for provisional sentence on a promissory note for £274 9s. 6d., with interest from May 31, 1907, and costs.

Order granted.

### ILLIQUID ROLL.

#### ESTATE LLOYD V. JACOBS AND MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Mr. Benjamin, K.C., moved for judgment against the second defendants under rule 319, in default of plea, for payment of £1,000, proceeds of a certain life insurance policy. Defendants did not appear, but had filed an affidavit, in which they intimated that they were perfectly willing to pay the amount of the policy so long as they themselves were protected. The policy had been lost, and there was no indication as to its whereabouts.

Mr. Benjamin said it was impossible for the executors to provide security as required by the company.

De Villiers, C.J., said that the company would be protected by Act 13, 1891 (section 27).

Mr. Benjamin said that the section had been referred to in the correspondence.

De Villiers, C.J., asked if the company were prepared to pay if the Court granted a rule nisi.

Mr. Benjamin: That is so.

Rule granted, calling upon all persons concerned to show cause on September 17 why the second defendants shall not pay to the plaintiffs the amount due under the policy in question, rule to be published once in two Cape Town newspapers.



WIENER AND CO, LTD. V. HOHOWSKY.

Mr. Payne moved for judgment, under Rule 329d, for £101 8s. for goods sold and delivered, with interest a tempore morae, and costs.

Order granted.

GENERAL MOTIONS.

WILKINSON V. WILKINSON. { 1907.  
Sept. 3rd.

Mr. Sutton moved on the petition of Katrina Hendrina Wilkinson, late of district Maclear, to make absolute a certain rule calling upon petitioner's husband, Wilhelm J. Wilkinson, also of district Maclear, to show cause why he should not pay to her attorneys in Cape Town a sum of £50, to enable her to institute an action against him for divorce on the ground of his alleged adultery. Counsel explained that when the matter was called on Friday last, his learned friend, Mr. De Villiers, said he had been instructed to oppose on behalf of respondent, but he had not received full instructions, and he then applied for a postponement, which was granted. It now appeared that there had been a misunderstanding. Mrs. Wilkinson had removed to the village of Elliot, and she had heard that her husband intended to dispose of the property—the parties were married in community—and she desired to interdict him from doing so. An urgent telegram was sent to Cape Town, but the wording was somewhat vague, and it was read as an instruction from respondent to oppose the rule. Respondent, as a matter of fact, did not appear to show cause against the rule being made final. Counsel said that he had also to apply for an interdict restraining defendant from disposing of the joint property, pending the action. An auction sale had been advertised to take place to-day, and it was important that applicant's rights should be protected.

Rule nisi made absolute, costs to be costs in the cause. The Court also granted a further rule calling upon defendant to show cause on the 24th September why he should not be interdicted from parting with more than one half of the joint property of plaintiff and defendant pending action against him for divorce, and calling upon F. C. A. Pote, or any other auctioneer appointed by defendant, to show cause on the same day why he should not be interdicted from parting with more than half the proceeds of any property sold by him pending such action as aforesaid, rule to operate as an interdict in the meantime, with leave to telegraph the order.

ESTATE DE KLERK V. LOMBARD.

This was an application by the executors testamentary in the estate of the late Willem A. C. de Klerk, division of Somerset East, for confirmation of the sale of certain one-tenth share in each of three properties in the division of Albany.

It appeared that the will prohibited the sale of the property to a stranger as long as the legatees were prepared to give an equal price. The farms in which the estate held certain shares had been offered in entirety, as it was thought a better price could thus be realised than by offering the undivided shares merely. An offer of £11,050 had been received, so that the amount which would accrue to the estate would be £1,105. There were 34 legatees interested under the will, and consents to the sale of the shares of the properties had been obtained from all except four.

Mr. De Villiers was for applicants; Mr. H. S. van Zyl was for respondent, M. J. Lombard, one of the legatees under the will.

Mr. De Villiers said that the ground had been offered to the non-consenting heirs at the price which had been offered, but none was prepared to take it over at that figure.

De Villiers, C.J., asked Mr. Van Zyl on what ground his client objected to the sale?

Mr. Van Zyl said that they submitted that the condition was one that the executors could not take advantage of, but only the legatees could avail themselves of. They said that the survivor had no right to sell. They also said that the heirs could only sell in case one of them was not prepared to give the price offered by a stranger. By the way in which these shares in the farms had been offered, a higher price had been obtained than would have been the case had the estate's undivided shares been offered as such.

De Villiers, C.J., said he must consider whether an offer was made before the petition was presented, and his opinion was that there was not such an offer before the presentation of the petition, as to amount to a compliance with the codicil, which required that there should not be a question of asking, but a definite proposal. He considered the objection fatal that the time had not arrived yet at which any legatee could be called upon to decide whether he would purchase a share or not. The application would be refused. The respondents took up the attitude which seemed to him in some way to be an unreasonable one, but they had got the law on their side, and they were entitled to raise the objection. He considered the petition a perfectly *bona fide* one, and the costs of the petition would come out of the estate.

## SUPREME COURT

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SMITH V. IMPERIAL COLD STORAGE. { 1907.  
Sept. 4th.

Personal injury — Negligence — Damages.

*The plaintiff, while in the service of the defendants as an agricultural labourer, was injured while assisting to work a steam threshing machine. The machine was in the same condition in which it had been supplied by the manufacturers, except that some extra precautions had been taken to prevent anything from falling into the drum. The injury was caused by the plaintiff slipping and his leg coming into the drum, but it was proved that every precaution had been taken to prevent an accident of that kind.*

*Held, that the defendants were not liable in damages.*

This was an action brought by Hendrik Smith *in forma pauperis* against his late employers, the Imperial Cold Storage Co., to recover a sum of £2,000 damages for the loss of a leg which had to be amputated through an accident plaintiff met with on defendant's farm while engaged in threshing operations.

Plaintiff's declaration stated that he was in the employ of the defendant company from about the middle of December, 1906, on their farm Bonne Esperance, Tulbagh district. He was not employed for any definite work, but as an all-round handy-man. Whilst engaged on a certain threshing machine, without any fault, neglect, or negligence on the plaintiff's part, and by reason of the carelessness of the defendants or their duly authorised servants, was injured. The plaintiff, together with Herman Robinson and Klaas Stuurman, were engaged in feeding the machine as it was impossible for one man to be continuously in the feeding box, since a great deal had to be done at this part of the machine. Whilst Robinson was in the feeding box, something or other went wrong with the drum of the ma-

chine, and the engineer was obliged to stop it from working to enable him to ascertain the cause and to put it into good working order. It was the plaintiff's turn to get into the feeding box, and while proceeding thither, he slipped on certain oats that were lying about on the top of the machine, and thus got into the drum, which as a result caused the injury sustained. The drum of such machine is practically always covered by a lid, but the machine used on this occasion by the defendant company was without a lid, and had been without a lid for the past two years.

The defendant company denied that there was any carelessness, neglect, or omission on their part or on the part of their agents in not providing a lid or other protection to cover the drum, and deny it was their duty to provide any such covering. They do not admit that plaintiff has suffered loss or damage in the said sum, and they deny that they are liable for any sum.

Dr. Greer (with Mr. Thoms) was for plaintiff, and Mr. Buchanan, K.C. (with Mr. Lourens), was for the defendants.

Hendrik Smith, the plaintiff, stated that in December last he entered the employment of the defendant company. He was a general labourer employed on the company's farm in the Tulbagh district. On December 18 he assisted in threshing. Three men were attending to the machine. His particular work was to cut the bands of the sheaves, but he was told by the foreman to make himself generally handy.

[De Villiers, C.J.: The sole issue is whether there is negligence on the part of the defendant.]

Dr. Greer: Yes, my lord; the defendant does not allege any fault upon plaintiff's part.

[De Villiers, C.J.: So it is simply a question of engineering?]

Dr. Greer: That is so.

Witness (continuing) explained that he slipped and fell into the drum of the machine, which was unprotected. In reply to his lordship, he said he could not tell how he came to slip.

[De Villiers, C.J.: As we understand your case, Mr. Greer, you contend that this drum should have been protected?—Yes, my lord.]

Witness stated that after his accident he was conveyed to the Somerset Hospital, where his leg was amputated. His wages with the defendant company were 2s. per day, rations, and wine.

(Cross-examined by Mr. Benjamin: How did you manage to get your foot in the drum?)

Witness: I don't know.

You had been feeding the machine before it stopped?—No; Hermanus Robinson.

Witness (continuing) said he did not know that Mr. De Villiers had paid all his expenses while in hospital, or

that his father had told him that  
he could go back to the farm and work.

Klass Stuurman, a fellow-labourer with plaintiff, described certain parts of the threshing machine. The drum was always exposed—there was no lid. He saw Smith slip and fall, but he was not sure why he slipped.

John Christian Simpson said he lived at Maraisburg, and had 28 years' experience of threshing machines. The particular machine responsible for the accident was, he believed, a Ransome. In his personal experience he made it an invariable custom to keep a covering over the drum, not simply to prevent men falling into it, but to prevent foreign objects like stones or iron or rakes from getting into the drum. A feeder on a threshing machine always closes the lid on the drum before getting out of his box.

Cross-examined by Mr. Benjamin:  
Ransome's machines are very well  
known—in fact, he used four of them  
himself.

Dr. Greer closed his case.

Benjamin Geo. S. Plumley said he had considerable experience of threshing machines. He was not present when the accident occurred. He had seen machines without protection for their drums. He had seen a Marshall and a Rustin and a Proctor's machine without the protecting drum lids.

Cross-examined by Dr. Greer: He had seen machines without a lid, and even a hinged feeding board which could cover the drum.

Witness Simpson, recalled, in reply to his lordship, said his evidence amounted to this, that in his experience he had never seen a machine without a cover or an adjustable feeding board.

Counsel were heard in argument on the fact.

De Villiers, C.J.: One must feel very great sympathy with the plaintiff in the accident which cost him his leg, and if it were possible to give him relief consistent with the provisions of the law, I should only be too glad to do so, more especially seeing that he does not come under the provisions of the Workmen's Compensation Act. Under that Act, agricultural labourers are expressly excluded. If plaintiff had been in other employment, he would maybe have been entitled to relief, but being engaged in agriculture the law has exempted him from the operations of the Act. Now, the plaintiff can only succeed in the present action if he can satisfy the Court that the accident happened through negligence. It appears that the machine was one of Ransome and Sims, of which a model has been put in. The machine was used in the same condition as supplied by the manufacturers, with the exception that the ledge above the drum was slightly raised, which indeed added to the protection of any person employed; it certain-

ly did not add to the danger. The evidence seems to prove that no matter how perfect a machine may be, when that machine is actually at work there is danger, and, in fact, you cannot work it without danger. Other machines, it seems, are provided with a lid, the object of the lid being to prevent articles or persons falling in while the machine is not in actual working order. The danger, however, would still exist when the machine was actually at work. It appears in the present case that the machine had begun to work, but the drum had not got sufficient speed upon it. The plaintiff slipped in some extraordinary manner; how that happened seemed to him inexplicable, and then his foot caught in the drum. An accident of this sort could never have been contemplated by the manufacturers or the defendant company. It could never have taken place when the drum was not working. The evidence simply shows that there is no machine yet invented without an element of danger. I consider, therefore, that the defendants were not guilty of any negligence. They had provided a complete machine, and they had given protection, and when the unfortunate accident happened it could not have been provided against. Moreover, it would have depended upon the plaintiff himself whether he would have put the lid on the drum or not. Under the circumstances, I do not think there was any negligence on the part of the defendants. Judgment will therefore be for the defendants. There will be no order as regards costs.

**SUPREME COURT**

## SECOND DIVISION.

[Before the Chief Justice (the Right  
Hon. Sir J. H. DE VILLIERS, F.C.,  
K.C.M.G., LL.D.).]

## GENERAL MOTIONS.

BOOTH V. BOOTH. { 1907.  
 { Sept. 5th.

Mr. Douglas Buchanan applied on behalf of Annie Sophia Booth for an order to sue her husband by edictal cita-

tion *in forma pauperis* for restitution of conjugal rights. Petitioner alleged cruelty and desertion.

The application was granted.

#### PARSONS V. PARSONS.

Mr. Douglas Buchanan applied on behalf of Mary Ellen Parsons for an order allowing her to sue her husband, Walter Hillier Parsons, by edictal citation for restitution of conjugal rights by reason of malicious desertion, and, failing this, for a decree of divorce. Petitioner asked the Court to give direction as to the mode of serving the citation and all other necessary processes.

Application granted. Service to be made by registered letter addressed to defendant in England. Citation to be returned by November 14.

#### *Ex parte* EXECUTOR ESTATE WHITLOCK.

Mr. P. Lewis applied on behalf of Roelof Andries Jansen, secretary of the Graaff-Reinet Board of Executors, in his capacity as executor testamentary of the estate of the late Jas. Whitlock, for an order authorising him to mortgage the properties in the estate for £650, and to dispose of the second-mentioned property in the petition when a fair price can be obtained for it, and use the proceeds in paying off a portion of the said bond, and that the cost of this application, together with the cost of raising the loan and passing the bond, may be paid out of the said estate.

Application granted as prayed.

#### *Ex parte* LIQUIDATOR OF ORANGE RIVER IRRIGATION CO.

Mr. Benjamin, K.C., applied on behalf of Mr. G. W. Steytler, as liquidator of the Orange River Irrigation Co., in liquidation, for an order confirming the sale of certain property, and authority to distribute the proceeds of the sale in legal order of preference.

Application granted.

#### BUTLER V. BUTLER.

Mr. H. S. Van Zyl applied on behalf of Elizabeth Amelia Butler, born Allison, married without community of property, to Chas. Arthur Butler, for an order authorising and directing the Registrar of Deeds at Cape Town to amend an ante-nuptial contract, which described her therein as Elizabeth Amelia Allison instead of Elizabeth Allison. Mr. Van Zyl informed the Court that petitioner was not present, but she would be present on the 10th.

[De Villiers, C.J.: Why is he not here?]

Mr. Van Zyl: She was not aware that the Court would hear the petition to-day.

Petition ordered to stand over *sine die*.

#### *Ex parte* ESTATE OOSTHUISEN.

This was a petition by Elizabeth Gertruda Adriaan Oosthuisen, widow of Jacobus Frederick Oosthuisen, and her major children. By the mutual will and testament of the said Jacobus Frederick Oosthuisen and his spouse, it appeared that the farm Bergfontein shall be sold, which must be divided amongst the eight children now living. Petitioners stated that the farm was of great value, and enabled the petitioner first mentioned to suitably maintain and educate the minor children, whereas, if sold, petitioners would, of necessity, have to purchase another farm, which might not be desirable for them. Petitioners therefore prayed that the Court would grant an order authorising that the landed property belonging to the estates of the late J. P. Oosthuisen and his predeceased, and surviving spouses, may be retained, and not sold by auction, as directed in the wills, and that they may be transferred to the said heirs, for which purpose the executrix—the petitioner first mentioned—be authorised to sign all necessary papers, and that the costs of the application be brought up against the estate.

[De Villiers, C.J.: The surviving spouse is still living.]

Mr. Lourens (for petitioners): Yes, my lord.

De Villiers, C.J.: It is quite clear that the provision was intended for the survivor and the benefit of the eight children of the testator. After the death of the survivor, provision was made that the property was to be sold, and I take it that the testator must have intended the sale for the purpose of paying any debts, and it was in the interest of the children that the debts should be paid. It would be quite competent for the children to buy the property, and in that case they would be fulfilling the terms of the will. To all intents and purposes, by remaining on the land, they become purchasers, and I take it that the intention of the testator is carried out by leaving them in possession of the property. I think that the arrangement should be carried out, instead of allowing strangers to get the property.

Order granted as prayed.

#### *Ex parte* THE MCGREGOR MUNICIPALITY.

Mr. Benjamin, K.C., applied on behalf of the Mayor of the Municipality of McGregor, in the division of Robert



son, for an order authorising the Registrar of Deeds to register the remainder of the farm Over de Berg, situate in the division of Robertson, and in extent 1,811 morgen, as the property of the Municipality of McGregor, on the petition of Adriaan de Waal van Reenen, in his capacity as Mayor of McGregor. The petition set out that on October 15, 1838, the following landed property was granted to Alewyn Petrus Smit and Johannes Jacobus Smit, namely, certain quitrent land, situate in the division of Worcester, being the place called Over de Berg, comprising 2,720 morgen. On March 21 a portion of the farm, 2,480 morgen, was transferred to one Jacobus Stephanus Naude. In 1865 Naude sub-divided the farm into several portions that were sold and transferred by him, leaving the remainder of 1,811 morgen upon which was laid out the village of Lady Grey, now called McGregor. Portions were disposed of and sold to several purchasers, and a portion was left for commonage for the inhabitants of the village of Lady Grey, now called McGregor. Since 1865 the inhabitants of the village have used the remainder of the farm as commonage before the municipality was the municipality of McGregor. Jacobus Naude is deceased, his estate was finally wound up by the Master of the Supreme Court, and is now unrepresented. The remainder of the farm still stands registered in the name of Stephanus Jacobus Naude.

De Villiers, C.J.: There appears to be a *prima facie* case for granting the rule, as there was an almost similar case in that of De Villiersdorp. The Court will therefore grant the rule in terms of the Act of 1881. The rule must be twice published in English and twice in Dutch in one or more newspapers circulating in McGregor.

#### BOFFEY V. BOFFEY.

This was an application by Cissie Johnson Lois Lucy Boffey for an order compelling her husband, Henry Sutton Boffey, to pay over to applicant a sum of £100 on account of legal expenses in the action for divorce instituted by her; £50 to provide for her maintenance during the period that must elapse prior to the hearing of the action, and £30 to discharge certain obligations incurred by her and costs of the motion.

Applicant stated she was married to the said Henry Sutton Boffey at Middleton-square, Islington, London, on August 21, 1902. Respondent was at that time a hotel proprietor in Salt River, and came to England for the purpose of marrying her. The parties arrived in Cape Colony and stayed for some time at the Locomotive Hotel, Salt River, of which the respondent was proprietor in partnership with his bro-

ther. Thereafter they moved to the Montpelier Hotel, Woodstock, and remained there till they removed to Wynberg early in the year 1904. There was no ante-nuptial contract or marriage settlement.

Mr. Struben appeared for applicant, and Mr. Uppington for respondent.

Applicant stated that she and respondent lived very happily until about December, 1905, when the latter became very friendly with a barmaid employed at the Railway Hotel, Wynberg, which together with the Royal Hotel acquired by respondent in 1906, was carried on by the parties. Applicant objected to her husband's attentions to the barmaid; thereafter she alleges she saw a change in his manner towards her. He became extremely unkind, and she began to suspect that his relations with the barmaid were improper. She alleges that she can provide abundant evidence of misconduct, and as corroboration she was filing an affidavit by one Phyllis Jacobs on the subject. There was also the evidence of applicant's sister and other persons. Applicant further stated that besides being the owner of the Royal and Railway Hotels, Wynberg, he is the registered owner of valuable property in Cape Town and Sea Point. Respondent offered £30, but this applicant considers quite inadequate having regard to the fact that he is evidently opposing the divorce, which will make the action a most expensive affair.

Respondent stated that he only came to this colony as a consequence of ill-health, and he had told applicant that as soon as he could afford it, he would give up business here and return to England. He had not adopted the Colony at his marriage as his domicile, nor had he done so at the present time. He denied that he was particularly friendly with the barmaid mentioned. She was an old servant, and that he had great respect for her. He denied having at any time used violence towards applicant, save in absolute self-defence, when under the influence of extreme temper she scratched him severely. Respondent further states that his wife evinced an uncontrollable aversion to his attending Masonic or similar functions, and it was usually on these occasions that trouble arose. He denies that he was ever the registered owner of the properties of the Royal or Railway Hotel. He was merely the tenant of each, and was now a monthly tenant of the Royal Hotel. The properties in the name of his brother and himself in Cape Town if sold would not pay the bonds upon them. The girl Phyllis Jacobs had made another affidavit repudiating the first she signed implicating respondent and the barmaid. She signed the first affidavit simply through a desire to do the latter an injury.

De Villiers, C.J.: The question must depend very much upon the condition of life in which the parties lived, and also whether they were married in community of property. As to the question whether they were married in community of property, I will not give a definite opinion at this stage, but to all intents and purposes respondent seems to have made this country his domicile even before he married, and if he married his wife so as to have domicile here, then the marriage is to be considered as if made in the Colony. Respondent will have to pay £100 towards the cost of action as applied for. There will be no order as to alimony, and costs will be costs in the cause.

#### HOFFMAN V. HOFFMAN.

Mr. R. Marais applied on behalf of Johanna Maria Hoffman for an order to sue *in forma pauperis* her said husband, Andrew Francis Hoffman, for a decree of restitution of conjugal rights, and in default of compliance therewith, for a decree of divorce, custody of the minor child of the marriage, as well as the maintenance of the latter. It appeared that the petitioner was married in Cape Town, and there was one child of the marriage. Petitioner alleged ill-treatment and that her husband took no steps whatsoever nor provided funds to enable her to return to him.

The respondent, in the course of correspondence, stated that he did not oppose the applicant's application for leave to sue *in forma pauperis*. He could not, he added, contribute anything towards the costs of the action, as he was not in a position to do so.

The applicant, called at the request of the Chief Justice, said that her husband was a cabinetmaker, but at present he was doing nothing. The respondent was living with his father.

[De Villiers, C.J.: By his letters it would appear he is willing to take you back?—He acknowledged he had nothing, and was unable to take me back.

[You are prepared to certify?]

Mr. Marais: Yes.

De Villiers, C.J.: Upon that certificate the Court will grant a rule calling on the respondent to show cause by Tuesday week why plaintiff should not be allowed to sue defendant *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce, with custody of the child of the marriage.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX V. VAN WYK. { 1907.  
Sept. 6th.

Magistrate's finding on credibility of witness overruled—Inadmissible evidence.

This was an appeal from a judgment of the Resident Magistrate of Ceres, who had convicted appellant, a domestic servant, of the theft of some whisky and brandy, the property of her master, Charles Steytler, and had sentenced her to one week's imprisonment.

The appeal was brought on the following grounds: (1) That the owner of the goods alleged to have been stolen did not prosecute; and (2) that the evidence for the prosecution as to the alleged theft is insufficient to convict, inasmuch as the witness A. N. Lottering, if the theft had been committed, was an accomplice, and she was contradicted on material points by the other two witnesses for the Crown, and, further, that she admitted that she was actuated by spite in the matter.

Mr. enjamin, K.C., was for applicant, Johanna van Wyk; Mr. Nightingale was for the Crown.

Counsel having been heard in argument on the facts:

De Villiers, C.J.: The whole story told by the witness Lottering was so improbable that it would have been better to have acquitted the accused. Mrs. Steytler's evidence does not carry the matter much further. She gives statements as to some other occasions which, I am afraid, may have had some effect upon the Magistrate. A good deal of her evidence was not admissible. The whole evidence is so weak and so unconvincing that I consider the Magistrate ought not to have convicted, and the appeal will be allowed and the conviction quashed.

#### REX V. GOUS.

Wild Ostriches Acts—Resident Magistrate's jurisdiction.

Where a person is tried for a contravention of Sec. 1 of Act 30 of 1890 before a Resident Magistrate under his ordinary

*jurisdiction, the fine imposed cannot legally exceed £10.*

This was an appeal from a judgment of the Resident Magistrate of Kenhardt, who had convicted appellant of contravening section 1 of Act 30, 1890, as promulgated by Proclamation No. 145, 1907, and sentenced him to a fine of £15, or two months' imprisonment, with hard labour.

From the record it appeared that Johannes Gous and Isaac Gous had been charged with having, on the 30th April last, in the district of Kenhardt, wrongfully and unlawfully killed, pursued, or hunted certain wild ostriches, a close or fence season being then in force. Accused both pleaded not guilty. Johannes Gous was found not guilty, but Isaac Gous was found guilty.

The Magistrate admitted that he had inflicted a penalty in excess of his powers under the Act, and he reduced the penalty to £10.

Dr. Greer was for appellant, Isaac Gous; Mr. Nightingale was for the Crown.

Having heard Dr. Greer in argument, De Villiers, C.J.: In this case it is unnecessary to hear Mr. Nightingale on behalf of the Crown. It is clear that the ostriches were killed on Government ground, and the question is whether there was sufficient evidence before the Magistrate to justify him in coming to the conclusion that it was Isaac Gous, the appellant, who shot the birds. Upon that point we have the evidence of Cornelius, who was present. He was told to hide himself behind a bush, and he saw the accused kill these ostriches. And his evidence is corroborated by the evidence of Blaatjes, who afterwards saw Cornelius and his brother coming back, and Cornelius and Isaac Gous each carrying a bag with ostrich legs in it, and the other Gous carrying a bag with feathers. Then the evidence is further corroborated by the evidence of the police. They saw marks at the place where cartridges had been recently fired, and lying at the place where they would be if the evidence of Cornelius is correct. It was suggested that Cornelius might have taken the gun and killed the ostriches, but that is unlikely. In my opinion the Magistrate was justified in convicting the accused. Then it was pointed out that under the Act there was no special jurisdiction, and that it was limited to the ordinary jurisdiction of the Magistrate which confines him to a fine of £10. He has imposed a fine of £15, and there must, therefore, be a reduction of the fine from £15 to £10. I must confess that I greatly regret that there is no provision in the Act for imposing a heavier fine than has been imposed in the present case. Here

are two birds having a nest apparently breeding, and the accused take advantage of these birds breeding there to come closer and shoot both the birds and carry off the legs. What was done with the eggs does not appear. An act of this kind is certainly deserving of much heavier punishment than a fine of £10, but that is the law, and the only course will be to reduce the sentence. The Court will allow the appeal to this extent that the sentence of £15 is reduced to £10.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX V. JAF TA AND OTHERS. { 1907.  
(Sept. 10th.

Magistrate's ordinary jurisdiction  
—Imprisonment.

De Villiers, C.J.: A case came before me as Judge of the week, in which three persons were accused of assault. The Attorney-General remitted the matter to the Magistrate, and two of the accused were found guilty. Adrian Jaf ta was sentenced to three months' imprisonment with hard labour. Casper Small was sentenced to six months' imprisonment with hard labour. The Magistrate has no power under his ordinary jurisdiction to sentence to six months' imprisonment. That portion of the sentence will have to be reduced to three months' imprisonment in the case of Casper Small. The rest of the sentence will be confirmed.

### ADMISSION.

Mr. P. T. Lewis moved for the admission of Johannes Alwyn van der Linde as an attorney and notary.

Application granted, and oaths administered.

### PROVISIONAL ROLL.

INSOLVENT ESTATE FULLER V.  
JACKSON.

Mr. Roux moved for provisional sentence on a mortgage bond for £200,

with interest at 8 per cent. from October 7, 1905; counsel also applied for the property hypothecated and attached, *ad fundandam jurisdictionem*, to be declared executable, and for leave to attach and pay over to the trustee the rents from the property.

Order granted.

#### DUNELL, EBDEN AND CO. V. FITZGERALD.

Mr. P. T. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### MARCUSON AND CO. V. MAZOUZ.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### GRAAFF V. SHATZKY.

Mr. Watermeyer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### STONE V. MAREE.

Mr. Pohl moved for provisional sentence on certain promissory notes for £4 6s. 6d., £6, £8, and £1 12s., and costs.

Order granted.

#### INSOLVENT ESTATE GEARD V. WARD.

Mr. D. M. Buchanan moved for provisional sentence on a promissory note for £90, with interest from June 13, 1907.

Order granted.

#### DOUGLAS V. GIBBONS.

Mr. Roux moved for provisional sentence on a promissory note for £6, with interest from the 22nd May, 1907, and costs.

Order granted.

#### TRUSTEES DIOCESE OF CAPE TOWN V. REIDEL.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### ESTATE HOPKINS V. COOMBBE.

Mr. H. G. Lewis moved for provisional sentence on certain five mortgage bonds for £3,000, £1,500, £1,400, £1,100, and £1,500, with interest, bonds due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

#### THE LAND CO., LTD. V. CROTE.

Mr. P. S. T. Jones moved for provisional sentence on a notarial mortgage bond for £150, and for £67 10s., less £25 paid on account, being interest due; counsel also applied for a lease specially pledged in the bond to be declared executable. Counsel said that defendant had failed to pay certain instalments which had fallen due this month.

Defendant produced certain receipts, and said that she had been told by Mr. Arderne that it would be all right if she did not pay the instalments at present, as long as she paid the interest. She was willing to pay the interest, and when things got better she would pay the instalments. She had paid off £250 in the way of instalments.

The matter was ordered to stand over, but

At a later stage judgment was granted as prayed.

#### PARKER V. HOFFMAN.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £60, with interest from the 25th August, 1904, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ILLIQUID ROLL.

VAN NIEKERK BROS. V. } 1907.  
BUCKLAND. } Sept. 10th.

Mr. Roux moved, under Rule 330a, for leave to sign judgment against the respondent for not proceeding with his action within the time fixed by the Rules of Court.

Order granted.

#### COLONIAL GOVERNMENT V. NEL.

Mr. Howel Jones, K.C., moved for judgment for £7 2s., being the amount of a fine at the rate of 1s. per diem for the period between the 14th August, 1906, and the 2nd January, 1907, for failure to pass mortgage bonds in terms of section 4 of Act 40, 1895.

Order granted.



KRAMER V. VAN AAS.

Mr. H. G. Lewis moved for judgment, under Rule 329d, for £170 17s. 8d., balance of account for goods sold and delivered, etc., with interest *a tempore morae* and costs.

Order granted.

CONNOLLY, LTD. V. VAN DER MERWE.

Mr. Sutton moved for judgment under Rule 329d for an account of goods received and sold by defendant for plaintiff, debate and payment of moneys found to be due.

Order granted, account to be filed within one month.

MENDELSSOHN V. MENDELSSOHN.

Mr. D. M. Buchanan moved for judgment under rule 329d for an account, debate, and payment of moneys found to be due.

Order granted, account to be filed within a month.

CONRADIE V. CONRADIE AND CONRADIE.

Mr. Roux was for the applicant, and Mr. De Waal appeared as *curator ad litem*. The application was to have the respondents declared of unsound mind, and for the appointment of a *curator bonis*. Counsel for the applicant read an affidavit from a medical man to the effect that the respondents were imbeciles, and incapable of managing their own affairs. Mr. De Waal said he had seen both respondents, and found them physically and mentally weak. Both confessed to their inability to do any business.

Mr. Roux suggested the appointment of Jacobus Nicholas Conradie as curator to the respondents' person and property, failing him, the petitioner. The former stipulated he should have the legacies belonging to the respondents at once.

Application granted. Johannes S. Conradie appointed curator to person and property, with power to maintain the respondents out of the interest, and if that is insufficient, then out of part of the capital, costs to come out of the lunatic's estate; yearly accounts to be filed with the Master of the Supreme Court.

REHABILITATIONS.

Mr. Homes applied for the rehabilitation of Christian Fredrick Klinck. The estate was sequestrated in June,

1902. The trustee's report contained nothing unfavourable.

Granted.

Mr. Marais applied for the rehabilitation of Barend Jacobus Lampbrecht, under 117 section of the Ordinance. The estate was placed under sequestration in July, 1904. Three-fifths of the creditors in number and value agreed to the application. There was an affidavit of full and fair surrender. The report of the trustees contained nothing unfavourable.

Granted.

Mr. Pohl applied for the discharge of Willem Gerhardus Voges from insolvency. There was an affidavit of full and fair surrender, and there was nothing unfavourable in the Master's report.

Granted.

Mr. Roux applied for the discharge of Rittenberg and Company, under the 117th section of the Insolvent Ordinance. The Master certified that all the creditors had given their consent.

Granted.

GENERAL MOTIONS.

*In re* PARSONS. { 1907.  
Sept. 10th.

Mr. D. M. Buchanan moved for leave to alter the return day of the citation in this matter from November 14 until November 1, which would leave 50 clear days before the citation was returnable here. The plaintiff was a very poor person suing for restitution of conjugal rights, and she had had no maintenance from her husband for some time, and she was eager to have the matter settled as soon as possible.

Application granted.

PEREGRINO V. ALEXANDER

Mr. P. S. T. Jones, for the applicant, moved for an order calling on the respondent to pay the costs of a previous and this application. In the former case the respondent was the applicant, and he obtained a rule nisi in an *ex parte* application restraining the respondent from parting with a certain cession. The rule was duly opposed, but after several postponements the Court made the rule absolute, and ordered the costs to stand over. The present respondent stated that he intended forthwith to institute an action to recover his share in the cession, but he had not taken any further proceedings.

The respondent was ordered to pay the costs of the application made by him, and subsequent proceedings connected therewith.

*Ex parte* ESTATE BOTHA.

Mr. Louwrens moved for leave to the executor testamentary to mortgage certain property in the division of Oudtshoorn in which minors are interested.

Order granted in terms of Master's report.

*Ex parte* ESTATE MULDER.

Mr. Payne moved for an order confirming certain settlements.

Order granted as prayed.

*Ex parte* BURGER.

Mr. Howes moved for the appointment of a temporary *curator bonis* to represent the estate of petitioner's husband, Johannes Stephanus Burger, of Clanwilliam, who had been removed to the Valkenberg Asylum. Counsel quoted section 15, sub-section 3, of the Act, and cited *ex parte J. J. de Villiers* (14 C.T.R., 386). It was not desired to have the respondent declared a lunatic. There was a possibility of his recovery within three or six months.

De Villiers, C.J., said that he did not see how he could grant power to the curator to institute and defend actions on the present application. The curator would be given powers to carry through negotiations which the respondent himself had begun, and also to pass transfer of the property and receive moneys. To that extent, powers would be granted to the curator. Willem Petrus Burger would be appointed curator.

*Ex parte* ESTATE MARSH.

Mr. Inchbold moved on the petition of the executor testamentary for an order authorising the cancellation of a certain mortgage bond for £100, hypothecating property near Cape Town. The bond had been lost. All the mortgagees were dead, but certain parties had offered to pay the balance due upon the bond on petitioner obtaining cancellation. Counsel cited *Ex parte Snell* (7 C.T.R., 344).

Rule granted, calling upon all persons concerned to show cause on the first day of next term why an order shall not be made as prayed, rule to be published once in two Cape Town newspapers; if no objection is raised, rule to be made absolute without further application.

*Ex parte* NUGENT.

Mr. Howes moved for the appointment of a provisional *curator bonis* to petitioner's husband, Dr. Wilson M. Nugent, lately practising at Vryburg,

pending proceedings to inquire into the respondent's state of mind. Dr. Nugent was confined to the Graham's Town Asylum.

Order granted, appointing Reginald de Beer as provisional *curator bonis* with powers prayed, and appointing the Resident Magistrate of Graham's Town to be *curator ad litem*, for the purpose of action to have defendant declared of unsound mind, with leave to give evidence on affidavit, summons to be returnable on the first day of next term.

## ALBERTYN V. MOUNTAIN VIEW STONE QUARRY AND BRICKFIELD CO., LTD.

Mr. Watermeyer moved for a winding-up order against the respondent company, carrying on business in Cape Town. The company owed the estate of petitioner's late husband £3,500, by virtue of a mortgage bond, and also interest. The company's liabilities exceeded its assets by about £1,350.

Winding-up order granted, and Etto Gerhardus von Bonde appointed liquidator, with the powers mentioned in the 149th section of the Companies Act.

*Ex parte* WALKERS.

Mr. Louwrens moved for an order confirming sale of certain property in Oudtshoorn made by petitioner on behalf of his minor sons.

Order granted as prayed.

*Ex parte* KARSTENS.

Mr. Roux moved for leave to petitioner to sue her husband *in forma pauperis* for judicial separation on the ground of his persistent cruelty.

Petitioner appeared, and was examined as to means.

Subject to counsel's certificate, rule nisi to issue, returnable on the first day of next term.

*Ex parte* BOOTH.

Mr. D. M. Buchanan moved for leave to petitioner to sue her husband *in forma pauperis*, and by edictal citation for restitution of conjugal rights. Petitioner's husband deserted her, and went to Johannesburg, and for some time past had had no communication with her. His whereabouts were unknown.

Petitioner appeared, and was examined as to means.

Rule nisi granted, returnable on the 1st November, personal service to be effected, failing which one publication in the "Star" (Johannesburg), and leave granted to sue defendant by edictal citation, citation returnable by the 1st November.

*Ex parte* CHRISTIANIE.

Mr. Watermeyer moved for leave to petitioner to sue her husband *in forma pauperis* for divorce on the ground of adultery. Petitioner had had no tidings of her husband's whereabouts since the early part of August.

Referred to counsel for report, and upon certificate by counsel rule to issue, returnable on the 1st November.

*In re* SOUTH AFRICAN GENERAL WORKERS' UNION LOCKED-OUT CIGARETTE WORKERS' CO-OPERATIVE SOCIETY, LTD.

Mr. Roux moved for confirmation of the first report of the official liquidator except as to prayer (b), to which objection had been taken by Mr. A. J. Chiappini.

Report confirmed as prayed, except as to prayer (b).

*Ex parte* ESTATE HOBSON.

Mr. Watermeyer moved, on behalf of the executor testamentary in the estate of Johanna Jane Hobson, for an order authorising the sale and transfer of certain property. There was a consent by the major heirs, and the Master's report was favourable.

Order in terms of the Master's report.

WYKEHAM V. WYKEHAM.

This was an application on behalf of James Wykeham, of Worcester, for leave to sue his adopted daughter, Adeline Emma Blanche Wykeham, by edictal citation, for the return of certain documents and money, and for leave to attach certain property for the purposes of the action.

The petition of the applicant was as follows: Your petitioner resided formerly in the Hope Town District, and came to Worcester in the year 1884. His niece, Adeline Emma Blanche Wykeham, has been residing with him as an adopted daughter for the past 35 years. Your petitioner placed considerable sums of money at fixed deposit in the Standard Bank at Worcester, but of recent years has kept no set of books, the amount of the deposit, however, being about £33,000. This money or the greater part of it was originally deposited in your petitioner's name; afterwards, in consequence of certain dispositions contained in your petitioner's will, which he made after the death of his wife, your petitioner deposited the money in the joint names of himself and his niece, with instructions to the bank that the money was to be payable

either to himself or to Adeline Emma Blanche Wykeham. Your petitioner latterly altered the terms of the deposit of the money so left with the bank, and deposited it in the name of his niece. Your petitioner bequeathed the residue of his estate to his niece, including therein the £33,000 so deposited in her name, with the exception, however, of certain legacies of landed property to other relatives. Your petitioner deposited the money in his niece's name in order to enable her to handle the same immediately upon his death, but your petitioner arranged with his niece, and it was clearly understood by her, that though the money was deposited in her name, it remained his full and free property to deal with as he pleased during his lifetime. Your petitioner moreover drew the interest accruing on the deposits, and renewed the same from time to time. Your petitioner kept control of the fixed deposit receipts, which were in his custody, and which he kept in his deeds box in his safe. Your petitioner informed his niece what steps he was taking with regard to the money deposited in the bank, and she agreed thereto, and your petitioner moreover informed her that he would remain entitled to the interest on the deposits, and advised her of the manner in which she was to dispose of the capital in the event of his sudden death. Your petitioner's niece was aware that by his will he had devised a large sum of money in her favour, and your petitioner verbally informed her that it was his wish that she was to reserve to herself an annual income of about £600, and devote the rest of the endowment of a certain college in England, with which proposal she agreed, and promised to carry out your petitioner's wishes. In or about the end of July, 1907, your petitioner's niece suddenly and without informing your petitioner of her intention, left Worcester by train, caught the mail steamer at Cape Town, and departed for England, where your petitioner is informed she resides at present at Woodbridge, Clive-avenue, Clive Vale, Hastings, Sussex. Shortly before your petitioner's niece's departure from Worcester, she administered to your petitioner some medicine, which rendered him unconscious, and on your petitioner refusing to take further doses on account of its nauseousness she forced the medicine on him by saying that his doctor had ordered it. Your petitioner has been informed by his doctor, who attended him shortly thereafter, that he was suffering from the effects of belladonna, and as your petitioner is about 86½ years of age, the administering of a drug of this sort was distinctly dangerous. Before her departure she found his safe had been opened, his deed box removed, and the contents rifled, but he was too exhausted to follow up the matter. Your petitioner

day of next term, personal service to be effected, failing which two publications in a Pretoria newspaper.

*Ex parte* ESTATE DU TOIT.

Mr. Gutsche moved for a certain rule nisi to be made absolute, authorising the appointment of petitioner as *curator bonis* to his brother, who is a deaf mute. Rule absolute.

*Ex parte* ESTATE LATE CAIRNCROSS.

Mr. Toms moved for an order authorising the substitution of certain diagrams, so as to enable transfer to be passed of a piece of ground acquired by the Railway Department for the Port Elizabeth-Avontuur line.

Order granted as prayed.

SCHMIDT V. SCHMIDT.

This was an application calling upon respondent to show cause why a further stay of execution should not be granted in an action in which respondent had obtained judgment against applicant for £90 11s. 11d., with costs, and with leave to attach the landed property of applicant.

Respondent had obtained judgment against applicant in the Resident Magistrate's Court, Wynberg, and he afterwards took provisional sentence on this judgment in the Supreme Court, but a stay of execution until the 31st August was granted by the Court to enable defendant (now applicant) to bring an action against the present respondent, against whom, he said, he had a counter claim. Applicant had not instituted his action within the time allowed, his explanation being that the delay was caused by counsel having been too busy to at once draw the declaration, and the fact that the declaration had had to be printed. In the meantime, however, a writ had been issued at the instance of the respondent. Respondent said that the applicant had received certain insurance money, and had been in a position to satisfy the writ.

Mr. Upington was for applicant, Wilhelm Schmidt, a Cape Flats farmer; Mr. Roux was for respondent.

Mr. Roux having been heard in argument.

De Villiers, C.J.: I am afraid that the delay in this case is not so much the applicant's fault as the persons who are employed. I do not think the applicant personally has been guilty of delay. It has been his attorney, and I am loth to punish him, because his attorney has not been quite diligent in the matter, or because his counsel has

been so busy that he could not draw the declaration. I shall extend the stay of execution further until the 1st November. Before the 1st November the case must be brought to trial, all preliminaries must be taken now, and it must be set down early in the term for trial, so that the whole thing may be completed before the 1st November. This is the last day that can be allowed, and I trust that every care will be exercised to bring it on for trial in the first part of the term; the interdict will continue, so that applicant cannot part with his property, and costs will be costs in the cause.

REX V. GOUS AND ANOTHER.

Game Preservation Acts (36 of 1886 and 38 of 1891).

*A person who allows a companion to use his shoulder as a rest for a gun while illegally shooting game is guilty of contravening Sec. 4 of Act 36 of 1886, as amended by Sec. 1 of Act 38 of 1891.*

This was an appeal from a judgment of the Resident Magistrate of Kenhardt, who had convicted appellant (Johannes Gous) of contravening section 4 of Act 36, 1886, amended by section 1 of Act 38, 1891, and sentenced him to pay a fine of £25, or to be imprisoned with hard labour for three months.

It appeared that in the Court below Johannes Gous and Izak Gous were charged with having, on the 4th May, and in the district of Kenhardt, pursued, shot, killed, or destroyed certain three gemsbok, without having obtained permits from the Government.

Izak pleaded guilty, and Johannes, who now appealed, pleaded not guilty, but both were found guilty, and sentenced to pay a fine of £25, or undergo three months' imprisonment, with hard labour.

Mr. Roux was for appellant; Mr. Nightingale was for the Crown.

Mr. Roux submitted that the conviction was against the weight of evidence, and that certain evidence was admitted which was legally inadmissible. Johannes was but a passive agent, and was therefore not liable to a penalty.

De Villiers, C.J.: Izak Gous, it is clear was guilty. He was called as a witness, and in his evidence he said Johannes had not killed a gemsbok, but had allowed his shoulder to be used as a rest for the shooting of the gemsbok. It seems to me that a man who stands and allows his shoulder to be used as a rest is just as guilty as the other man who fires the gun, but I do not confine myself to



that point, because I think the one is as guilty as the other. The evidence given by Cornelius, which was believed by the Magistrate—the Magistrate believed that not only Johannes became a rest for the rifle, but was an active instrument in pulling the trigger and killing one gemsbok, while Izak must have killed two gemsbok. The Magistrate has dealt very leniently with these men, because he might have fined each of them £25 for each buck which was shot. Now, it is suggested that if a man goes out shooting gemsbok that it is all one act how many he shoots, and that he could only be fined £25. I am wholly unable to take that view. The shooting of each gemsbok is a contravention of the law. It is possible that if a man fired at one gemsbok and hit two, another question might arise, which I do not wish to decide upon now. But if two separate shots are fired at two separate gemsbok, I consider them separate offences, and for each offence the offender is liable to a fine of £25. That being my view of the law, it is clear that both Izak and Johannes were equally guilty, and were properly sentenced at all events to pay a fine of £25 each. The appeal must therefore be dismissed, and the conviction confirmed.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. } 1907.  
                                  } Sept. 17th.

Mr. Roux moved for the admission of Jacobus Edmund Joubert Krige as an attorney and notary.

Application granted, and oaths administered.

*Ex parte* DONOVAN.

Attorney — Admission in the Transvaal and in Cape Colony — Matriculation certificate of the Cape University — Act 14 of 1899.

*D.*, having been admitted as an attorney of the Supreme Court of the Transvaal, applied

for admission as an attorney of the Supreme Court of this Colony. He produced no certificate in terms of Sec. 1 of Act 14 of 1899, but it appeared that the regulations of the Cape University provided that no student could be admitted to the Transvaal law certificate examination unless he had first passed the matriculation examination of the University.

Held, that *D.* be admitted as prayed.

Mr. D. M. Buchanan moved for the admission of Richard Bartholomew Donovan as an attorney, and asked for leave to the applicant to take the oaths before the Registrar of the High Court of Griqualand. Counsel (in answer to the Court) said that the applicant was an attorney of the Transvaal Supreme Court, and had passed the Transvaal law certificate examination.

De Villiers, C.J., said that, according to the Act of 1899, applicant must pass the matriculation examination of the Cape University or some examination which, in the opinion of the Council of the University, was equivalent thereto.

Mr. Buchanan said that he was not aware whether the applicant had passed such an examination.

The matter was ordered to stand over for further inquiries.

*Postea* (September 18th).

Mr. D. M. Buchanan again mentioned the application of Richard Bartholomew Donovan for admission as an attorney. The matter was before the Court on Tuesday, when it was stated that applicant was an attorney of the Supreme Court of the Transvaal, and the question was raised as to whether he had passed the matriculation examination of the Cape University, or an examination equivalent thereto. Mr. Buchanan now informed the Court that, according to the regulations of the Cape University, admission to the law certificate examination of the Transvaal was a notification that the applicant had passed the matriculation examination. The practice of the Court had been to admit when the law certificates was produced to the Registrar.

[De Villiers, C.J.: Have you nothing from the University to the effect that the examination which Donovan has passed is, in the opinion of the Council, equivalent to the matriculation examination?]

Mr. Buchanan said that with the papers was a certificate that the applicant had passed the Transvaal law certificate examination. One of the re-

**Order granted.**

COLONIAL GOVERNMENT V. FRASER.

Mr. Howell Jones, K.C., moved, under Rule 329d, for judgment for £100, for, and on account of, income tax for the year ended June 30, 1906, and costs. One George Jopp was, under section 47 of Act 36, 1904, sued as agent of the defendant Fraser.

Order granted.

MCARTHUR, ATKINS AND CO. V. LEWIS.

Mr. Inchbold moved, under Rule 329d, for judgment for £329 3s. 9d., balance of account for cash advanced by, and moneys received for, plaintiffs, as per defendants' own account rendered, with interest *a tempore mora*, and costs.

Order granted.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REHABILITATION. { 1906.  
                                  } Sept. 18th.

Mr. De Waal applied, under section 106 of the Insolvent Ordinance, for the discharge from insolvency of Jacobus Francois Rossouw.

Granted.

### GENERAL MOTIONS.

SHAW V. SHAW.

Mr. Roux moved for the removal of this case to the ensuing Circuit Court at Riversdale.

Order granted as prayed.

BRAUDE V. BRAUDE.

Mr. M. Bisset moved for the removal of this case to the ensuing Circuit Court at Oudtshoorn.

Order granted as prayed.

SCHOEMAN V. OLIVIER.

Mr. Louwrens moved for the removal of this case to the ensuing Circuit Court at Oudtshoorn.

Order granted as prayed.

*Ex parte* VON BELOW.

Mr. Roux moved on the petition of Gustav Adolph von Below, of Middelburg, for an order interdicting the transfer of a certain erf in Middelburg from Christian Jooste and Nicolaas S. Lessing to Dirk Jacobus Biggs. Petitioner stated that he was engaged in certain negotiations for the purchase of the erf, the sale having been entrusted by the owners to Stephen Hugo, auctioneer, of Middelburg. Petitioner acquired an option over the premises for £300 from Mr. Hugo, and had offered £280 for the property, when he ascertained that the owners had, through another attorney, disposed of the property meanwhile for £300. Petitioner had since offered £300, and he claimed that he was entitled to exercise his option. Jooste resided at Philippolis, Orange River Colony, and Lessing resided in the Middelburg division. Petitioner prayed for leave to sue Jooste by edictal citation, and for an order restricting transfer of the property to Biggs and for a judicial attachment *ad fundandam jurisdictionem*.

De Villiers, C.J.: The applicant does not make out a clear case that he has a right of action. He had an option, as he says, for £300, although Minnaar (Mr. Hugo's clerk) does not speak of any price being mentioned, but the petitioner himself admits that, after that, he made fruitless attempts to get the property for £280. While these fruitless attempts were being made, the property was sold to Biggs. I do not say that he had a right to sell it to Biggs. It may be that further facts may be disclosed to show that he had no such rights. Still, there was no clear contract of purchase. Moreover, there was nothing to show that Biggs knew about this. Even if he did know, I do not see how he could be prevented from getting transfer in terms of his contract from the owners of the property. If Lessing has broken his contract, well, let him be sued for damages. As to Jooste, I do not think there is sufficient before me to justify me in attaching this property, which would prevent Biggs from getting transfer. There will be no order.

*Ex parte* HOFFMAN.

Mr. Marais moved for a certain rule nisi to be made absolute admitting petitioner to sue her husband *in forma pauperis*.

Rule absolute, Mr. Marais to be counsel and Messrs Michau and De Villiers to be attorneys to the petitioner.

*Ex parte* BREGENZER.

Dr. Greer moved for an extension of the return day of certain rule calling

upon petitioner's husband to show cause why she should not be admitted to sue *in forma pauperis*. Counsel said that respondent had now moved further up-country, and appeared to be about 400 miles beyond Livingstone.

Return day extended until the 1st February.

ESTATE LLOYD V. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Mr. Benjamin, K.C., moved for a certain rule nisi to be made absolute calling upon respondents to show cause why they should not be ordered to pay over to plaintiffs certain moneys due under a policy of insurance. There was no appearance for respondents.

Rule absolute.

*Ex parte* BROWNELL.

Mr. M. Bisset moved for a certain rule to be made absolute admitting petitioner to sue her husband *in forma pauperis*, and by edictal citation, for restitution of conjugal rights. Counsel read an affidavit sworn before a notary public at Calgary, province of Alberta, Canada, to the effect that service had been made upon respondent at Cayley, province of Alberta.

De Villiers, C.J., said that the Court had continually laid down that affidavits produced should be sworn before commissioners of this Court, or before people whom the Court was satisfied were entitled in the country in which the affidavits were sworn to take affidavits. There was nothing in this case to show that in Canada a notary public was entitled to take affidavits. What part of Canada had the affidavits been sworn in?

Mr. Bisset: In the province of Alberta.

[De Villiers, C.J.: In Quebec they have got the old French law, which confers very large powers upon a notary.]

Mr. Bisset said he thought that Alberta was a recently-constituted province.

De Villiers, C.J., said that in this case the Court would take the fact that the affidavit had been sworn before a notary as sufficient. There was, he added, great risk in getting affidavits of this kind. If there had been very great importance attaching to it, the Court might have declined to take the proof of service as satisfactory, but as this was merely a formal notice of service, an order would be granted.

Rule absolute, Mr. Bisset to be counsel, and Messrs. Walker and Jacobsohn to be attorneys to the petitioner.

*Ex parte* MINI.

Mr. Roux moved, on the petition of William Mini, for leave to sue his wife Catherine by edictal citation, and also one Jeremiah Taleni. Petitioner said that he was married to Catherine at Tsomo, Transkei, and that subsequently they lived together at the Native Location, Maitland. His wife wrongfully and unlawfully deserted him, and she went and lived in cohabitation with Jeremiah Taleni. The present habitation of respondents was unknown to petitioner, but he believed they were living at some place in the Transkei. He desired to institute an action against his wife for divorce, custody of the minor child, and forfeiture of any benefits of the marriage in community, and for costs of the action against Jeremiah.

Leave to sue by edictal citation granted, citation returnable on the 1st November, personal service, failing which, one publication in the "Kokstad Advertiser."

*Ex parte* ESTATE HEYWOOD.

Mr. P. T. Lewis moved, on the petition of the executors testamentary of estate late Thomas William Heywood, for leave to sell and mortgage certain estate property. From the petition, it appeared that the late Mr. Heywood carried on business as an auctioneer and sworn appraiser at King William's Town, and he directed in his will that the business should be continued and carried on by his executors for the benefit of his estate. He also directed that none of the landed property, with certain exceptions, should be sold before his youngest son, who was 17 years old, had obtained the age of 21 years. There was, petitioners pointed out, an overdraft against the estate in favour of the African Banking Corporation of £689. The business had, so far, been carried on at a profit, enabling petitioners to support and maintain the deceased's widow and family, and they were sanguine that this would be maintained, although at the present time the business was extremely limited, owing to the depression and want of capital. The property wherein the business was carried on was of far larger dimensions than the business necessitated, and petitioners were strongly of opinion that if portion thereof could be disposed of so as to pay off part, if not the whole, of the mortgage bond, thus decreasing the amount payable monthly for interest, it would be to the benefit of the estate. They asked for leave to sell such portion of that property as they may deem advisable, and, if necessary, to pass a general bond hypothecating any of the pro-



perty of the estate in favour of the African Banking Corporation. The Master approved of the petition. Order granted as prayed.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

INSOLVENT ESTATE POT- ( 1907.  
GIETER V. HOTZ. ( Sept. 24th.

Mr. M. Bisset (with him Mr. Howes) moved, in terms of consent, for the appointment of a commissioner to take the evidence of Johannes S. F. Potgieter, sen., at his residence at Oudtshoorn, in an action to be heard at the ensuing Circuit Court at Oudtshoorn.

Order granted, appointing the Resident Magistrate of Oudtshoorn as commissioner, costs to be costs in the cause, and leave given to telegraph the order.

### PROVISIONAL ROLL.

BOARD OF EXECUTORS V. TURNER.

Mr. Philipson Stow moved for provisional sentence on a mortgage bond for £1,600, with interest from the 1st July, 1906, less £30 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

BREDENKAMP V. SOHMPER.

Mr. Marais moved for provisional sentence on a mortgage bond for £300, with interest from the 9th January, 1905, bond due by reason of expiration of time for which the money was lent; counsel also applied for the property hypothecated to be declared executable.

Order granted.

ESTATE GILL V. ZIES.

Mr. Toms moved for provisional sentence upon a mortgage bond for £500, with interest from the 1st January, 1907, less £5 15s. 2d. paid on account. Bond due by reason of non-payment of interest. Counsel also applied for the

property hypothecated to be declared executable.

Defendant said that one of the properties had been handed over for collection to Mr. Arderne in lieu of interest, and that the rent was more than sufficient to cover the interest.

Mr. Toms said he was instructed that the rent from the property did not cover the interest, and that the only amount received from the defendant was £5 odd.

Ordered to stand over for inquiry.

At a later stage the matter was again mentioned, and provisional sentence was granted, execution to be stayed for a month.

BLANKENBERG V. SCHIETKAT.

Mr. Toms moved for provisional sentence on a mortgage bond for £300, with interest from the 1st January, 1907, bond due by reason of non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

DE VILLIERS V. LIEBENBERG.

Minor—Surety—Tacit emancipation—Failure to repudiate on attaining majority.

*Defendant, a minor, had, with the authority of his father and natural guardian, signed a promissory note as surety for his said father. At that time the plaintiff was upwards of 20 years of age and leased a farm and owned cattle in partnership with his father. During the currency of the note he attained majority, but he did not then repudiate liability on the note.*

*Held, that having been tacitly emancipated at the time he signed the note, and not having repudiated his liability on becoming of age he was liable as a surety.*

This was an application for provisional sentence on a promissory note for £61 1s. 10d., with interest from the 8th November, 1906.

The affidavits of defendant and his father stated that the defence was that Hendrik Johannes Liebenberg signed the note at a time when he was aged 20 years and nine months, and was a minor under the guardianship of his

father. The note represented the balance owing of a loan advanced to defendant's father. Defendant received no benefit from the note, and signed it at the request of his father, who was responsible. The latter had been unable to pay, and his estate had been surrendered as insolvent.

The answering affidavit of the plaintiff was to the effect that he sent the note for signature by defendant, and his eldest son, if the latter were of age. The note was subsequently returned to deponent, signed by the defendant and his father. When the father's affairs became entangled in difficulties, he said that his son, if allowed time, would pay the note.

Mr. De Villiers for plaintiff, Mr. Gutsche for defendant.

Mr. De Villiers: The defendant pleads minority, and says that he signed the promissory note at the request of his natural guardian. That a minor is not liable on a contract entered into with the authority of his guardian is surely a new doctrine, and I do not think that I need argue that point.

[Hopley, J.: You certainly had better argue it. Here a father gets his minor son to become security for the father's benefit. How can the minor be bound?]

The plaintiff did not know that the son was a minor.

[Hopley, J.: Could not the father be prosecuted for obtaining money by false pretences?]

There was no false pretences in this case. The father did not say that his son was a major.

[Hopley, J.: It would be very hard on the ward to hold him liable.]

The ward has his remedy against the guardian. My point is that for all legal purposes the ward and the guardian are a full legal *persona*. Then again the son had been tacitly emancipated. He was trading in his own name as his father's partner. They had hired a farm together, and as the father's letter of January 13th shows, possessed cattle in common.

Again, there was ratification by the son of this suretyship after he had attained his majority. He became of age on the 11th February, 1907, and the note had then still half the time to run before maturing. The son did not repudiate the note on attaining majority. He did not do so even in April, 1907, when the creditor wrote to him.

[Hopley, J.: Does a contract which is void *ab initio* become valid by ratification?]

Even a minor who enters into a contract without his tutor's consent can ratify it after attaining majority *Voet* (26, 8, 4), *Maasdorp's South African Law* (Vol. 1, p. 247). By not repudiating the suretyship he damnifies the holder of the note if he is allowed to do so now. As to the consent of the tutor

making the contract binding see *Voet* (46, 1, 5). The only way in which he can escape from his obligation is by obtaining *restitutio in integrum Voet* (26, 8, 3), *Maasdorp* (Vol. 1, p. 246), and *restitutio in integrum* may be refused if it was generally supposed that the minor was a major *Voet* (4, 4, 43). As far as I know, *restitutio in integrum* has never been granted in this Colony.

Mr. Gutsche: It is common cause that when the defendant signed the note he was not of full age.

[Hopley, J.: Oh, no. The father held out his son as being of full age, and he now denies it.]

As to his age, we have the affidavit of his parents. If his father misrepresented his age, that cannot prejudice the defendant. In order that a contract entered into by a minor with his tutor's consent can be held to bind the minor, it must be proved that the contract is for the minor's benefit *Auret v. Hind* (4, E.D.C., 283). Here the defendant received no benefit.

[Hopley, J.: He and his father were trading in partnership, it was surely a benefit to him that the partnership property should not be sold in execution.]

I submit that there was a partnership. As to *restitutio in integrum*, that is exactly what, to all intents and purposes we are asking for. *Restitutio in integrum* is either substantial or judicial, *Van der Linden* (Book 3). As to tacit emancipation; the facts here do not prove it. Even if the defendant had been tacitly emancipated it would have been necessary to have shown that the special benefit which he derived from his suretyship was connected with the trade which he carried on. As to ratification, the failure of defendant to reply to plaintiff's demand must be construed rather as a repudiation than as a ratification of the contract.

Mr. De Villiers, in reply, quoted *Maasdorp's Institutes* (Vol. I., p. 246), and submitted that it was not necessary, if the tutor consented, to show that the contract was for the benefit of the minor. On the point that any contract entered into by a minor tacitly emancipated must deal with the trade which he exercised, he cited *Maasdorp* at p. 237. Counsel also quoted *Gerrick v. Keytler* (1879 Buch., 147).

Hopley, J.: Provisional sentence was claimed upon a promissory note dated November 8, 1906, in which two men called Liebenberg made themselves jointly and severally liable for the promissory note to the plaintiff or his order. The note is one made for six months, and fell due on the 8th May in this year. The first signatory, Christoffel Liebenberg, has now become insolvent. The note has been presented for payment, and proved in the estate, and the plaintiff is now suing the second signatory, Hendrik Liebenberg, who is the

son of the insolvent. The defence set up is that of minority at the time of the execution of the contract, and it is said that Hendrik Liebenberg at the time of making this note was twenty years and nine months of age. Now, in ordinary circumstances, a minor who makes a contract at such an age as that without the authority of his guardian, by which he has not benefited, would be able to repudiate such contract, if he has not ratified it after attaining majority. In this case, when the note fell due, the minor was something like three months over the age of twenty-one, and I am assuming in the consideration of this matter that the proof of age is satisfactory, although no certificate has been produced, and for the present I will treat it on the basis that the age as set forth in the affidavits for the defence is the correct age of the defendant. Now, during the whole of the six months the plaintiff was clearly under the impression, I should say, from the correspondence and the affidavits that the defendant in this case was of full age at the time he made the contract. He did not ask that a minor should be drawn into this contract, but in writing that there was this balance due by the father he urged him to pay; and the father in writing back told him: "I now keep my cattle, and hire a farm, together with my eldest son." The plaintiff wrote back: "I have read your letter of the 6th, and I enclose an account to date making a total of £61 1s. 10d. I also enclose the promissory note to be signed by you and your eldest son if he chooses to do so, and also if he is of age." He added: "If your son signs I shall not take legal steps against you." In answer to that, the father sent a letter promising to comply with the suggested arrangement. "Your letter," he said, "with account and promissory note to hand, dated 15th November. I and my son will sign it and return it to you. He is at present not here. I shall see him next week. He is on the farm"—that is, the farm which they had hired together, according to the previous letter—"with our cattle. We shall then both sign it, and send it back to you." Later on, apparently, the promissory note was, in terms of the promises contained in those two letters, sent forward and signed by the son. Now, the first question that arises is the one taken by Mr. De Villiers, that the defence of minority cannot prevail in a case like this, where the minor has undertaken a responsibility, and entered into an obligation with the consent and by the authority of his guardian. It is true that he was not looked upon as a minor by the plaintiff, who believed he was contracting with a major, and he was led to thinking so by the father and the son, who entered into the contract as though he was a

major. Now, it may very well be that the minor at that day was ignorant of his rights, and that he simply signed at the request of his father; still his father was his natural guardian, and so he was doing this act with the authority and at the request of his guardian. It may have been an improper thing on the part of the guardian to do, but, on the other hand, there is nothing to show this Court that the son was not fully aware of the position, and that he consented to undertake this for the sake perhaps of benefiting his guardian, who was using his authority to clothe him with sufficient power to enter into such a contract. In such circumstances a question might possibly arise as to the liability of the ward; but it is a point about which I do not think it necessary to express a final opinion. There are other points in the case which may fairly be taken to be decisive. The next contention on behalf of the plaintiff is that the defence of minority cannot prevail, because there has been a tacit emancipation of the minor; and that, it seems to me, has a good deal of substance in it. In April this year, when the note had not yet matured, the father wrote to say how sorry he was that he would not be able to meet his obligations as he had been very ill with typhoid fever, and that if he were pressed by his creditors he would be obliged to surrender his estate. He wrote about the son as though he were on the farm managing their cattle and in such terms as to lead to the conclusion that he and his son were farming in partnership. If it be true they were carrying on partnership together, I think it would be in all probability held that there had been a tacit emancipation, and that this young man was acting on his own responsibility. Then there is the further point, in which I think there is also substance, that after he had reached the age of twenty-one the defendant must be taken to have known his full legal rights. The promissory note had then still three months to run, upon which promissory note, although he is a joint maker, it is admitted that he was really in the capacity of surety; yet knowing that he was surety of this note, he still continued to allow these three months to elapse without raising a single word of protest. There was nothing in the way of repudiation on his part. Such conduct I think goes very far in the direction of amounting to a ratification. Do these facts I have related entitle a man who was a minor when he entered into such a contract in such circumstances, to get now what is practically a *restitutio in integrum* by being held irresponsible on such obligation? It seems to me that if he were to come here to claim a *restitutio in integrum* he would have to prove first of all that he had entered into this contract entirely without any benefit to himself

and without the authority of his guardian. As to that it seems to me there is a great deal to be said, and one does not know whether he was being benefited or not at that time by guaranteeing his father's debt. It is true that the father benefited by it, and though the contract appears a voidable one, the defendant never took any steps to have the contract set aside. I think that the facts go very far to show that he had been tacitly emancipated. Shortly before the due date of the note, the holder of it wrote to this young man asking him to take steps to provide for the note at its due date; he took no notice of the letter, and never raised any defence such as that of minority. This would probably be taken to imply a ratification of the contract. In all these circumstances it seems to me there must be provisional sentence with costs, leaving it to the defendant if he thinks he can do so to succeed in a principal case.

[Plaintiff's Attorney: P. De Villiers; Defendants' Attorney: G. Trollip.]

#### HYDE V. NGEWABE AND OTHERS, AS EXECUTORS ESTATE LATE NGCWABE.

Mr. M. Bisset moved for provisional sentence on a promissory note for £357 5s. 9d., with interest from the 31st December, 1906.

Order granted against defendants as executors, and property declared executable. If the practice of the Court is that letters of appointment should be produced, plaintiff to produce defendants' letters of appointment.

#### ALBERTYN V. ENGEL.

Mr. Toms moved for provisional sentence for the sum of £55, with interest on a bond which had become due by reason of non-payment of interest.

Order granted.

#### HOPKINSON V. CARTER.

Mr. Uppington moved for provisional sentence on a mortgage bond for £1,500, with interest, and that the property specially hypothecated and certain rents be declared executable. The bond became due by reason of non-payment of interest.

Order granted.

#### ILLIQUID ROLL.

#### VOS V. REYNOLDS.

Mr. Roux moved for judgment under Rule 319, for £87 3s. 5d., for services

rendered and moneys disbursed in connection with a certain action, and the administration and final adjustment of the estate of the late John Leonard Shayler, with interest *a tempore moræ* and costs.

Order granted.

#### GENERAL MOTIONS.

IMPERIAL COLD STORAGE  
AND SUPPLY CO., LTD. V. } 1907.  
DISTRIBUTING SYNDICATE } Sept. 24th  
FOR COLD STORAGE.

Mr. McGregor, K.C., for the appellants (the Distributing Syndicate), moved for leave to extend the time to appeal against a judgment of Mr. Justice Maasdorp, until the first day available next month for the hearing of appeals. Mr. Uppington, for the respondents, appeared to consent to the application, and he also asked that two further special cases prepared by the referee should be heard at the same time.

Hopley, J., said he could not bind the Appeal Court to hear the further matters at the same time as the appeal, and ordered the matter to stand over on the application of counsel for the respondent.

#### KOPELOWITZ V. AUERBACH.

Attachment of goods *ad fundandam jurisdictionem*—Foreign defendant—Agent.

*If a foreign firm has an agent within this Colony who is fully empowered to accept service of process on their behalf, the Court will not grant an order of attachment ad fundandam jurisdictionem against them.*

This was an application by Arthur Solomon Kopelowitz upon notice calling upon the firm of A. Auerbach, merchants, of Hamburg, Germany, to show cause why applicant should not sue them by edictal citation, and why certain goods should not be attached *ad fundandam jurisdictionem*.

Applicant alleged that the respondents' late agent, one Schwerts, had entered into a contract with him whereby he, on their behalf, undertook to furnish applicant with credit to the amount of £1,000, to enable him to start business as a general dealer in Montagu. He was an unrehabilitated insolvent, and, by reason of the breach of contract by respondents in their failure to furnish the credit as agreed with Schwerts, who at the time held their general power of attorney, he had suffered damages.



He proposed to institute an action against respondents for damages as aforesaid, and he prayed that certain goods of the value of about £400 belonging to respondents, and at present lying at certain premises in Cape Town, should be attached *ad fundandam jurisdictionem*.

The respondents' position, as disclosed in an affidavit by their present representative in Cape Town, was that Schwes had no power to enter into such a contract as applicant proposed to sue upon without the authority of his principals. That authority had not been obtained. It was furthermore contended that there was no need to sue by edictal citation, as deponent had full power from the respondents to accept all judicial processes. Objection was also taken to the attachment of the goods in question as being unnecessary, and constituting a hindrance to respondents in their business.

Mr. Benjamin, K.C., for applicant. Mr. Close (with him Dr. Greer) for respondents.

Mr. Benjamin, in argument, quoted the case of *Einwald v. German West African Co.* (5 Juta, 86), and contended that these orders of attachment were granted not merely *ad fundandam jurisdictionem*, but also *ad firmandam jurisdictionem*.

Mr. Close submitted that the application was quite superfluous, and that there was no need to ask for leave to sue by edictal citation or to attach the goods, as the respondents employed a duly-authorized agent to represent them in this colony. He quoted Van Zyl's *Jud. Prac.* (p. 110).

Hopley, J.: At this stage it is not necessary to enter into the merits of this case, which concerns a contract entered into here by a tradesman in this country with a foreign firm. He entered into a contract with the accredited agent, holding the general power of that foreign firm, whose domicile is in Hamburg. He entered into the contract which it is alleged has now been broken, and he says that on that account he has a right of action. The only question which arises for my consideration at this moment is whether, supposing he has such a right of action, he has any need to apply to this Court to attach anything belonging to that foreign firm for the purpose of founding or strengthening jurisdiction. The firm seems to be one which exports goods from Germany to Cape Town to be dealt with here by its agent in the fullest possible manner, and there are in Cape Town at the present moment—so it is alleged and admitted—certain goods which could be attached if the Court deemed it necessary. On the other hand, such a business as that of the respondents' requires the goods to be in circulation, and the Court would not order such goods to be attached with the possible result of para-

lysing the business of such firm unless it was absolutely necessary for the purpose of gaining jurisdiction or otherwise satisfying the practice of this Court. Now, the firm of Auerbach have had occasion to change their agent. They have taken away from the agent who entered into this contract with the applicant, his power, and fully conferred it on another, a Mr. Otzen, who now represents them, and whose power of attorney prior to the date of this application the applicant had seen. So far back as July last he saw Otzen's power of attorney. Now, it is stated to-day that Otzen's power is of the fullest description, and authorises him to appear in this Court to accept the jurisdiction and abide the results. But Mr. Benjamin argues that it is not sufficient, and that his client, having a cause of action against the defendant, must go further for the purpose of getting the jurisdiction of this Court firmly established, and that although that foreign firm has placed a person here with the fullest powers, it is still necessary to attach some goods belonging to the firm. I do not think there is any case which goes to that length. A foreigner can accept the jurisdiction of this Court, and this has been frequently done by their empowering an agent with the fullest powers. They do it, no doubt, for the purpose of facilitating their trade. They empower someone they can trust to accept service to fight their legal battles for them and abide the result. They submit themselves through their agent to the jurisdiction of the Court, and do away by such act with any necessity to found or to confirm jurisdiction. Mr. Benjamin has also frankly admitted that the object of the application is to secure some goods upon which the judgment could be executed; but I see no reason to place a foreigner over whom the Court has jurisdiction in a worse position than any other defendant, and I know of no practice to that effect. The application was unnecessary, and is refused with costs.

#### *Ex parte* ESTATE NIEUWOUDT.

Mr. Roux moved for confirmation of the sale of certain property in the estate of the late Susannah Nieuwoudt to the executor testamentary in the estate.

Order as prayed.

#### REX V. NAASON AND ANOTHER.

Juvenile offenders—Whipping—Acts 21 of 1869 and 8 of 1889, Sec. 1.

*Sec. 1 of Act 8 of 1889 does not so modify Act 21 of 1869 as to allow a Magistrate to*

*sentence any boy over the age of 14 to whipping for a first offence.*

Hopley, J.: There was a small matter, *Rex v. Johannes Naason and Petrus Lucas*, which came before me from the Acting Resident Magistrate of Ceres last week, in which these two boys, whose ages are recorded as 15, pleaded guilty to petty theft of a little firewood, and were each sentenced by the Magistrate to receive a certain number of cuts with the cane. The age was recorded on the charge sheet as 15, but there was no evidence or finding of the Magistrate on the point, and I accordingly referred the matter to him with a query, asking him whether he could justify that sentence, pointing out that the Act No. 21 of 1869 allows juvenile criminals not over the age of 14 to be whipped for a first offence, and this was a first offence apparently. The Magistrate has written back his reasons, saying that the boys and their parents were of a respectable class, and he thought that the whipping would have a better effect than to confine them within the gaol, where they would come into contact with criminals. He justifies his sentence by Act 8 of 1889 (section 1), where he says, "It is laid down that where any child under the age of 16 years is found guilty of any offence, whether a first offence or not, he may in lieu of any punishment be apprenticed," and he, therefore, draws the conclusion from that that he is entitled to inflict any punishment whatsoever, and, therefore, that in inflicting a whipping he was acting within his powers under the Act of 1889. That conclusion is founded upon a fallacy. Of course, the Act of 1889 in using the words "any punishment" means only any punishment which the Magistrate is legally entitled to order, and there is nothing in that Act to change the Act of 1869, which confines the power of whipping to children under 14 years of age. The conviction will be sustained, but the sentence must be quashed, and the matter will be sent back to the Acting Resident Magistrate to pass a legal sentence. As this sentence has been hanging over the accused about a week, I might suggest, if he does not wish to send them back to the contamination of the gaol, where presumably they have been confined, pending the execution of his illegal sentence, that he might, under the circumstances, simply admonish them, and send them about their business. This is merely a suggestion from the Court. He has to pass a legal sentence, and the matter will be remitted to him for that purpose.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

FRENCH AND CO., LTD. AND ( 1907.  
OTHERS V. WOODS. ( Sept. 30th.

This was an application to make absolute a certain rule nisi restraining the respondent (Alfred Woods) from performing certain play known as "The Silver King," pending an action to be brought by applicants.

Mr. Upington was for applicant; Mr. Benjamin, K.C., was for respondent.

The rule was granted on the petition of applicants by the Chief Justice on the 12th September, and leave was then given to telegraph the order to Aliwal North, where respondent was appearing, the applicant undertaking to be responsible for any damage respondent might sustain by reason of being compelled to discontinue the performances.

A considerable number of affidavits was read, from which it appeared that the applicants were Samuel French and Co., Ltd., publishers, of Southampton-street, London, and the executors and representative of the late Wilson Barrett. The petitioners stated that in 1882 a drama entitled "The Silver King," was written by Henry Arthur Jones and the late Henry Herman. Rights in the said play were secured and registered at the Stationer's Hall. Petitioners said that they were the holders of the rights. The respondent had been producing the play in the Transvaal and Orange River Colony, and while he was producing the play at Kimberley, in August last, endeavours were made to secure from him the fees which were payable, but no settlement was effected. He thereupon proceeded with his company to the Orange River Colony, and had, notwithstanding the protest of petitioners' representative in South Africa, performed "The Silver King" at Bloemfontein and elsewhere. He was advertised to produce "The Silver King" at Aliwal North on the 12th September, 1907, and also to proceed to other towns in the Colony for a similar purpose. Petitioners' representative had endeavoured to prohibit the respondent from playing the piece, but he was defied by the respondent, and stated that he intended to continue to produce the play. An affidavit by Frank Wheeler was also read, in which he stated that he was the representative of the petitioners in South Africa, with instructions to look after their interests. He spoke of an interview that he had with the respondent in Kimberley in reference to the production of "The Silver King."

An affidavit by the respondent, Alfred Woods, was read, from which it appear-

ad that his position was that he had authority from Frank Wheeler to produce "The Silver King." He had been touring the country in the earlier part of the year with this and other plays, under arrangement with Mr. Frank Wheeler, for a period of three months, and when the tour terminated at His Majesty's, Johannesburg, on or about the 30th April, he arranged with Mr. Frank Wheeler to start a tour from Johannesburg to Cape Town. It was agreed that he should have the use of the wardrobe, scenery, etc., of Mr. Wheeler on the contemplated tour, and the first performance took place at Klerksdorp on the 22nd July, 1907. When they commenced, Mr. Wheeler said he would have to charge a royalty. He said, "I must charge you something, but it won't be much, not more than £1 for each performance." This he (respondent) agreed to pay. No objection was taken to the performances until the company were at Kimberley on the 24th August, when an interview took place between Mr. Wheeler and deponent and their legal advisers. Mr. Wheeler said there had been a good deal of friction, and they had better settle amicably, and he asked for his profits to date, and demanded a weekly settlement. Deponent declined to make other than monthly settlements, and Mr. Wheeler lost his temper and said: "Now, for your — cheek, although I agreed to let you play 'The Silver King' for £1 a night, I will now charge you £5." Deponent subsequently sent £121 to Mr. Frank Wheeler, being his share of the profits of the first month's performances, and £15 for playing rights for fifteen nights. He went on to say that he found that overtures were being made to members of the company, including Horace Hunter and others, to leave the company, so that Mr. Wheeler could start him with "The Silver King." Deponent always had been and was still prepared to render monthly settlements to the said Wheeler, or to pay a royalty of £1 for each production. An affidavit by the manager of the Woods-Williamson Company (Mr. Thompson) was also read, in which he said that it was agreed with Mr. Wheeler that the settlements were to be monthly, and that respondent was to be charged not more than £1 a night.

In an answering affidavit, Mr. Wheeler entered at some length into the history of his business relationships with the respondent. He denied that he had agreed with the respondent that he should be charged not more than £1 for each production, and insisted that he was entitled to weekly settlements of his share of the profits of the tour. He said that he had to send to Cape Town to ascertain what the fee for the playing rights was, and that while he

was in Kimberley, he informed respondent that £4 a night would have to be paid. Deponent said that he gave the respondent notice to terminate the tour. The affidavit of Alfred Wyburd, general manager for B. and F. Wheeler, Ltd., stated that after the receipt of the order at Aliwal North, respondent produced "The Silver King" at Aliwal North on the 12th September. Respondent and the company afterwards went to Burghersdorp, Queen's Town, Molteno, and Cathcart, but the play was not produced. Deponent had seen a statement by Mr. Thompson, the manager of the company, showing a profit of £400, and he had demanded £119, shown to be due to Mr. Wheeler for use of the "properties," share of profits, etc., but he had not succeeded in obtaining the money.

In the course of the affidavits, casual reference was made to the friction which took place between Mr. Woods and the press while he was appearing in Cape Town. It also appeared that Mr. Woods originally met Mr. Frank Wheeler at an hotel in London, and that negotiations took place with a view of providing him with an engagement in South Africa, en route for Australia.

Mr. Upington for applicant. Mr. Benjamin, K.C., for respondent.

Mr Upington said it was common cause between the parties that not a word was said by Frank Wheeler that he was acting as agent for Samuel French, Ltd., in anything, or as agent for the executors of Wilson Barrett. The first question was really whether his clients, Samuel French, Ltd., and the executors of Wilson Barrett, had got the playing rights of the piece. Once that right was established it rested upon Woods to show where he got the right to play. There was not a word in the agreement about the play rights of the "Silver King." An agreement was entered into between Frank Wheeler, in his personal capacity, with Woods, Frank Wheeler to grant the use of wardrobe and scenery for the small tour, and in consideration of that he was to get 25 per cent. of the profits. Wheeler admitted that Woods should be allowed to play the "Silver King." The question was what were the terms of the agreement. Woods said that the agreement was that he was to be allowed to play this piece during the whole of the tour. Taking that as being the case, the tour had been terminated, and reasonable notice had been given to terminate an utterly indefinite contract. Was there anything in the document before the Court to show that Frank Wheeler would have been justified or entitled to enter into such a contract as alleged by Mr. Woods? This play was to be performed for their joint benefit, and the principals in England were perfectly entitled

to stop these two persons in their individual capacities from performing this piece and *a fortiori* they could stop Woods.

Hopley, J., said he did not know whether counsel for the applicant should address the Court at this stage.

Mr. Upington said he would like to hear what his learned friend had to say.

Mr. Benjamin said his learned friend was seeking to draw a fine distinction between Wheeler in his private capacity and Wheeler in his capacity as representing Samuel French and Co. The distinction was a difficult one to grasp. Wheeler was the agent here, and he had authority to allow the performance of this play, and what the fees to be charged in any particular case were left solely to his discretion. The only question was what terms did Mr. Wheeler arrange? It was clear that it was contemplated by him that the "Silver King" should be played. Wheeler was aware of the movements of this company. The consent of the agent of Samuel French was given for the purpose of this piece. Counsel submitted that the balance of testimony was in favour of the position taken up by the respondent that this tour was to continue as long as Woods found it profitable right down to Cape Town. It was a matter solely within his discretion, and his discretion would be determined by the success or the failure of the tour. The respondent was quite prepared to give security pending an action. With regard to the continuance of the tour, the balance of testimony was also in favour of respondent. Counsel submitted that the real history of the case was that there had been an arrangement originally for a monthly settlement, but that Wheeler was pressed for money, and he wished to have weekly settlements. He was surprised no doubt that the tour was turning out a success, and his share of the profits for the first four weeks of the play, apart from the royalties, was over £100. Wheeler induced the members of the company to leave Woods—a most improper action on his part—and started these people on their own independent tour. That in every way he sought to embarrass the respondent was clear from the telegrams, and utterly irrelevant matter had been put before the Court on behalf of the applicant.

[Hopley, J.: On both sides, I think.]

Mr. Benjamin: The matter put before the Court on behalf of the applicant was really intended to prejudice the Court against the respondent. For instance, there was the reference to the assault at Kimberley. Counsel contended that no prejudice could be done to the applicant until the hearing of the action, and he submitted that the balance of justice was entirely in favour of the respondent, who should be allowed to continue the performance of this piece.

Mr. Upington having been heard in reply:

Hopley, J.: A great deal of irrelevant and unnecessary matter has been introduced into this motion, and had it not been that both sides seem to me to be equally guilty, I should have asked the Registrar to call the attention of the Taxing Master to the fact, and see that the enormous expense of some of these affidavits should be disallowed or considerably cut down, but, as I say, both sides seem to have indulged equally in the indiscretion, and I shall let them meet their own difficulties in their own way. The application is for the extraordinary remedy of an interdict on motion, and first of all it is necessary for the applicant in such a case to satisfy the Court that he has a perfectly clear right. Now, that point in the case has been considerably obscured by the amount of entirely irrelevant matter which has been introduced. It is perhaps inseparable from the circumstances, seeing that the applicants are represented here by Messrs. B. and F. Wheeler, Limited, and Messrs. B. and F. Wheeler, Limited, have also had an understanding, a contract of some sort or other—its exact nature I need not now determine—with the respondent, so that it becomes very difficult even for a trained mind to dissociate entirely the actions of Messrs. Wheeler in their personal capacity from those with which we are concerned in their representative capacity as the agents of Messrs. Samuel French and Co., Limited, and the executors of the late Mr. Wilson Barrett, who are the proprietors of the acting rights of the "Silver King." It is, however, perfectly clear that the respondent never has made any contract with the applicants of to-day, who are the proprietors of these playing rights. The respondent has been touring the country since about the 20th July with the "Silver King" under an arrangement of the 4th July made with Mr. Frank Wheeler when he was in Johannesburg. That agreement, which is attached to the affidavits, is rather short and inexplicit in some of those details which become important as to this present motion, but, at all events, there is one thing that is perfectly clear in it, and that is that it is purely an agreement between Mr. Frank Wheeler or Messrs. B. and F. Wheeler (I suppose he was acting for them) and the respondent in this case. Now, it may very well be that different views may be taken as to the guarantee with regard to the "Silver King" when such an agreement as that was made. It may very well be argued hereafter that Mr. Woods was under the impression, and that he might be rightly under the impression, from the legal point of view, that Messrs. Wheeler in agreeing with him, if they



did agree, that the "Silver King" should be staged during this tour, also guaranteed that they had the right to stage the "Silver King," and that they would pay any acting rights there may be to the proprietors of the play. It may be that such a construction might be put upon such a contract, but one thing is quite clear, and it is that they never said that, as agents of the proprietors, they guaranteed that the respondent should be allowed to play this play throughout this tour or so long as it may last. Now, Messrs. Wheeler come here and say: "We are not Wheeler, Ltd., at all, but here is a man going about the country playing this play under an agreement with one of us, it is true, but not under any agreement with our principals as agents of French and Co., Ltd., and of the estate of Wilson Barrett, and we ask that he may be stopped." Whether they are doing this for the purpose of putting pressure upon Mr. Woods to settle or get a settlement of their private complications with him, whether they are doing it, as has been suggested, from spite, because they have become annoyed with him, or whether they are doing it from any other reason whatsoever, it seems to me that this is a matter, which I think it has been fairly argued can well be settled afterwards between them. The Court has to see whether the applicants have come here with a clear right, and, as far as I can see, legally they have. They have a clear right to the acting rights and to make charges for each time the play is acted, and, therefore, if somebody is infringing these rights, and they are being irreparably damaged, the Court would interfere on motion even if there were other matters which might perhaps make it rather doubtful how the matter might finally end. They have their clear right. Is there anything in the way of irreparable damage they are likely to sustain if the play is allowed to be acted? Purely out of pocket expenses they are not likely to suffer. The play is there, it is a good property, and it is not easy to put that on the same basis as ordinary movable property which somebody or other is destroying or wasting. The play will be as good a play after a certain amount of acting as before. Still, this is part of the estate of Wilson Barrett and part of the property of French and Co., Ltd., and it ought to be bringing its proper return, and they say here it is being played by a person in the Colony of the Cape of Good Hope, and he is not giving to us any proper returns for it. The answer to that is: "You are not irreparably damaged by that; you can fairly wait for the slower process of an action," to which the reply is: "Mr. Woods is not a man of any substance, he is a man on his way to Australia, he may be going

at any time, he is an actor touring about the country in a precarious position pecunarily, and, therefore, unless he be stopped now our property may be damaged and become stale in the eyes of the public of this colony, when someone else, who will pay us the proper fees, may wish to go on tour with the play, and in that respect we are irreparably damaged." It seems very hard to combat that view, and the only position I can see that the respondent could take in the matter to get himself allowed to produce this play is the one suggested by Mr. Benjamin, and that is that he give substantial security in the way of meeting the proper fees when they hereafter can be ascertained. I think that is the only arrangement the Court under the circumstances can give effect to by its judgment. Leaving it to Messrs. Woods and Wheeler to adjust their own private quarrels in the best way they can, and adjust their own accounts in the best way they can, and settle their own matters in the best way they can: putting all this entirely on one side, the only point the Court has to consider is whether it should accede to the application. I think the Court should intervene to stop Mr. Woods from playing the "Silver King," but, at the same time, give him the opportunity, if he can find the necessary security, to go on with the play and play it as much as he likes during this tour. The order of the Court will be that the rule be made absolute, to be suspended if respondent finds security in the sum of £200 to the satisfaction of the Registrar, to abide the result of an action, with leave to the applicants to bring their action for their fees or royalties or any other sum due to them, and leave granted to the respondent also to bring his action to have this order set aside or to obtain any other relief he may be entitled to in the premises, costs to abide the result of such action, but if the action be not brought by either side before the end of next term, then there will be no order as to costs.

[Applicants' Attorneys: Van Zyl and Buissinné: Respondent's Attorneys: Michau and De Villiers.]

*Ex parte KATZIN.*

Mr. Swift moved, as a matter of urgency, for an order authorising the attachment of certain goods and chattels, the property of one S. W. Garne, pending an action to be brought by petitioner for recovery of the sum of £4 2s. 6d., due to the Empire Steam Laundry, of which the petitioner is managing director. Peti-

tioner said that the respondent owed the debt for washing done by the laundry, and had failed to pay the debt, though demands had been made. Respondent had taken his passage to England by the S.S. Gascon, which was due to leave Table Bay at 4 o'clock this afternoon. There were no assets except his goods and chattels, which had been taken to the ship.

Hopley, J., asked counsel under what Rule of Court he applied?

Mr. Swift said that he applied under the common law.

[Hopley, J.: You want to attach some of his luggage, because you cannot attach his person?]

Mr. Swift: That is so, my lord. The amount is under £15, and we cannot attach his person.

[Hopley, J.: I have never heard an application like that.]

Mr. Swift said that it had frequently been done.

Hopley, J., pointed out that no judgment had been obtained against the respondent.

Mr. Swift said that unless the Court granted an order, the applicant would have no remedy against the respondent.

Hopley, J.: Very likely. There are lots of people who give small credits and who have no remedy.

Mr. Swift said that he believed there was authority for the application, and he quoted from Van Zyl's Judicial Practice (pp 159 and 161).

Hopley, J.: Without saying that the applicant in this case is wrong in the

procedure he has chosen to adopt, and without saying that there is not some process by which a debtor who owes less than £15, and who is about to depart from the jurisdiction of this Court, may be compelled to pay his creditor, and without being able to go into the law at such sudden emergency, I may say it is a curious thing that no one in court, and I should think not the oldest practitioner of the court, nor apparently Mr. Van Zyl in his "Judicial Practice," can remember a single instance of this sort as occurring. It is quite possible that creditors may have thought that amounts of £15 were too small to trouble about, and to try and stop their debtors from leaving, but it may also be that there is a quite well understood notion abroad that if a man does not owe as much as £15, you have really no remedy. I do not say that this is, nor that it should be the law. All I say is that when I am asked suddenly to do an unprecedented thing of this sort, I should be absolutely convinced that I am right in doing so, and counsel admits that the matter has come so suddenly upon him that he has not been able to find any direct authority or anything in our law which would authorise me to do what I am asked to do in this case. At present I can see no good reason for supposing that this remedy has been neglected all these many years by creditors without some good, sound, substantial legal reason underlying their conduct. There will be no order on this application.



# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.                      { 1907.  
  } Oct. 1st.

Mr. De Waal moved for the admission of Jacobus Willem Loubser as an attorney and notary.

Application granted and oaths administered.

#### PROVISIONAL ROLL.

DONNELLAN V. KOHNE.

Mr. D. M. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ESTATE FRIEHLICH V. DE VILLIERS.

Mr. D. M. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WICHT V. LYONS.

Mr. Rowson (for plaintiff) moved for the provisional order for the sequestration of defendant's estate to be superseded.

Provisional order superseded.

S.A. MUTUAL LIFE ASSURANCE SOCIETY  
V. FILLIS.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £3,300, with interest from the 1st January, 1907, bond due by reason of non-payment of interest. Counsel

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applied for £4, insurance premiums, and for the property hypothecated to be declared executable.

Order granted.

ESTATE WELLS V. PATTERSON AND  
CRUICKSHANK.

Mr. De Waal moved for provisional sentence on a mortgage bond for £3,000, less £130 paid on account, with interest from the 1st July, 1906, bond due by reason of non-payment of interest. Counsel also applied for £17 10s. insurance premiums, and for the property hypothecated to be declared executable and the rents attached.

Order granted.

HARRIS V. GORDON.

Mr. Rowson moved for provisional sentence on an unsatisfied judgment of the R.M. Court at Woodstock, and to have defendant's salary, now due or about to become due, declared executable.

Order granted as prayed.

#### ILLIQUID ROLL.

WIENER AND CO., LTD. V. { 1907.  
KOPELOWITZ.                      } Oct. 1st.

Mr. D. M. Buchanan moved for judgment, under Rule 329d, for £127 19s. 9d., for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

STANDARD BANK V. FREEMAN.

Dr. Rainsford moved for judgment under Rule 329d for £963 14s. 3d., balance of overdraft, with interest and costs.

Order granted.

**WBENSCH V. JOOSTEN.**

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £22 3s. 4d., for professional services rendered, with interest *a tempore morae* and costs.  
Order granted.

**INSOLVENT ESTATE FALSE BAY QUARRY CO. V. HIRSCH.**

Mr. Close moved for judgment under Rule 319, for £502 2s. 8d., amount of deficiency as per second liquidation and distribution account of the insolvent estate of the company, of which defendant is one of the partners.  
Order granted.

**ZEVENFONTEIN ESTATE, LTD. V. VILJOEN.**

Mr. J. E. R. de Villiers moved for judgment, under Rule 319, in default of plea, for £280, with interest from the date of sale of each erf mentioned in the declaration, and 6 per cent. from the date of summons, and costs.  
Order granted.

**CLARABUT V. CLARABUT.**

Judicial separation — Consent paper.

*The Court will grant judgment on a deed of separation in terms of a consent paper.*

Mr. Close moved for judgment, under Rule 319, on a deed of separation, in terms of consent paper.

Hopley, J., said he saw that a question had been raised recently in the Eastern Districts Court as to whether this was a correct practice.

Mr. Close said that it was an established practice in this Court to give judgment in such a case as this. The defendant had been summoned, and declaration had been filed. A deed of separation had been entered into, and the judgment of the Court was now sought upon it. Counsel cited *Powrie v. Powrie* (7 C.T.R., 191), *Burslem v. Burslem* (13 C.T.R., 1,200), and *Liebenberg v. Liebenberg* (14 C.T.R., 211).

Hopley, J.: This application seems to me to be in accordance with the practice of the Court, and judgment will be given in terms of consent.

**MINNAAR V. GAAL.**

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £568 2s. 9d., less £264 paid on accounts, pur-

chase price of certain granite macadam, with interest *a tempore morae*, and costs.

Order granted.

**REHABILITATIONS.**

Mr. De Waal applied, under the Act 38, 1884, for the rehabilitation of George Hugh Handler.

Granted.

Mr. P. S. T. Jones applied under section 14 of Act 38, 1864, for the rehabilitation of Morris Breger. Counsel read a letter from the trustee in the insolvency opposing the application, and explaining that there were no funds in the estate to enable him to appear to oppose. Counsel also read an affidavit by the applicant, who said that the trustee was quite mistaken in saying that he (applicant) was not present at the second meeting of creditors. He went to Austria, having been given to understand that his presence was not required at the third meeting. The other partner in the firm remained in the Colony.

Hopley, J.: I think in this case the application should be renewed in six months. If the trustee wishes to oppose, he may then do so by affidavit. The course he has adopted is rather an irregular one; still, he has drawn the Court's attention to the fact that there were irregularities in the keeping of the books, and he accuses the insolvent of having been away from the second meeting. In that he seems to have been incorrect, but he may have meant the third meeting, and he reports the insolvent as having absconded. Leave will be given to apply again in six months, the trustee and the creditors must have notice in the ordinary course, but applicant need not again file an affidavit of full and fair surrender.

Mr. J. E. R. de Villiers applied under section 117 of the Ordinance for the rehabilitation of Robert Warner, senior.

Granted.

Mr. Weesels applied for the release of the estate of Pieter Hendrik de Villiers from sequestration.

Granted.

**Ex parte LUNTZ BROS.**

Release from sequestration — Rehabilitation—Ord. 6, 1843 (Sec. 106).

*An insolvent firm had entered into a composition with their creditors—it did not appear whether all the creditors had consented. Thereafter the second meeting of creditors*



was held, but no trustee was appointed and nothing further was done.

Held, that insolvents were entitled to release from sequestration, but not to rehabilitation under Sec. 106 of the Insolvent Ordinance.

Report of Ex parte Bouwer ("Bowern") 1, S.C. 48, corrected.

Mr. D. M. Buchanan applied for the release of the estate of Luntz Bros. from sequestration, and for their discharge in terms of section 106 of the Ordinance. Counsel cited *Russouw's case* (12 S.C., 172), *Bowern's case* (1 S.C., 48), and *Ex parte Wolff* (20 S.C., 200). He said that applicants had entered into a composition with the creditors. A second meeting of creditors was held, but no trustee was appointed.

[Hopley, J.: I could grant you a release from sequestration; I do not think you are entitled to anything beyond that.]

Mr. Buchanan suggested that the Court should allow the release of the estate and reserve any rights of creditors so as to prevent any creditor who may be lying by from taking further proceedings against the applicants.

[Hopley, J.: I do not see how my order can possibly prejudice anybody's rights. I simply release the estate from sequestration, and let others take their own course as to what their rights are. If they have certain rights, then their rights will not be prejudiced, and the present applicants' rights, of course, will not be prejudiced either. You wish the applicants to be entirely rehabilitated. As far as I can see, the cases quoted only go the length of releasing their estates from sequestration.]

Mr. Buchanan: We will be quite willing to accept that, as long as it is understood that it will not prejudice the creditors if any attempt is made by those who have not entered into the composition to enforce their claims in full.

[Hopley, J.: I cannot say that that would be the effect of my order. That is a point that would have to be decided if a creditor came and sought to have a full payment of his debt. It seems to me that on the authorities, as far as they have gone, the applicant is entitled to have his estate released from sequestration. I cannot see that the authorities go so far as to show that he is entitled to rehabilitation, or a discharge in that sense. What the effect may be for the applicants I am not concerned about. An order will

be granted for the release of the estate from sequestration.]

At a later stage the papers in the case of "Bowern" were produced, and

Hopley, J.: I find that there is some error in the report of this case. In the first place, the name, as I suspected, ought to be "Bouwer." In the second place, there was never an application for anything but a release from sequestration. That was all that was asked for in the petition. The order of the Court is "release from sequestration granted as prayed," so that there was no idea at all of granting a rehabilitation under that. As I suspected all along, it was not a rehabilitation at all. It was simply a release from sequestration, and that was all that, under the circumstances, the Court would be entitled to grant. That is as far as I went this morning. I shall ask the Registrar of the Court to make a note that the case is badly reported. The Bar might do the same, and thus help some future Court in the matter.

#### BOOTH V. BOOTH.

Mr. D. M. Buchanan moved for leave to the applicant to take out the rule nisi granted by the Court on an application for leave to sue *in forma pauperis*, and for the edictal citation also granted to stand over for the present. Counsel explained that the Court granted a rule nisi and leave to sue by edictal citation at the same time, but it was now found that there would not be time to publish the citation before the return day fixed by the Court.

Hopley, J.: Leave will be granted to take out and serve the rule nisi only at the present time, leaving the matter of citation embraced in the existing order in abeyance *pro. tem.*

#### GENERAL MOTIONS.

WOLSTENHOLME V. WOLSTEN- ( 1907.  
HOLME. { Oct. 1st.

Mr. Rowson moved for an amendment of a certain order granted by the Chief Justice in an action brought by the applicant against the respondent for divorce. The Chief Justice granted a decree of divorce, subject to proof of service upon the defendant. It now appeared that the applicant's attorney had inadvertently omitted to give the defendant notice of the proceedings for divorce, and the present application was for the notice served on the respondent on the 24th September to count in lieu of the notice which should have been given before the hearing.

Mr. Justice Hopley: I think you had better mention this application to the

Chief Justice, who made the order that you desire to be amended. I certainly do not feel inclined to interfere.

COLONIAL GOVERNMENT V. ESTATE  
CLAASENS.

This was an application upon notice to the respondent estate to show cause why a third arbitrator should not be appointed, under Act 29, 1898, section 8, in connection with certain arbitration proceedings to determine the price to be paid for land acquired by the Railway Department on the route of the Victoria West-Carnarvon railway.

Mr. Howel Jones, K.C., was for applicants; Mr. P. S. T. Jones was for respondents.

Affidavits were read, from which it appeared that the arbitrators appointed by the respective parties had disagreed, and the parties were now unable to agree upon the appointment of an umpire. Each of the parties submitted nominations, and objections were raised by the other side on various grounds.

Order granted, appointing the Hon. J. N. P. de Villiers as third arbitrator, failing him, Mr. J. Collet, and failing both, Mr. A. J. de Villiers, and failing these three, Mr. N. J. S. de Villiers, costs to be costs in the arbitration.

*Ex parte* ESTATE FRASER.

Mr. Close moved, on the petition of J. B. Cleghorn and G. Jopp, as *curators bonis* of the estate of Thomas Helieson Fraser, of Cape Town, for leave to surrender the estate as insolvent. Petitioners stated that, owing to the extreme depression, which had caused a falling off of the rents of the property, petitioners had for some considerable time past experienced the greatest difficulty in carrying on the administration of the estate. In June last an application was made to the Court for leave to mortgage or sell certain of the property. This application was granted, but, although every effort was made by petitioners, it was found impossible to raise the amount required on mortgage or to sell property which would sufficiently rid the estate of its liability, and enable petitioners to administer the same in a proper manner. On the 3rd September last a meeting of creditors was held, at which it was proposed to assign the estate. The Standard Bank, which had a claim of £64,000, intimated that they would not agree to the assignment, but that they considered voluntary surrender was the proper course. In view of the position of the estate, petitioners said it seemed advisable that it should be surrendered. Counsel said that the

application was brought under section 3 of the Ordinance.

Leave was granted to the *curators bonis* to surrender the estate, costs of this application to come out of the estate.

Hopley, J. (in answer to counsel) said that the question of the curators' remuneration must come up for determination in the ordinary course.

*Ex parte* FAGAN

Mr. Swift moved, on behalf of petitioner, who is one of the trustees in the insolvent estate of Mr. C. Barnard, for confirmation of sale of certain ground at Somerset West to petitioner. The co-trustee and the mortgagees consented.

Order granted as prayed.

*Ex parte* SMIT.

Mr. J. E. R. de Villiers moved for cancellation of a certain mortgage bond hypothecating property in the division of Clanwilliam. Petitioner said that the indebtedness had been paid off, but the bond had been lost or mislaid.

Rule nisi granted, returnable on the 29th October, rule to be served on the executor of the estate of the late J. H. Norgarb, and to be published once in "Ons Land."

*Ex parte* FERREIRA.

Mr. Toms moved for leave to petitioner, who resides at Knysna, to sue her husband, Cornelius J. Ferreira, *in forma pauperis*, for restitution of conjugal rights, failing which a decree of divorce.

Rule nisi granted, subject to certificate by counsel, rule returnable on the 1st November, service to be effected on the father of the respondent, and proof to be given on the return day that the rule has reached respondent.

*Ex parte* BARTIE.

Mr. P. S. T. Jones moved for leave to petitioner to sue her husband, John Wm. Bartie, late of Observatory and Kalk Bay, by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. Respondent's present whereabouts were unknown.

Hopley, J., commented on the paucity of information in the petition. The respondent, he said, was alleged to have left his wife a few months ago, and there was nothing to show that he intended to desert her. It might be that he was in such a position that he could not return to her, and that he had not maliciously deserted her. It might be, indeed, that he was dead,

Mr. Jones pointed out that the petitioner said that some little time earlier respondent left her, but returned again.

[Hopley, J.: That fact does lend colour to the theory of desertion. I had overlooked that portion of the petition.]

Leave granted to sue by edictal citation, citation returnable on the 1st April, 1908, personal service, failing which, publication in the "Gazette," and in the weekly editions of the "Cape Times" and "S.A. News" once every month for the next four months.

*In re* BRITISH STEAM LAUNDRY, LTD.  
(IN LIQUIDATION).

Mr. Wallach moved for confirmation of the official liquidator's first and final report. The report had duly lain for inspection, and no objection had been raised thereto.

Report confirmed, company dissolved, and official liquidator's fee fixed at ten guineas.

*In re* PETRUSVILLE PROSPECTING  
SYNDICATE, LTD.

Mr. Wallach presented the first report of the official liquidator, and applied for the usual order.

Ordered that the report lie for inspection for 14 days at the Master's Office and the liquidator's office, one publication of notice in the "Midland News" and "Ons Land."

*Ex parte* ESTATE HAYWARD.

Dr. Greer moved, on the petition of the executor testamentary, for an order authorising transfer of certain property in accordance with an agreement entered into between the parties concerned. The Master's report was favourable.

Order granted as prayed, subject to the Master's approval of the terms of the bond to be passed, and Mr. G. N. Hayward appointed curator ad litem for the purpose of assisting the minors to pass the bond.

WILKINSON V. WILKINSON.

Mr. Inchbold moved for a certain rule nisi interdicting respondent, Peter W. J. Wilkinson, from dealing with certain property in the joint estate of applicant and respondent, to be made absolute.

Rule absolute.

KOENIG V. FRIEDMAN.

FRIEDMAN V. KOENIG.

Mr. Toms appeared for Koenig (plaintiff in the action); Mr. W. Porter

Buchanan, K.O., appeared for Friedman (defendant in the action).

In the first matter, the plaintiff asked leave to have a Commissioner appointed to sit at Kimberley to take his evidence and that of five other persons.

In the other matter, the defendant asked leave to have a Commission appointed to take his evidence in German South-West Africa.

It was stated that the amount in dispute between the parties was very small, viz., about £48.

Hopley, J., said he thought it would be much better if the evidence could be given before a Commission sitting within the jurisdiction, say at Upington.

Mr. Buchanan did not object to this proposal, but he said that he did not see how, in that event, the case could be heard next term. He thought the case had better stand over until the February term.

Mr. Toms said that there had already been considerable delay.

Both applications were granted. Mr. F. J. Collison, barrister-at-law, was appointed commissioner to take the evidence of Koenig and his witnesses at Kimberley, and the R.M. of Upington, and failing him, the Assistant R.M., commissioner, to take the evidence of Friedman, costs of both applications to be costs in the cause. The case was ordered to be taken off the roll for the 15th October, so as to be set down for some other convenient date.

*Ex parte* LIQUIDATORS S.A. CO-OPERATIVE DAIRY CO.

Mr. J. E. R. de Villiers moved, as a matter of urgency, on the petition of Peter Davidson and Reginald Barker, as official liquidators of the South African Co-operative Dairy Company, for leave to enter into a certain arrangement for the letting of the company's premises and machinery. Petitioners said that among the assets were creamery buildings and machinery situated at Adelaide, which were now shut down, business having ceased, and proceedings were being taken for the compulsory winding-up of the company. On the 23rd September a meeting of former shareholders and cream suppliers of the company was held for the purpose of considering some mode of continuing the dairy business at Adelaide pending the final liquidation of the company. As a result of that meeting, petitioners had received an application from the former directors for the hire of the dairy premises and plant until the liquidation shall have been completed. As the premises were not at present in use, and as it would be in the interests of the creditors of the company that petitioners should be in a position to dispose of the concern as one in which

business is being carried on, petitioners were, subject to the Court's sanction, agreeable to let the premises and plant as aforesaid. They asked the Court for some direction as to the rent to be charged to the lessees. Mr. De Villiers said he recognised the difficulty of asking the Court to fix the rent.

Hopley, J.: I quite agree that it is a most desirable thing to do, instead of having the plant lying idle all the while. I do not, however, see how I can fix the rent. I think the best thing would be for the liquidators to make the best bargain they can. An order will be granted as prayed, the liquidators to arrive at the amount to be charged for rent with the lessees, and in the event of not being able to agree they may apply to the Court, giving full information.

#### *Ex parte LANG.*

Dr. Greer moved, as a matter of urgency, on the petition of Frederick J. C. Lang, hotel manager, Claremont, for the attachment of certain moneys in the hands of Christopher Brady, attorney, Cape Town, due to one Samuel Lang, pending an action to be instituted by petitioner to recover £20 balance due to him from the said Samuel Lang for commission. Respondent was stated to be in the Transvaal.

Order granted for the attachment of the moneys in the hands of Mr. Brady, as stated, *ad fundandam jurisdictionem*, the said moneys to be placed in the hands of the Registrar of this Court, pending an action to be instituted, and leave granted to sue respondent by edictal citation, personal service to be effected, returnable on the 1st November.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### REVIEW.

REX V. JOSEPHS.

{ 1907.  
Oct. 8th.

Liquor—Act 28 of 1898, Sec. 4—  
Voters' list—Native voter.

*As soon as a voters' list has  
been compiled and initialled*

*by the Civil Commissioner, any  
aboriginal native, whose name  
appeared thereon, is entitled to  
be supplied with liquor, even  
before the said list is printed.*

Hopley, J.: A case came before me some time ago from the Magistrate's Court in Namaqualand, of Rex v. John Josephs, a coloured labourer, who was charged with contravening section 4 of the Act 28, 1898, in that he procured, as agent on behalf of one Basson, a Damara, some brandy, which he bought or received in contravention of the terms of the liquor licence. He pleaded not guilty, but was found guilty. It would appear that Josephs himself is entitled to buy brandy, and the point the Magistrate had to consider was whether at the time Basson was entitled also to have brandy. Basson, it would appear from the evidence, had not been on the voters' roll for 1905, and the voters' roll for 1907 had been completed by the Magistrate, and initialled by him, but had not yet been printed at the date when the brandy was supplied to Josephs, admittedly, for Basson. Basson is a smelter at some copper works, and had been put upon the voters' roll for 1907. As I say, this voters' roll had been considered by the Magistrate and initialled by him, while Civil Commissioner, so that it was all ready except the printing. The Magistrate held in those circumstances that as in an election—as far as I can follow his reasons—a printed copy of the voters' roll would have been necessary for the purpose of carrying out that section, and as no printed copy had yet been made, Basson, therefore, was not yet upon the voters' roll, and not yet entitled to buy brandy, and that, therefore, Josephs must be convicted. As far as I can see, on looking into the Act, the voters' roll was a voters' roll for 1907, and the Act said nothing about the printing to make it a completed roll. The conviction, I thought, was wrong, and I referred the papers to the Attorney-General, who, after looking into the matter, has sent me his opinion, and his view of the matter is that the roll was a completed roll, that the mere fact that it was not printed made no difference, that, therefore, Basson was entitled to buy brandy, at the time being on the voters' roll for 1907, and that in that case Josephs ought not to be convicted. The conviction must, therefore, be quashed.

### ADMISSIONS.

Mr. J. E. R. de Villiers moved for the admission of David Johannes Philippus Scholtz as an attorney and notary.



Application granted, oaths to be taken before the Resident Magistrate of Ventersdorp.

Mr. Toms moved for the admission of George Alfred Tunbridge as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Cradock.

### PROVISIONAL ROLL.

#### HARGREAVES AND NOURSE V. SEKHOSANA.

Mr. P. T. Lewis moved for provisional sentence on a mortgage bond for £150, with interest at 10 per cent. from the 22nd July, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### WESTERN WINE, BRANDY, AND SPIRIT CO., LTD. V. MOORE.

Mr. Struben moved for a decree of civil imprisonment on an unsatisfied judgment for £11 and taxed costs.

Order granted.

#### PRINCE, VINTCENT AND CO. V. SIEFF.

Mr. Payne moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### FRANK V. ROGERS.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £190, with interest from the 13th June, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### HOCKLEY V. TAYLOR, TRADING AS TAYLOR AND CO.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### EDWARDS V. KITCH.

Mr. P. S. T. Jones moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Wynberg, for £9 4s., due on a promissory note, and £2 15s. 7d., taxed costs, and 12s. 6d., messenger's fees, and

for a certain inheritance derived by defendant under the will of his father to be attached.

Order granted as prayed.

Some time later the defendant appeared, and asked for leave to reopen the matter as he had been under a misapprehension as to the time. He said he desired to have a suspension of execution, as he only received £5 a month from the estate, and he was without employment.

Hopley, J., requested the parties to try to come to an arrangement, and ordered the matter to stand over.

At a later stage the matter was again mentioned, and the Court granted a suspension of the order already made, upon payment of 10s. a month by the executor of the estate, with leave to the plaintiff to move the Court, when so advised, for an increased order. Defendant was meanwhile interdicted from disposing of his interest in the inheritance until the debt and costs be satisfied.

#### HOLMES V. MARCUS.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £30, less £5 paid on account, with interest, bond due by reason of notice having been given; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### SMUTS V. BEYERS.

Mr. Ingram moved for provisional sentence on a mortgage bond for £250, with interest from the 1st January, 1907, bond due by reason of the non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ILLIQUID ROLL.

#### STANDARD BUILDINGS, LTD. (JOHANNESBURG) V. WHEELER.

Mr. D. M. Buchanan moved for judgment under Rule 329d for £905 6s. 3d., in terms of certain agreement of lease, with interest *a tempore morae* and costs.

Order granted.

### REHABILITATION.

Mr. Payne applied, under section 117 of the Insolvent Ordinance, as amended by section 14, Act 38, 1884, for the

discharge of Lipman Abrams and Abel Kapelus, trading as Abrams and Kapelus.

Discharge granted.

### GENERAL MOTIONS.

*Ex parte* INSOLVENT ESTATE ( 1907.  
KOPELOWITZ. ) Oct. 8th.

Mr. Toms moved, as a matter of urgency, on the petition of Alfred Wills and Abbott, merchants, Cape Town, for the appointment of a *curator bonis* in the insolvent estate of Arthur Solomon Kopelowitz, general dealer, Montagu, with power to carry on the business and dispose of the perishables.

Order granted, appointing Mr. Shaw as *curator bonis*, with powers as prayed.

### IMPERIAL COLD STORAGE AND SUPPLY CO., LTD. V. DISTRIBUTING SYNDICATE FOR COLD STORAGE.

This was an application for an extension of time within which to prosecute an appeal from a judgment of Mr. Justice Maasdorp, sitting as a Divisional Court.

Mr. McGregor, K.C., was for applicants; Mr. Upington was for respondents.

It appeared that respondents raised no objection to an extension, but desired that certain special cases should also be heard at the same time as the appeal. To this applicants raised no objection.

By consent, an extension was granted until the ensuing term, costs to be costs in the cause.

Hopley, J., said that it would be left to subsequent negotiations to arrange for the other matters to be heard at the same time as the appeal.

### *Ex parte* ESTATE BASSARDIEN.

Dr. Greer moved, on the petition of the executor testamentary, for leave to mortgage certain estate property, in order to satisfy a bill of costs, and for an order releasing petitioner from his office as executor.

Leave granted to the executor to further mortgage the property as prayed, and ordered that he be hereafter relieved of his trust.

### *Ex parte* BECHUANALAND PRESS, LTD.

Mr. D. M. Buchanan moved for a certain rule nisi to be made absolute appointing J. P. Frylingh as official liquidator of the company, and applied for the appointment of Messrs. Syfret, God-

lonton, and Low, attorneys, to assist the liquidator under section 151 of the Companies' Act.

Order granted.

### *Ex parte* WESSELS.

Dr. Greer moved, on behalf of petitioner, a spinster, of Cape Town, for leave to sue, in *forma pauperis*, the estate of the late James Jacobus Gabriel, for damages for seduction. Counsel cited *Carelse v. Estate De Vries* (16, C.T.R., 787).

Subject to counsel's certificate of *probabilis causa*, rule granted, returnable on the 22nd October.

### MAHOMED V. WITTON.

This was an application calling upon respondent to show cause why applicant should not be granted leave to sue him by edictal citation for £14 19s. 10d., and why certain immovable property should not be attached *ad fundandam jurisdictionem*.

Dr. Greer was for applicant, a general merchant, of Maitland; Mr. Toms was for respondent, who resides in Johannesburg.

Affidavits having been read, counsel were heard in argument.

Dr. Greer cited *Wolfson v. Crowe* (14, C.T.R., 682).

Mr. Toms cited *Rogerson v. Meyer and Berning* (2 Menzies, 28).

Hopley, J.: In this matter it would appear that some moneys had got into the hands of the agents for the respondents under rather peculiar circumstances. Applicant had been sued in the Court of the Resident Magistrate of Woodstock, and, as far as I can see, on the affidavits, entirely without his knowledge, the summons having been pinned on the last known place of residence, judgment was obtained against him by default, and the first he knew of any of the proceedings was that some of his goods were attached in a place which they were quite able to find, and in which he was then carrying on business. One would have thought that if any little trouble had been taken in the first instance, the man could have been served at this address, so that there would not be judgment by default. Then, under duress of the judgment, and under protest, the amount of the judgment and costs, some £14 odd, was paid over to the then plaintiff in the Magistrate's Court. But the defendant at once caused steps to have the case re-opened, and upon the rehearing of the case with all the additional evidence adduced, which ought to have been adduced in the first instance before the Magistrate, if the case had been properly brought on, the

Magistrate determined that the merits of the case were in favour of the defendant, and reversed his judgment. One would have thought then that the agents would have handed back to applicant at once the money so obtained by them, because the whole thing meant that by the judgment they had obtained moneys under duress, which ought never to have been obtained by them. But, instead of doing so, they have retained the moneys for some reason which I cannot understand. Now, there is the present application, because the respondent is out of the jurisdiction. It is said by the applicant that the respondent has property which is within the jurisdiction, and, unfortunately, he mentions property as being immovable property, and it is said that there is no such immovable property, and that, therefore, no such jurisdiction can be available against him. Well, that is a question of fact. It may be that he has no immovable property. Then will come the further question: has he any goods or movable property under this Court's jurisdiction which may be attached so as to found jurisdiction? It would appear that he has an agent here who says that he is entitled to collect rents for him and other sums of money, and, therefore, it would seem most highly probable that he has from time to time this property within the jurisdiction, and that his agent handles that property in this jurisdiction, and that, therefore, if the process of the Court were now sought to be employed, it can be obtained by bringing this man, who was formerly under its jurisdiction, again within the jurisdiction. Certain immovable property is mentioned in the petition. As far as getting jurisdiction over the respondent is concerned, I think it would be cheaper and more just to the parties to make a more general order, so as to include all property or goods of the respondent within the jurisdiction, because, as far as I can see, it would only add to the costs if one were simply to grant an order attaching the property described in the petition, which may or may not be in the jurisdiction. I think it cannot be to the prejudice of the respondent if a more general order were made to include any property in the jurisdiction. The Court will, therefore, grant leave to sue by edictal citation as prayed, provided that the jurisdiction of this Court can be established over the respondent, and for the purpose of establishing such jurisdiction the Court will grant leave that any immovable property of the respondent within this jurisdiction be attached to found such jurisdiction, failing any immovable property that any goods belonging to the respondent be attached to found jurisdiction. If such goods be attached, and the jurisdiction be founded, then the costs of this application shall be

costs in the cause; if no goods can be found, and no jurisdiction can be established, then it will be clear that the applicant has come here entirely wrongly, and that if he wish to sue the respondent he must sue him in his own forum, and in that case the applicant would have to pay the costs of this application.

Dr. Greer: I take it that "goods" would include any moneys in the hands of respondent's agent?

Hopley, J.: It would include goods or money. The citation will be returnable on November 8, and there must be personal service on respondent, or on his attorney authorised thereto. I would advise the parties to try to save expense as far as possible, because it is quite clear that this small matter of £14 odd may run into some hundreds.

#### *Ex parte* ESTATE GOOSEN.

Mr. Coenradie moved, on the petition of the executors testamentary of the late Johannes Cornelis Goosen for confirmation of a sale by public auction of certain ground in the village of Ladismith to one of the petitioners.

Order granted as prayed.

#### *Ex parte* ESTATE LATE DU PREEZ.

Mr. Pohl moved for directions as to security of legacy, to enable transfer of certain property to be passed.

Order granted, authorising transfer to be passed, subject to £400 being paid over to the Board of Executors, or the General Estate and Orphan Chamber, or the Colonial Orphan Chamber and Trust Co., the interest during the lifetime of the first petitioner to be paid to her, and at her death the principal to be paid to Maria Hannah Fourie (born Du Preez).

#### *Ex parte* HENNINGS.

Mr. J. E. R. de Villiers moved for leave to petitioner to raise a loan of £220 on certain life assurance policy, which he had ceded for the benefit of his wife and children. The wife and one of the children consented. Petitioner desired to apply the proceeds to the maintenance and better education of the children.

Order granted authorising the raising of a loan of £220 on the policy, such amount to be expended on the education of the minors, and to be paid to Messrs. Hennings, Stephen H. Hugo, and Willem Hovy jointly; they, or the survivors of them, are authorised to spend the same on the said object until the whole be exhausted, payments to be made by them jointly.

*Ex parte* INSOLVENT ESTATE VISSER.

Mr. Pohl moved, on the petition of the trustee, for an order authorising the amendment of a certain order of sequestration, by changing the insolvent's name therein from Jan Hendrik Visser to Jan Hendrik Jasper Visser.

Order granted as prayed.

## UNITED TOBACCO COMPANIES (SOUTH), LTD. V. CAPE TOWN TOWN COUNCIL.

Mr. Upington moved for a certain award of arbitrators under the Land Clauses Arbitration Act to be made a Rule of Court, with costs. Counsel said that the amount awarded was £1,300.

Award made a Rule of Court, with costs, subject to filing of proof of appointment of the arbitrators.

*Ex parte* INSOLVENT ESTATE VAN DEN HEEVER.

Mr. W. Porter Buchanan, K.C., moved, on the petition of the trustee, for confirmation of the liquidation account and plan of distribution. Counsel explained that the insolvent notified certain objections to the Master, and opportunity had been given her to proceed with her objections, but she had not taken proceedings, although due notice had been given to her of the present motion, which was brought under section 112 of the Ordinance.

Account confirmed, costs out of the estate.

*Ex parte* KRYNAUW.

Mr. Swift moved for leave to the petitioner to sue by edictal citation one Theodore E. J. Pienaar for provisional sentence on a mortgage bond for £600. Respondent was believed to have gone to Portuguese West Africa.

Ordered to stand over for further information, with leave to renew the application on Tuesday next.

At a later stage, Mr. Swift again mentioned the matter, and gave further details as to the circumstances under which respondent had left the Victoria West district and gone to Lobito Bay.

Leave to sue by edictal citation granted and property attached, citation returnable on the 12th January, personal service, if possible, failing which, publication in the "Gazette" and "Victoria West Messenger," and a marked copy of the "Gazette" to be addressed to the defendant at Poste Restante. Lobito Bay, costs to be costs in the cause.

## CROZIER V. CROZIER.

Dr. Greer moved, on behalf of plaintiff in the action (Johanna Wilhelmina Crozier), for leave to effect substituted service on the defendant of an order for restitution of conjugal rights. It appeared that defendant had removed from the address in Montreal, Canada, at which he had been residing, and that his present whereabouts were unknown.

The return day of the order of restitution were extended, defendant to return to plaintiff on or before the 31st December, failing which, to show cause on the 12th January; personal service, failing which, one publication in the "Gazette" and a Montreal paper.

*Ex parte* MILNE.

Mr. Inchbold moved for leave to applicant to sue *in forma pauperis* James Meredith Maurice for £500 damages, for malicious prosecution and defamation of character. In argument, counsel cited *Chambers v. Chambers* (4 C.T.R., 277), *ex parte Du Ploy* (3 C.T.R., 11), *Watermeyer's Executrix v. Watermeyer* (3 C.T.R., 7), and *Shakofsko v. Noorden* (1 C.T.R., 121).

Hopley, J.: In this case the petitioner seems, besides having been a teacher in a mission school, to have been a book-keeper in some confidential relation to a gentleman called Col. Maurice, who seems to carry on business as a timber merchant and a general business at Portland, in the Knysna district. In the course of his duties Col. Maurice discovered, as he says, an absence of money which ought to have been accounted for by the petitioner, and also discovered that some of the books had been mutilated. He laid a charge of embezzlement against petitioner, which, after inquiry, was dismissed by the Magistrate, and the Attorney-General declined to prosecute. It is said that this was a malicious proceeding on the part of Col. Maurice, but if the allegations in the affidavits of Col. Maurice and somebody else, who supported him and who audited the books, are to be believed, whether Col. Maurice was actuated by the kindest of feelings or not, still no action for malicious prosecution would lie, because there would be reasonable cause for causing a legal inquiry to be had into the conduct of this man. Mr. Inchbold, in applying for leave to applicant to bring a suit as a pauper, says that, even if there were reasonable and probable cause for Col. Maurice in his action in laying this charge, still Col. Maurice went beyond what was allowed to him by law in openly stating that this man he was then prosecuting was a scoundrel, or words to that effect, and he says that, therefore, for defamation he has an ac-



tion. Now, he asks that he may be allowed to bring an action as a pauper. I am not saying that he has not an action for defamation, but no special damages have resulted. He was suspended for a time from the discharge of his duties, but apparently he is back again and he is earning his own salary and he is still at his old position as a teacher of the mission school. His position with Col. Maurice, of course, he has lost, but apparently it is through some fault of his own. Now, in the absence of special damage of that sort, and in view of the fact that petitioner still retains his position as a teacher at this school, earning £5 a month and contributions of something like £1 a month—I do not suppose he would exaggerate the amount of the contributions, and that is the value he himself admits—and also in view of the fact that, if he has not lodgings provided for him, in a place like that he would be able to obtain cheap lodgings, I am asked to say that this man is a pauper within the meaning of Rule of Court 125, and that he should be allowed to bring an action for his alleged grievance as a pauper. I do not think that under such circumstances as these the man is probably a pauper. He may not have £10 worth of goods, he has the certificate of two householders who have given their affidavits, but still at the same time I am not by any manner of means satisfied that he could not raise £10 wherewith to bring an action. The Court does not wish to shut out a real pauper from the remedies to which he is entitled, but I think when a man comes and asks to leave to sue as a pauper he must prove to the satisfaction of the Court that he is a pauper. On the facts before me, I cannot say that the applicant has shown that he is a pauper. The application is refused.

*Ex parte* ESTATE THEUNISSEN.

Mr. De Villiers moved on behalf of the petitioner, Johan C. Theunissen, of Loxton, for an order confirming certain expenditure on building a house for the minor children of Martinus W. Theunissen, of whom he is the guardian.

The matter was ordered to stand over for further inquiry, and for a further report by the Master.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1907.  
{ Oct. 15th.

Mr. W. Porter Buchanan, K.C., moved for the admission of Jonathan Carl Albert Anders as an attorney, notary, and conveyancer.

Application granted, oaths to be taken before the R.M. of King William's Town.

Mr. Long moved for the admission of Charles Henry Arthur Becton as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin, K.C., moved for the admission of Edward Huron McConnell as an attorney and notary.

Application granted, and oaths administered.

Mr. Douglas Buchanan moved for the admission of Francis John Truter as a translator in English and Dutch.

Application granted, oaths to be taken before the R.M. of Beaufort West.

Mr. Douglas Buchanan moved for the admission of Norman Ogilvie Norton as a conveyancer.

Application granted, oaths to be taken before the R.M. of East London.

Mr. J. E. R. de Villiers moved for the admission of Leopold William Luyt as a conveyancer.

Application granted, oaths to be taken before the R.M. of King William's Town.

## PROVISIONAL ROLL.

### JAGGER AND CO. V. FEIN.

Mr. Louwrens (for plaintiffs) moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

### BOARD OF EXECUTORS V. SONNENBERG.

Mr. Philipson Stow moved for provisional sentence on a mortgage bond for £4,000, with interest from the 1st January, 1907, and £8 odd, balance of interest due at the 31st December, 1906, bond due by reason of non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

## MORUM BROS. V. VOSO.

Mr. H. S. van Zyl moved for provisional sentence on a mortgage bond for £200, with interest at 10 per cent., from the 1st January, 1905, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

## LASSEN V. ROLL.

Mr. W. J. van Zyl moved for provisional sentence for £100 on a promissory note.

Order granted.

## MORTON V. VAN OUDTSHOORN.

Mr. H. S. van Zyl moved for provisional sentence on a mortgage bond for £850, less £90, paid on account, with interest from the 1st January, 1907, and 10s. 3d. insurance premiums; counsel also applied for the property hypothecated to be declared executable.

Order granted.

## ILLIQUID ROLL.

ESTATE VAN NOORDEN V { 1907.  
DE VILLIERS. { Oct. 15th.

Mr. Watermeyer moved for judgment, under Rule 319, in default of plea, for £241 4s. 9d.

Order granted.

FRANCIS BROS. V. RACHEL CHARLOTTE  
A. DEVONSHIRE, AS EXECUTRIX OF  
THE ESTATE OF THE LATE H. J. A.  
SPANDAU.

Mr. Close moved for judgment, under Rule 319, in default of plea for transfer of certain lot of ground at Ugie, East Griqualand. Defendant, who resided in the Transvaal, was sued by edictal citation.

Ordered that transfer be passed by defendant before the 31st December, failing which the Sheriff authorised to pass transfer on behalf of the defendant.

## NUGENT V. NUGENT.

This was the return day of a summons calling upon respondent to show cause why he should not be declared of unsound mind, and incapable of looking after his person and property.

Mr. Howes appeared for plaintiff, and read affidavits by Dr. Greenlees, superintendent of the Graham's Town Asylum and the R.M. of Graham's Town (the

curator *ad litem*), in proof of the respondent's insanity.

Order granted, declaring the respondent of unsound mind, and appointing Reginald E. de Beer, of Vryburg, as curator of his person and property, costs of this action to be paid out of the lunatic's estate.

## REHABILITATIONS.

Mr. Swift applied under section 117 of the Ordinance for the discharge of Robert Callahan.

Granted.

Mr. Louwrens applied under section 117 of the Ordinance for the discharge of Simon Stern.

Granted.

Mr. W. J. van Zyl applied under section 117 of the Ordinance for the discharge of Gerson Berman.

Granted.

Mr. J. E. R. de Villiers applied under section 107 of the Ordinance for the release of the estate of Pierre Francois Haupt from insolvency. The necessary consents had been given by all the creditors except one, a Belgian company. Efforts to trace the company had failed, and it was believed to be no longer in existence.

De Villiers, C.J., said that the section had not been complied with.

Ordered to stand over *sine die*.

Mr. J. E. R. de Villiers applied under section 106 of the Ordinance for the discharge of Petrus Johannes Albertus Tancred.

Granted.

## GENERAL MOTIONS.

WOLSTENHOLME V. WOL- { 1907.  
STENHOLME. { Oct. 15th.

Mr. Rowson moved for a variation of the order granted by the Court in certain divorce proceedings brought by applicant against respondent. The Court had granted a decree, but subject to satisfactory proof to the Registrar that defendant had been served with proper notice of set down and trial for the 2nd August. It appeared that, by an inadvertence, notice had not been given for the trial on the 2nd August, though notice had been given for the 12th July, and application was now made for substitution of the 24th September, in the order of Court. Notice had been given to defendant of the present application.

De Villiers, C.J.: I don't think an order should be made in the form in which it is proposed. It is quite clear that the defendant failed to enter appearance, and allowed judgment to go

by default, and it is quite clear also that now, after due notice of this motion, he does not come forward to resist. I may take it, therefore, even if due notice had been given to him to plead at the trial on the 2nd August, he would not have appeared. Under such circumstances there is no injustice done to him by granting a decree of divorce with costs, without the condition attached to the original order, but such costs not to include any costs incurred subsequent to the 2nd August, nor any costs connected with the notice of set down.

#### STEYTLER V. STEYTLER.

This was an application brought by defendant in the suit upon notice calling upon her husband to show cause why he should not pay to her a further sum of £300 towards the costs of defending the action, why he should not furnish the applicant with exact particulars as to the exact place or places at which each separate act of adultery is alleged to have been committed, and why the set-down of the case for the 22nd October should not be discharged, and the case set down for trial on the 12th November next.

From the affidavits, it appeared that the parties, who belong to Ceres, are married in community. Respondent had paid over £50. Applicant's attorneys estimated that the expenses of the defence would be something like £400, as over a score of witnesses from various parts of the Colony would be called. The particulars of the alleged misconduct which had been supplied said that in certain months mentioned, defendant committed adultery with parties whose names were given, at and near Ceres, and in Mitchell's Pass. It would be impossible, applicant said, for her to be ready with her defence on the 22nd October. Respondent submitted that the particulars given in the pleadings were sufficient for the purposes of the defence, and said that he was unable to make any further payment towards the defence.

Mr. Schreiner, K.C. (with him Mr. Bisset), was for applicant; Mr. Benjamin, K.C., was for respondent.

Mr. Schreiner submitted that the details given as to the alleged adultery were vague and embarrassing, and that applicant was entitled to more exact particulars. Counsel mentioned *Williams v. Shaw* (4 E.D.C., 105) and *Hills v. Colonial Government*, and cited *Sachs v. Spielmann* (58 Law Times, 102), *Spedding v. Fitzpatrick* (59 Law Times, 492), and *Briton Medical and General Life Assurance, Limited, v. Britannia Fire Association and Whinney* (59 Law Times, 888). Counsel, in conclusion, urged that the amount

which had been paid over was altogether insufficient for the purposes of the case.

Mr. Benjamin contended that it was impossible to give further information of the acts of adultery than were given. The defendant denied that she had committed adultery. With regard to the necessity for the amendment of the law to enable fuller particulars to be given, counsel quoted the case of *Davis v. McDonald* (22 Supreme Court Reports, page 157). He contended that there was no reason why the case should not go on on the original day on which it was set down for. He did not see the necessity for bringing 23 witnesses from all over the Colony to disprove the charge of adultery. The plaintiff did not take any steps to divorce his wife until she applied for a judicial separation. With regard to the contribution to costs, £50 was ample. The witnesses necessary for the defence were the defendant herself and those she was accused of committing adultery with. They were married in community, but the wife only brought about £20 a year into the estate.

Mr. Schreiner, in reply, said that counsel had considered the question of the number of witnesses, and probably knew more about the necessities of the case than did Mr. Benjamin.

De Villiers, C.J., said that, presuming that the defendant was not guilty, what was the necessity for the exact place where the adultery was alleged to have been committed being given.

Mr. Schreiner replied that the charge was laid against defendant, but she had to know where the offences were alleged to have occurred, and she could refute them, and bring evidence to the contrary. The defendant would be greatly prejudiced if this case was not postponed, whilst the plaintiff would not be inconvenienced at all if it was.

De Villiers, C.J.: "It is quite clear that this is a case of considerable importance to both parties, and certainly of great importance to the defendant, who is now the applicant, and whose honour is at stake, and who denies the acts of adultery alleged in the declaration. As the parties are married in community of property, I think she is entitled to a larger sum than £50, which has been granted to her. At the same time, I do not think she is entitled to the sum claimed. The amount which the husband should be compelled to furnish to his wife should be the least possible amount necessary for her to proceed with her suit. I think, if in addition to the £50, if she receives £75, it will be sufficient for the purpose. I cannot imagine that such a large number of witnesses are necessary, especially if the respondent gives the present applicant further particulars, as I intend ordering he

shall. The Court will order that the respondent pay the applicant £75, and that respondent furnish applicant with particulars as to the places where the acts of adultery are alleged to have been committed. As to the time when the acts of adultery were committed, it might be very difficult for witnesses to give exact dates, but there should be no difficulty for the witnesses being able to state the exact place or places where adultery was committed, and the Court will therefore order that the present respondent furnish the applicant with those particulars. The costs will be costs in the cause. As to the postponement, I do not think there will be an injustice if the case goes on on the day originally fixed. The matter has been a considerable time before the Court, and by this time applicant must know all the witnesses she will require, and I cannot imagine there will be any necessity for a further postponement beyond the day already fixed. That is a convenient day for all parties, and I think the respondent is ready, because sufficient notice was given to the applicant."

Mr. Schreiner asked the Court to give an order that the particulars be furnished within 24 hours.

Mr. Benjamin said that as far as the places were concerned, he intended to define them in words as nearly as possible. He did not intend to point out the exact spots in the neighbourhood. He did not know if it would be possible to furnish details within 24 hours.

[De Villiers, C.J.: Then if you cannot you must have a postponement of the trial.]

Could your lordship not extend the time to 48 hours?

[De Villiers, C.J.: well, 48 hours ought to be enough.]

The Court ordered that the sum of £75 be paid within 24 hours, and that all the particulars be supplied within 48 hours.

#### ESTERHUIZEN V. ESTERHUIZEN.

Mr. Toms moved for a decree of divorce in default of defendant's failure to comply with an order of the Court ordering the restitution of conjugal rights.

Granted.

#### HARVEY V. HARVEY.

Mr. Inchbold moved for a decree of divorce in default of defendant's failing to comply with an order of the Court calling on defendant to show cause why an order for divorce should not be granted.

Counsel mentioned that when the previous application was before the Court, Mr. Justice Hopley raised the question as to whether the Court had jurisdic-

tion to set aside a marriage settlement made in England or not.

The case was directed to stand over in order to be mentioned before Mr. Justice Hopley.

#### KENNEDY V. KENNEDY.

Mr. Struben moved for a decree of divorce in default of defendant's failure to comply with an order for restitution of conjugal rights.

Granted.

#### *Ex parte* MCGREGOR MUNICIPALITY.

Mr. Benjamin moved for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

#### *Ex parte* LEVINY.

Mr. Philipson Stowe moved for an extension of the return day of citation pending a possible arrangement.

Granted.

#### *Ex parte* MAXWELL AND EARP.

Mr. P. S. T. Jones moved for an order for leave to attach a certain inheritance.

Counsel stated that the respondent, who was now resident in German South-West Africa, owed the applicants a sum of £2,200, and other clients £670. He had through the death of his mother come in for a certain inheritance, left him by his father, and this application was for leave to attach that inheritance.

An order was granted calling on the respondent to show cause why the applicant should not attach the money, and interdicting the Master or executors from parting with any of the inheritance pending an action to recover same.

#### *Ex parte* ROBERTS.

Mr. Coenradie moved for leave to sue *in forma pauperis*. Counsel mentioned that in 1906 applicant was in the employment of B. Lawrence and Co., as a commercial traveller. In February of that year, whilst in the execution of his duties, he was injured by being thrown from a cart by one of the boys in the employ of B. Lawrence and Co. Under the Workman's Compensation Act applicant recovered £150 from his employers. From this amount B. Lawrence and Co., Ltd., deducted a sum of £2 1s. 11d., made up as follows: "To cash collected from T. M. Morrison and not paid in, £1 5s. 11d.; ditto Young and Co., 13s. 6d." Petitioner denied the al-



legations that these amounts were not paid in by him, and contended that the statement "and not paid in" constituted a libel upon him, and B. Lawrence and Co. contended that petitioner had collected the moneys, and instead of accounting for it had retained the amount, and was, therefore, guilty of a criminal act. Petitioner wished to claim damages for libel, and applied for leave to do so *in forma pauperis*.

De Villiers, C.J.: I think I can give your client some advice, and that is not to throw good money after bad, and press for a libel suit. The words "cash collected for Morrison and not accounted for," does not constitute a libel. Where is the libel? A man may forget to pay in money. I cannot see where the libel is. According to his own statement, he makes out no case whatever. Whether counsel is going to certify it or not, I cannot say, but on the petition as it stands there is no case. I cannot give leave to sue *in forma pauperis*.

*Ex parte* ESTATE VAN HEERDEN.

Mr. Toms moved for leave to sell certain property.  
Granted.

*Ex parte* ESTATE COURTIS.

Mr. Close moved, on the petition of the executors testamentary, for leave to raise a loan of £375 on security of estate property in Cape Town in order to pay for necessary repairs, rates, and taxes, and other purposes. The widow was willing to allow the interest to be deducted from her income from the estate. The heirs, all majors, consented.  
Order granted.

ALEXANDER V. FRIEDLANDER AND ANOTHER.

This was an application for an order directing the respondents to withdraw from operation a certain writ of execution issued by C. and A. Friedlander, in the matter of *Peregrino v. Alexander*, and to instruct the Deputy Sheriff of the Cape to release the applicant's goods and chattels from attachment by virtue of the said writ.

Applicant's case was that some little time ago the respondent Peregrino obtained costs against him on an order of the Court, C. and A. Friedlander being Peregrino's attorneys. Before he could pay the said costs to Friedlander, he was served by the messenger of the Resident Magistrate's Court, Cape Town, with an order granted by Mr. Justice Hopley on Friday, the 20th of September, attaching the moneys in his (applicant's) hands, and

declaring the same executable in satisfaction of a certain judgment obtained by one S. Hoffman against the respondent Peregrino in the R.M.'s Court, Cape Town. On the 25th September, applicant showed the order to C. Friedlander, who made himself acquainted with the whole of the facts of the matter. In terms of the order he (Alexander) settled with A. J. MacCallum (the solicitor to the said Hoffman). Notwithstanding the fact that the respondents knew that he had been restrained as aforesaid, they had wrongfully, unlawfully, and maliciously proceeded to issue a writ against him for recovery of the amounts aforesaid, upon which the Deputy Sheriff had seized his goods and chattels. Applicant had suffered, and was suffering serious and great damage in consequence of the attachment of his goods and chattels.

Respondents, C. and A. Friedlander, in answering affidavits, said that they consented to a postponement of an application they were bringing against applicant for costs of the previous matter between him and Peregrino on the applicant agreeing to settle the costs with the respondents. Subsequently, Friedlander proposed to have the bill of costs taxed, but consented to put this off on applicant paying £5 on account of his indebtedness for costs. They had not acted with malice. Deponents said that there was no fund belonging to Peregrino in the hands of applicant. In the matter of *Hoffman v. Peregrino*, the judgment and costs amounted to about £20.

The replying affidavit of Peregrino stated that he desired to withdraw the writ of execution against the applicant.

Mr. Upington for applicant. Mr. Benjamin, K.C. (with him Mr. P. S. T. Jones), for respondents. F. Z. S. Peregrino in default.

Mr. Benjamin said that, under those circumstances, C. and A. Friedlander could not press for a continuance of the writ, but he submitted that they should not be called upon to pay costs of this application. If anyone should pay the costs, that person was Peregrino. Under the order of the Court, the applicant was not bound to pay over any portion of the amount he owed for costs in the matter of Peregrino against himself. He was not holding funds for Peregrino, but he owed a sum of money for costs in proceedings between him and Peregrino. Now Peregrino had gone behind Friedlanders' backs, and had filed an affidavit on the other side.

Mr. Upington said that the applicant had an amount of money which he owed for costs. Applicant said it was £25, and the respondents said it was more. C. and A. Friedlander, before they caused the writ of execution to be issued, were fully aware of the order of Mr. Justice Hopley. They ostensibly

acted for their client, Peregrino, but, as a matter of fact, they appeared to have been acting solely in their own interests. Peregrino, there was no doubt, was a man of straw. The effect of making Peregrino responsible for the costs would be to mislead the applicant in costs.

De Villiers, C.J.: It is quite clear that, after the attachment by order of Mr. Justice Hopley had taken place, this writ of execution ought not to have been issued. But it is not equally clear to my mind that Mr. Friedlander fully understood that the order of Mr. Justice Hopley referred to the same fund which he wished to attach by virtue of the writ of execution. The order declared the sum of £25 or thereabouts in the hands of L. Alexander executable in satisfaction of the judgment obtained by plaintiff against defendant. Well, it would not be clear from that order that it applied only to a debt for costs alleged to be owing by Mr. Alexander to Mr. Peregrino. The writ of execution should, of course, be discharged, but the question is now who should pay costs of the present application? Well, Peregrino, of course, is liable, but I do not see upon what principle the attorneys who acted for him should be held liable unless there is proof of malice on their part. At present, I am not prepared to decide this question upon motion that there was malice. If the applicant can prove malice on the part of the attorneys he can bring a fresh action. If he cannot get his costs out of Peregrino, and if he can prove that the attorneys who acted for Peregrino, maliciously issued a writ of execution knowing the money had already been paid over, possibly he might succeed as against Friedlander. But I do not think that, upon motion, the Court would be justified now in deciding that there was any malice on the part of Friedlander in acting for the interests of his client, Peregrino. The Court will, therefore, simply order that the writ of execution be discharged, and that the applicant's costs be paid by the respondent Peregrino.

#### *Ex parte* ESTATE BREDEVELD.

Mr. Philipson Stowe moved for an order authorising the Master to pay out certain moneys.  
Granted.

#### VAN HEERDEN V. ESTATE VAN HEERDEN AND ANOTHER.

Mr. Benjamin, K.C., moved to have a certain agreement made an Order of Court.  
Granted.

#### *Ex parte* KING WILLIAM'S TOWN MUNICIPALITY.

Mr. Payne moved for the appointment of the Mayor and Town Clerk as trustees for debenture-holders, in place of T. P. Dyer, deceased.  
Granted.

#### SWART V. SWART.

Mr. J. E. R. de Villiers moved for an interdict to restrain the respondent Johannes Jacobus Swart from dealing with an inheritance he is entitled to under the will of his brother, pending an action at law.

An order was granted calling on the respondent to show cause on November 5 why the executors of the estate of Daniel Andries Swart should not be restricted from paying to respondent or anybody else the inheritance, or transferring any land, pending a further order of the Court. In case transfer of land has been effected, to restrain the trustees from paying to respondent any of the proceeds, pending a further order of the Court.

#### *Ex parte* MULDER AND OTHERS.

Mr. Douglas M. Buchanan moved for the appointment of Mr. J. E. R. de Villiers as *curator ad litem*.  
Granted.

#### *Ex parte* ESTATE CAMPBELL.

Mr. Douglas M. Buchanan moved for an order authorising transfer of certain property.  
Granted.

#### *Ex parte* CARE.

Mr. P. A. Marais moved for leave to sue *in forma pauperis*.  
Granted.

#### *Ex parte* BOOTH.

Mr. Douglas M. Buchanan moved for leave to sue *in forma pauperis*. The requisite advertisement had been inserted in a Johannesburg paper, but a communication had been received from Port Elizabeth from defendant, stating he had seen the notice, but intended to keep out of the way.

Granted, Mr. Douglas M. Buchanan to act as advocate, and Messrs. Van Zyl and Buissinne as attorneys.

#### *Ex parte* KARSTEN.

Mr. Payne moved for leave to sue the defendant *in forma pauperis* for restitution of conjugal rights.

The respondent appeared, and said he did not see how his wife could sue him. She had deserted him three times, and he knew she was living with another man.

[De Villiers, C.J.: Have you proof of that?—I have seen them out walking arm in arm at 10.30 at night, and she has been seen in a man's room.

Granted; Mr. Roux was appointed counsel.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

BLUMENTHAL V. DUPPER. { 1907.  
Oct. 16th.

Mr. Toms moved for provisional sentence on a mortgage bond for £250, with £4 10s. interest, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### BECKMAN V. SEGALL.

Mr. Long moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### BROWN V. REYNOLDS AND ANOTHER.

Mr. H. S. van Zyl moved for the final adjudication of the private and partnership estates of the defendants as insolvent.

Order granted.

### ROWBERRY V. LIEBMANN.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £50, and for certain pictures and volumes of the "Encyclopædia Britannica," deposited as security, to be declared executable.

Order granted.

## MATRIMONIAL CASE.

### BROWNELL V. BROWNELL.

This was an action brought by Magdalena Maria Brownell, of Worcester, against her husband, Alonza Aaron Brownell, described as a blacksmith, for restitution of conjugal rights, failing which a decree of divorce.

Mr. M. Bisset was for plaintiff; defendant, who was sued by edictal citation, did not appear. Defendant was stated to be resident in Calgary, Province of Alberta, Canada.

Magdalena M. Brownell (the plaintiff) said she was married to defendant at Cape Town on the 17th March, 1902. They lived together at Salt River until May, 1903, when defendant left her. She had not since heard from the defendant. He left without giving her warning, except that he said he was going up the coast. He gave no intimation that he was going to Canada. She had written to her husband, care of Robert McClay, at Vancouver, but had received no reply. There was one child of the marriage. She desired to apply for a sum of £3 a month as maintenance of the child.

Decree of restitution granted, with costs, defendant to return to or receive the plaintiff on or before the 15th January, 1908, failing which to show cause on the 1st February, why a decree of divorce should not be granted, with costs, and plaintiff declared entitled to custody of the minor, and why the defendant should not contribute £3 a month towards the maintenance of the minor, rule to be served in the same manner as directed in regard to previous process.

## APPEALS.

### INSOLVENT ESTATE SHER AND CO. V. COHEN.

### INSOLVENT ESTATE SHER V. KELLY.

This was an appeal from a judgment of the R.M. of Calvinia in an action brought by the applicants against respondent to recover £8 13s. 3d. for goods sold and delivered.

Mr. P. S. T. Jones was for the applicants; Mr. Alexander was for respondents.

Defendant in the Court below had admitted the correctness of the amount, but pleaded a set-off against the whole amount. The Magistrate gave judgment of absolution from the instance.

Mr. Jones having been heard in argument,

De Villiers, C.J., said that before he heard Mr. Alexander he would like to hear the other appeal brought by the estate against one Kelly,

The case of Insolvent Estate of H. D. Sher and Co. v. Kelly was then called. In this case the trustees sued Daniel Kelly to recover a sum of £9 14s. 1d. for goods sold and delivered by the plaintiffs to the defendant. The defendant was represented by Mr. Yates, who pleaded a settlement, and admitted that the goods charged for were purchased, and the Magistrate granted absolution from the instance, with costs.

Mr. Jones, who appeared for plaintiffs, said that this case differed in this essential from the other case, that there could not be set up any concurrence on the part of Sher to the arrangement alleged to have been made in this case. Fifty pounds was owed by Kelly to the partnership, and Kerbel went to collect it, and he got a cheque for £75, £25 of which was apparently an advance to himself. Kelly stated that Kerbel gave him a promissory note for £25, thereby putting the case clearly that it was a promissory note by Kerbel and not by Sher and Co. Kerbel in his evidence stated that when he went to Kelly with the account and asked Kelly to give him £25 as he was in want of money, and signed a promissory note for it, Kerbel did not say that he had borrowed the money on behalf of the firm.

[De Villiers, C.J.: Is it quite clear that Kelly knew that Kerbel was acting on his own behalf and not on that of the firm?]

Mr. Jones said that that fact was not quite clear. Kelly said in his evidence that he was dealing with Kerbel as a partner of Sher and Co. Even if it was shown that the partnership got anything from the transaction, that would not make the transaction binding on the partnership. Counsel quoted the case of *Guardian Insurance Co. v. Lovemore* (5 Juta, page 205) in support of the contention.

[What is there to show that they were not dealing with the partnership?]

Mr. Jones: The fact that Kerbel borrowed the money for himself.

[How is that shown?]

The fact that he said he was hard up.

[Did not Kelly think he was acting for the firm?]

Mr. Watermeyer, who appeared for the defendant, contended that Kelly's transaction was with the firm, as he had lent the firm money before.

De Villiers, O.J.: I shall first deal with the case against Cohen. It is quite clear from the evidence that the firm of Sher and Co. consisted of Sher and Kerbel. It would appear that the advance was made by Cohen to Kerbel, and it may be taken for granted that Cohen knew when making that advance that it was to Kerbel in respect of business other than that of the partnership, but after the advance had been made, the arrangement was made between Kerbel

and the defendant that the defendant should be allowed to purchase goods from the firm in reduction of this debt. If Sher was unaware of this arrangement, clearly such an arrangement could not bind the partnership, and the only question is if there is satisfactory evidence that Sher was acquainted of this by Kerbel. Well, Kerbel states his partner was aware of it, and consented that goods should be purchased in reduction of this debt; and therefore, unless that agreement formed the nature of undue preference, the defendant is entitled to succeed. If the firm had not surrendered, and the action had been brought by the firm, there would have been a clear defence to the action, Sher having consented to the arrangement. As there is no evidence of undue preference the agreement is binding on the trustee, and I am of opinion that the appeal in that case should be dismissed with costs. Then, coming to the case against Kelly. That stands on somewhat different footing. Assuming in that case that Kerbel did not act on behalf of the firm, Kelly did not know of it. Sher was absent, and they had left the whole of the management of the business in the hands of Kerbel. Kerbel gets this advance from defendant, defendant believing it was an advance to the firm, and the only point to be made in this case on behalf of the plaintiff is that the promissory note given by Kerbel was in his own name, but then that was by no means an unusual practice on his part, because in the case of the purchase of goods on behalf of the firm, he sometimes did that, but that would not prevent the creditors having their claim on the firm. Then, although the promissory note was only signed by Kerbel, Kelly, according to the evidence, honestly believed that he was dealing with Kerbel as a representative of the firm, and that Kerbel was borrowing this money on behalf of the firm, and he afterwards agreed that goods should be purchased in reduction of the amount of the claim. Well, I think the Magistrate had quite sufficient evidence before him in coming to the conclusion that it was a transaction between the firm and Kelly, and that Kelly had reason to believe that Kerbel represented the firm, and on that ground lent the money to the firm. For these reasons, this appeal will be dismissed with costs.

#### REX V. HURST.

Goose club—Payment for liquor in advance—Act 28 of 1883, Sec. 69.

*H., a licensed victualler, contracted with certain persons that in consideration of a*



certain weekly deposit during 21 weeks they should, on payment of the last deposit, receive certain goods, which included liquor. Until the final deposit was paid, any depositor could at pleasure re-claim all the money which he had deposited.

Held on appeal, that H. had not contravened either Sec. 69 of Act 28 of 1883, or any of the amending Acts.

This was an appeal brought by Fred. Hurst, of the Theatre Bar, Opera House Buildings, from a judgment of the A.R.M. of Cape Town.

Appellant was recently proceeded against in the Magistrate's Court, and charged with the crime of contravening section 69 of Act 28, 1883, and the liquor laws, 1883-1904. He was found guilty, and sentenced to pay a fine of 5s., in that he had carried on a certain goose club under the rules of which he engaged to supply to members who contributed 21s. in weekly instalments, a hamper containing port, brandy, and sherry, a goose, and a box of cigars.

Mr. Upington was for appellant; Mr. Howel Jones, K.C., was for the Crown.

Mr. Upington, in support of the appeal, said the point was whether under the circumstances there had been a payment in contemplation of this section of the Act. The object of the Act was to prevent persons from depositing money with a licensed victualler as a payment in advance, and then proceeding to have drinks at that bar until the money was exhausted. This was entirely a different case. There was no payment, because at any time a man who had paid his 1s., 2s. or 3s. could go to the proprietor and demand his money back.

[De Villiers, C.J.: Is all this in anticipation of Christmas?]

Mr. Upington: Yes, that is the idea. The goose is for the Christmas dinner, and the cigars are to be smoked after the festivities.

[De Villiers, C.J.: I mean it doesn't go on all the year round?]

Oh, no. It closes on December 21, and the fortunate persons who have paid up get their Christmas hampers, and those who haven't receive their money back again.

[De Villiers, C.J.: Which is the more fortunate?]

Well, from the point of view of my client I should say those who have paid up, but whoever may be the fortunate person, the circumstances do disclose that the payment cannot be regarded in any way as a payment in advance for liquor to be supplied, as contemplated by the Act. Counsel added that

he had not been able to find any authority in England.

[De Villiers, C.J.: Have they goose clubs in England?]

Oh, yes; they are very widespread in England and Ireland.

[De Villiers, C.J.: They need not necessarily be confined to geese, but may include turkeys?]

Yes; even the humble sirloin of beef might be made the object of such a club. It would be hard to construe the Act as to render illegal a perfectly harmless institution which gives a great deal of pleasure to poor people who may not be over-provident, and at Christmas time haven't the money for a Christmas dinner.

[De Villiers, C.J.: Is it quite clear that any depositor may get back his money before the final payment?]

Yes; that is not disputed at all.

Mr. Jones, for the Crown, held that Mr. Upington's arguments were in the nature of an appeal *ad misericordiam* because he had got a hard case. I was proverbial that hard cases made bad law. It was possible to understand goose clubs when geese only were supplied, but they were open to abuse when the hotel proprietor could so arrange them that liquor was supplied. He submitted that money so contributed was a payment in advance for liquor, among other things, to be supplied.

De Villiers, C.J., put it to counsel that if his contention were upheld, those persons who had paid money into such clubs during the past few years would, according to the section, be able to recover their money back even though they had had the Christmas cheer.

Mr. Jones: That is so; that is what the section says.

Mr. Upington briefly replied.

De Villiers, C.J.: The 69th section of the Act enacts that no person shall receive payment in advance for any liquor to be supplied, and the question to be decided in the present case is whether the appellant did receive payment in advance for liquor to be supplied. The Court must bear in mind that this is a criminal offence, which entails serious consequences upon the person convicted, and should certainly construe a section of this kind rigidly, and not in favour of a conviction. The arrangement connected with these goose clubs seems to be this: That the members deposit 1s. a week for 21 weeks, in anticipation of Christmas, but every member as I understand it—Mr. Jones does not deny that this is the effect—is entitled at any time to withdraw the deposits which he has made, and it is only upon payment of the final instalment that the sale actually takes place, and that the liquor, together with the geese, is supplied. That being so, I am unable to hold that the appellant did receive payment in advance for liquor

to be supplied, because there was no purchase, and the section really refers to liquor purchased in advance, because where you receive payment in advance for liquor to be supplied, that means in advance for liquor sold and to be supplied. But the liquor here is not sold. The liquor is only to be sold upon payment of the final instalment, and, until the final instalment is paid, they are deposits made, but not payments in advance for liquor to be supplied. What the Act intended to provide against seems to me a wholly different state of things. There is no doubt a great temptation for a drunkard, when he has money in hand, to go to some liquor place and deposit money for the purpose of drawing upon that money and getting liquor out of it from time to time. Here we have to deal with instalments deposited before hand, not because the man is flush of money at the time, but in order to enable him by thrift to accumulate money to have some "good cheer" for Christmas. It seems to me a perfectly harmless mode of investment, and I cannot bring myself to believe that the Legislature intended that this section should apply to a case of this kind. Under these circumstances I am of opinion that this conviction should not stand. The Magistrate seems to have considered the offence a very venial one, because he imposed only a fine of 5s., but, to my mind, there was really no offence, and it was not intended that it should be regarded as an offence. The result, if Mr. Jones be correct, would be now that all the past payments could be recovered, whether these people have all had their good cheer at Christmas, whether they have had their geese, and whether they have had their money's worth, and they would now be able to recover the sums that they have paid, because the section provides that "any payment so made in advance may be recovered, notwithstanding that any liquor may have been supplied subsequently to such payment." Now, if there is a contravention in the present case, as contended for by Mr. Jones, then it would be clear that all those persons who belonged to goose clubs during the past four years in different parts of the town, could go to these people who have innocently and in all good faith sold these goods, and recover back all that was paid. That was not the intention of the Legislature, and for these reasons, I am of opinion that the conviction should be quashed.

[Appellant's attorney: A. J. McCallum.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

COLONIAL GOVERNMENT V. { 1907.  
S.A. SUPPLY AND COLD { Oct. 17th.  
STORAGE CO., LTD. { „ 21st.

Transfer duty — Sale of land previous to issue of title— Assignment of interest—Act 5 of 1884, Sec. 2.

*In July, 1895, the Colonial Government agreed to allow C. & Co. to reclaim 38,799 square yards of land from the foreshore of Table Bay, and to thereafter issue title to the land so reclaimed to C. & Co. In May, 1899, C. & Co. sold 70,010 square feet of the reclaimed land, with buildings thereon, to defendants, and also 43,727 feet of land still covered by water. C. & Co. bound themselves to reclaim the latter land as and when required by the defendants: they also arranged to pass transfer of the whole of the above land to defendants when in a position to do so. Plaintiffs now claimed £3,774 10s. 4d. as transfer duty payable upon the purchase price of the land sold to defendants, together with interest at 12 % from November, 1899, when, as it alleged, the duty became payable.*

*Held, that an out and out sale of the property was effected by C. & Co. to defendants; and not a mere assignment of an interest.*

*Held further, that where a person is in occupation of land in anticipation of a grant thereof from Government, and sells such land before the grant is issued, such transaction constitutes a sale of land within the terms of Sec. 2 of*

*Act 5 of 1884, and that transfer duty is payable thereon.*

This was an action to recover the sum of £3,774 10s. 4d. transfer duty, alleged to be due by the defendant company.

The plaintiff's declaration was as follows:

The plaintiff is Wm. Aldred Collard, in his capacity as the Assistant Treasurer of the Colony and Receiver-General of Revenue, and as such representing the Colonial Government in this action. The defendant (David Pieter de Villiers Graaff) resides in Cape Town, and is sued as the South African liquidator of a certain joint stock company, lately carrying on business in this colony, under the name of the S.A. Supply and Cold Storage Company.

2. On the 4th May, 1899, the said company purchased from the firm of Combrinck and Co., and the said firm of Combrinck and Co. sold to the said company certain two pieces of land in Cape Town situated on or near the Dock-road, to wit, a piece of land, measuring 70,010 square feet in extent, together with buildings, and all fixed plant and machinery thereon for the sum of £145,010, and a piece of land adjoining the aforesaid piece, measuring in extent 43,727 square feet, for the sum of £43,727.

3. Thereupon there became due and payable to the Colonial Government by the said company as and for transfer duty upon the purchase price aforesaid of the said two pieces of land, and the immovable property thereon as aforesaid, the sum of £3,774 10s. 4d., being two pounds per centum upon the total purchase price.

4. No portion of the said transfer duty has at any time been paid, and by reason of its failure to pay the same upon the 4th November, 1899, the said company became liable to pay interest to the Colonial Government upon the aforesaid sum of £3,774 10s. 4d., at the rate of twelve pounds per centum per annum from the last mentioned date. No portion of the said interest has at any time been paid.

5. Upon the 8th June, 1903, the said company voluntarily entered into liquidation, and on or about the 8th June of the said year, the defendant was appointed to act as sole liquidator thereof, in so far as the South African trusts and properties of the said company are concerned, with full powers under section 133 of the Statutes 25 and 26, Vict. cap. 85, and has in his possession, or control, in this colony certain assets of the company.

6. On or about the 3rd April, 1907, a rule was granted by this Honourable Court, operating as an interdict, restraining the defendant from parting with any of the assets of the said com-

pany pending the result of an action to be instituted against him for the recovery of the transfer duty payable by the said company.

Wherefore the plaintiff claims: (a) payment of the said sum of £3,774 10s. 4d.; (b) interest upon the said sum from the 4th November, 1899, at the rate of 12 per cent. per annum; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1 and 5 of the declaration, save that he says he has no assets of the said company in his possession or control in this colony, that the said company was registered in England and not in this colony, and that it ceased to carry on business in this colony on or about the 1st of April, 1902.

2. On the 10th July, 1895, the firm of Combrinck and Company entered into a certain agreement with the Government of this colony, which agreement was subsequently in 1895 sanctioned by resolutions of both Houses of Parliament and a copy of the said agreement is hereunto annexed and marked "A," to which the defendant begs to refer this Honourable Court.

3. In accordance with the said agreement and subject to its terms and conditions the said firm obtained the right to reclaim from the sea a certain area of land, and it was agreed that after reclamation the land should become the property of the said firm, and a title thereto embodying such conditions as should after such reclamation be applicable should be granted to them, and that if the said firm should fail to complete the whole work of reclamation within ten years after the sanction of Parliament was obtained, such portions of the area as should then remain unreclaimed should revert to the Table Bay Harbour Board.

4. The said firm proceeded with the said work of reclamation, and before the 4th day of May, 1899, had reclaimed certain parts of the land in the said area measuring 70,010 square feet in extent, but had not completed the reclamation of any part of the remainder of the said area, which reclamation was not completed until the month of June, 1905.

5. On the 4th day of May, 1899, the said firm entered into an agreement with the South African Supply and Cold Storage Company, Limited, whereof a copy is hereunto annexed and marked "B," and on the 5th August, 1899, the Government of this colony, lawfully acting by the Treasurer, appeared before the notary William Templer Buissinne in the presence of witnesses and subscribed the original of a notarial deed of that date, whereof a true copy is hereunto annexed and marked "C."

6. In terms of the said notarial deed the Government of this colony *inter alia*

agreed to accept the aforesaid company in the place and stead of the firm of Combrinck and Company under the agreement marked "A" in respect of a piece or portion of land measuring 113,737 square feet, which included the land measuring 70,010 square feet aforesaid and a further piece measuring 43,727 square feet, which was then partially reclaimed but still covered with water, and promised to do all such acts, matters, and things as might be necessary or as might be required of the Government under the agreement marked "A."

7. Thereupon the said company became and was accepted by the said Government as the party for all purposes to the said agreement marked "A," being substituted in the place of the said firm with regard to the said piece or portion of land measuring 113,737 square feet.

8. The said pieces of land then reclaimed and partially reclaimed as aforesaid measuring 70,010 square feet and 43,727 square feet respectively are the pieces of land referred to in paragraph 2 of the declaration and the said company acquired under the agreement marked "B" all the rights of the said firm in respect of the said pieces of land under the agreement marked "A" for the sums mentioned in that paragraph and became and was substituted as aforesaid for the said firm for the purposes of the said agreement marked "A" in respect of the said pieces of land.

9. Save as aforesaid the defendant denies the allegations in paragraph 2.

10. On the 30th October, 1902, the said company with the consent of the Government of this colony ceded all its rights under the said agreements marked "A" and "B" in respect of the pieces of land aforesaid to the South African and Australasian Cold Storage and Supply Co., Ltd., at which time the reclamation of the aforesaid area was not complete, nor was any person entitled to receive in terms of clause 1 of the agreement marked "A" a grant of the said land or any part thereof.

11. The South African and Australasian Cold Storage and Supply Co., Ltd., thereafter, with the consent of the Government, ceded all its said rights on the 18th February, 1904, to the Imperial Cold Storage and Supply Co., Ltd., and upon the whole work of reclamation being completed as aforesaid in June, 1905, the Government made a grant to the remaining partners of the firm of Combrinck and Co. of the entire area, notwithstanding lawful protest made at the time by Combrinck and Co. that the grant of the two pieces, measuring 113,737 square feet aforesaid, should not be made to them by reason of the premises.

12. Under the Derelict Lands Act of 1881 an order was thereafter made en-

titling the Imperial Cold Storage and Supply Co., Ltd., to obtain transfer of the said pieces of land, in accordance with the provisions of the said Act.

13. By Act No. 5 of 1884, section 2, it is provided that: "Except as in this Act is excepted, a duty (hereinafter called transfer duty) of £4 per centum upon the purchase price or value of any freehold property or property held from Government, upon quitrent or other leasehold tenure, sold or otherwise alienated or transferred after the taking effect of this Act, shall be payable and paid: (1) By the purchaser of any such property. (2) By any person becoming entitled to any such property by way of exchange, donation, legacy, testamentary or other inheritance, or in any manner otherwise than through the medium or by means of purchase and sale. (3) By any person into whose name any such property registered in the Deeds Registry of this colony, in the name of any other person, shall be registered or transferred."

14. By Act No. 10 of 1886, the duty aforesaid is reduced to two per centum.

15. The defendant specially pleads that the South African Supply and Cold Storage Co., Ltd., at no time became or is liable to pay the sums claimed in this suit or any sums by way of transfer duty under the said Acts, by reason that the said company neither was nor is the purchaser of any freehold property or property held from Government upon quitrent or other leasehold tenure, nor became or is entitled to any such property by way of exchange or in any other mode set forth in sub-section (2) of section 2 of Act No. 5 of 1884, nor sub-section (2) of Act 5 of 1884, nor was, or is a person into whose name any such property registered in the Deeds Registry of this colony in the name of any other person has been registered or transferred, and, further, by reason that, according to the true intent of the said taxing Statutes, no transfer duty is payable by the said company or the liquidators thereof in the circumstances above set forth.

16. The defendant further pleads specially, if the above pleas be insufficient, that by reason of the execution by the Government of the notarial deed marked "C" aforesaid, and the acceptance in good faith by the said company of its position as coming into the place and stead of the firm of Combrinck and Co., the plaintiff is estopped and debarred from claiming from him or the liquidators of the said company any payment of transfer duty which could not have been exacted from the said firm of Combrinck and Co.

17. He admits that no transfer duty or interest has been paid by him or the said company, and says that no demand for any such payment was made until the year 1907, notwithstanding that in September, 1903, in his capacity



as liquidator in South Africa, he duly called for claims against the said company.

18. Save as aforesaid, he denies all the allegations of fact and conclusions of law in paragraphs 3, 4, and 6 of the declaration.

Wherefore he prays that plaintiff's claim may be dismissed, with costs.

The plaintiff's replication was as follows:

1. The plaintiff admits the allegation in paragraph 1 of the defendant's plea that the company was registered in England and not in this colony, and admits paragraphs 2, 12, 13, 14, and 17, save that he says that the word "any," in line 7 of paragraph 13, is incorrect, and that the word "every" should be substituted therefor.

2. He admits the reclamation by the firm of Combrinck and Co., to the extent of 70,010 square feet, before the 4th May, 1899, and that the reclamation of the whole area was not completed until June, 1905.

3. He admits the agreement of the 4th May, 1899, referred to in paragraph 5, and that the Treasurer subscribed the deed of which annexure "C" to the plea is a copy, and he admits that the pieces of land referred to in the said annexure are the pieces of land referred to in paragraph 2 of the declaration.

4. As to paragraph 10, he admits that on the 30th October, 1902, the company entered into a certain agreement with the South African and Australasian Cold Storage and Supply Co., Ltd., for the sale and purchase of the said pieces of land, whereof he annexes hereunto a copy, marked "D," and that the consent of the Government was given thereto in the form and upon the conditions set out in a document signed by the Treasurer upon the 5th November, 1902, a copy whereof is hereunto annexed marked "E."

5. As to paragraph 11, he admits that on the 8th February, 1904, the South African and Australasian Cold Storage and Supply Co., Ltd., sold the said pieces of land to the Imperial Cold Storage and Supply Co., Ltd., and that the Government consented thereto, upon condition that the said consent should not be construed or taken to be a waiver or abandonment of any right which the said Government might have under or incidental to or arising out of any of the agreements entered into in 1895 and 1899, copies of which are annexed to the defendant's plea, and that of 1902 aforesaid.

6. Save as aforesaid, and saving admissions, the plaintiff denies all the allegations of fact and conclusions of law in the plea contained, and joins issue thereon, and again, as before, prays for judgment, with costs.

Mr. H. Jones, K.C. (with him Mr. Nightingale), for plaintiffs; Mr.

Schreiner, K.C. (with him Mr. H. S. van Zyl), for defendants.

David Pieter de Villiers Graaff said he was a director in the defendant company, and also originally one of the partners of Combrinck and Co. He was a defendant in this case as one of the liquidators of the defendant company. He was specially appointed in England for the purpose of the South African winding-up. The company had been finally wound up. It ceased to carry on business in this country at the end of April, 1902, when it disposed of its undertaking to the Australasian Company. The South African Supply Company was entirely distinct from the Australasian Company. The Australasian carried on business for a short period, and then it was absorbed by the Imperial Company. He was one of three liquidators of the defendant company, the others being Mr. Niel and Sir James Sivewright, and a resolution was passed under the Companies Act in England vesting in him certain powers in South Africa. He called for claims against the defendant company to be sent in. He put in the "Gazette" dated August 7, 1903. No claim was made for transfer duty until last March, when he went to England. He was absent at the time. Everything was then adjusted here, and he left for England for the purpose of taking final resolutions for the winding-up. Mr. J. G. van der Horst was his secretary here, and he called for tenders for the remaining assets. When witness was absent steps were taken to attach all assets in the jurisdiction. In England proceedings had been taken upon this same claim. The date of that was after the initial proceedings here. The solicitors of the liquidators in England had deposited the sum of £7,250 to abide the result of this action. He was director throughout the defendant company's existence. The agreement by which the company contracted with Combrinck and Company in May, 1899, was made in England. He was there at the time, and was a party to the contract. In England, under the statute, stamps were imposed upon it *ad valorem* upon the basis that it was an agreement disposing of certain rights under a concession. The company paid, he believed, £1,150 in stamps, under protest, and then took advice. They had to pay this sum as upon an equitable interest in property other than land. They were taxed in England on that basis. There was no getting out of it; they had to pay it. Until they got this claim, they had never heard of the Government ever attempting to claim transfer duty.

Cross-examined by Mr. Jones: In the first instance Combrinck and Co. may have asked for title to the land in accordance with the agreement. Government gave title to the whole area, but not with the company's consent. They



never wanted title to the whole area. They protested that they found that Government gave them more than they were entitled to. They asked for title to certain portions. He did not remember that they wrote asking for transfer to be given to the Imperial Company. The Government certainly never claimed transfer duty until March or April of this year, and the transaction was in 1902 between the South African Supply Company and Combrinck and Company. On the 18th August, 1905, he never knew, nor did he ever contemplate, that transfer duty would have to be paid. He never expected that Combrinck and Co. would have to pass transfer to the S.A. Supply Co., because the Government accepted the Supply Co. instead of Combrinck and Co. in respect of that particular area. They never tested the question in the Courts as to whether they should pay the £1,150 in England, but they took eminent counsel's opinion, that of Advocate Stroud, and it was to the effect that they would have to pay.

By the Court: The amount of £1,150 which they paid in England applied to this partly unreclaimed and reclaimed ground.

Re-examined by Mr. Schreiner: In 1899 about 70,000 feet of this land was reclaimed, and of the other ground in question over 40,000 feet was still under water, but had been partially reclaimed. A large portion of what was disposed of in 1898 was still under water.

Johannes Gerhardus van der Horst said he was an attorney of this Court. In 1905 he was business manager of Combrinck and Co. and secretary to the liquidator of the defendant company here. He signed the notice put in in that capacity in 1905. When the grant was issued in July he was in England. He came out about the third week in July, and shortly after his arrival he saw the grant. He then wrote the letter of the 31st July for Combrinck and Co. to the Surveyor-General. There were two mistakes in the grant. He pointed out that Mr. J. A. Graaff was not a partner, and therefore that his name should not appear. That amendment was made. The Government, however, would not meet him in the matter of only issuing the grant for the portion actually belonging at that time to Combrinck and Co. He gave notice to the Imperial Cold Storage Company of the position the Government took up, and then the Imperial Cold Storage Company made application to the Court under the Derelict Lands Act. He did not think that they had yet got title, because there was no deduction on either the diagram or the grant. They had an order under the Derelict Lands Act entitling them to the land. He published the notice calling for tenders for the remaining assets of the defendant company. The plea in abatement was not pressed when it was found that

there were assets in England. In point of fact, there were no assets within the jurisdiction of this Court. He had a copy of the return to the Board of Trade showing the company's assets in England. The £7,250 referred to was deposited in the names of the solicitors for the liquidators and the solicitors for the Agent-General.

Cross-examined by Mr. Jones: He did not think that up to the 31st July, 1905, Combrinck and Co. had asked for title to the whole extent of ground. The grant gave the whole area that had been reclaimed in July, 1905. No grant could be issued until there had been complete reclamation. He protested as soon as he found that they had been granted land which did not belong to them. He admitted that the letters now read did not specially raise the point as to what exact portion of ground was required. Combrinck and Co. had ceded their rights to the land. There was no occasion to pass transfer, because the Government had accepted the Supply Company in place of Combrinck. When he wrote to the Surveyor-General asking for the title to be amended, he was not thinking of saving transfer duty. The thought of the transfer duty never crossed his mind, to the best of his recollection. Of course, he knew generally that when a transfer is passed transfer duty was payable.

Mr. Jones, in argument, contended there was no selling of any right to reclaim; there was simply a selling of the property, and of the right to transfer the property when it was in a position to be transferred. He submitted that the defendant company was the purchaser of freehold land, and as such was liable for the payment of transfer duty. Counsel referred to the case of the *Collector of Customs v. Walker* (6 Juta, 402).

Mr. Schreiner said that largely the matter rested on the construction of section 2 of Act 5 of 1884. It could never be the reasonable and true construction of the Taxing Statute that it was the duty of this company to come to the Commissioner with a cheque for transfer duty on land that was going to be granted ten years hence, land not then in existence. None of the land became granted until there had been reclamation of the whole, and until that time the company had no right to any of the land. Counsel referred to the cases of the *West London Syndicate v. Commissioners of Inland Revenue* (77 Law Times, p. 797), *Farmer and Co. v. Commissioners of Inland Revenue* (79 Law Times, p. 32).

Mr. Jones having replied,

*Cur. Adr. Fult.*

*Postea* (October 21).

Maasdorp, J.: On the 10th day of July, 1895, the Colonial Government

entered into an agreement with Combrinck and Co., which was subsequently sanctioned by Parliament, whereby the Colonial Government agreed "to allow the firm to reclaim from the sea a piece of land, in extent 38,799 square yards more or less, situated between the North Wharf and the old Coaling Wharf, which land shall, after reclamation, become the property of the said Combrinck and Co., and a title thereto will in due course be granted to them." On the 4th day of May, 1899, the firm of Combrinck and Co. entered into an agreement with the defendants, whereof, amongst other things, they sold to the defendants: (1) All that piece and parcel of land situate in Dock-road, Cape Town, containing 70,010 square feet or thereabouts, lately reclaimed by the vendors, including the North Wharf, together with the buildings and chambers used for refrigerating and cold storage, and all fixed plant and machinery thereon (£145,010); (2) all that piece and parcel of land now covered by water adjoining the property lastly hereinbefore described, stretching towards the Coaling Wharf, and containing 43,727 square feet or thereabouts (£43,727). By clause 12 of the agreement it is provided that the vendors shall, as and when required by the company, but at the expense of the vendors, reclaim the property secondly described, in the same workmanlike manner as the portion already reclaimed, and in such manner that the properties firstly and secondly described shall form one block. It is stated in clause 4, sub-section I., that the properties here referred to fall under the agreement between the Government and Combrinck and Company, and it is agreed that on completion of the purchase the vendors shall issue such assignments, powers of attorney, or other deeds as may be necessary for vesting the benefit of the agreement with the Government (so far as it relates to the property sold to defendants) in the company. As the firm of Combrinck and Co. was not under the circumstances in a position to give transfer in the ordinary course to the defendants, the parties secured themselves by entering into an agreement on the 5th day of August, 1889, whereby Combrinck and Company appointed Messrs. Van Zyl and Buissinne to be irrevocably their agents to pass transfer to the defendants when in a position to do so, under their agreement with the Government. And on behalf of the Government, the Treasurer-General, who was a party to this agreement, undertook to do everything necessary under the agreement with the Government, and to accept the defendants in the place and stead of Combrinck and Co. The plaintiff now claims the sum of £3,774 10s. 4d., as transfer duty payable upon the purchase price of the property sold to

the defendants on the 4th day of May, 1899, together with interest at the rate of 12 per cent. from the 4th November, 1899, when the duty became payable. Briefly stated, one of the grounds of defence is that the defendants became by virtue of the above-mentioned agreements not the purchasers of land from Combrinck and Company, but the assignees, with the consent of the Government, of certain interest in land, the title to which would ultimately be acquired by the defendants direct from the Government. That the defendants, as far as the land in question was concerned, took the place of Combrinck and Co. in the agreement with the Government. That the defendants would have become entitled therefore to a grant direct from the Government, and not to a transfer of property from Combrinck and Company. They further plead that whatever their rights were, they parted with them with the consent of the Government to other companies before the time arrived when title was to be granted, and they consequently never became liable to the payment of transfer duty. Now, regard being had to the terms of the agreement between Combrinck and Co. and the defendants, it is quite clear that an out and out sale of immovable property was contemplated, and not the mere assignment of an interest, and furthermore, Combrinck and Company undertook that in due time they would see that proper title was delivered to the defendants. This is made quite clear in the agreement of the 5th of August, where agents are appointed with irrevocable power to pass transfer when they were in a position to do so. That seems in my opinion to mean that Combrinck and Co. would pass transfer to the defendants when they, upon the completion of their agreement with the Government had themselves obtained transfer. But it is contended that the Government had, by the part it took in the agreement of August 5, 1899, obviated the necessity for transfer from Combrinck and Co. to the defendant by accepting the defendant as the future grantees under the terms of the original contract. In the first place, I do not think the Government had the power to release the defendant in this manner from obligations in respect of transfer duty already incurred by them as purchasers of immovable property, and, in the second place, a proper construction of the contract of August 5 will not, in my opinion, lead to the conclusion that they intended to do so. And even if it was intended, as might legally be done, to grant direct to the defendants the portion of land sold to them by Combrinck and Co., that would not absolve them from the payment of transfer duty. The attention of the Court has been directed to Government Notice, No. 428 of 1859. Now, it is quite clear that such notice could not make law nor

alter the law, but it seems to me to be a correct statement of the law issued for the information of Civil Commissioners and other officers charged with collecting transfer duty. According to this notice, which has been acted upon since its promulgation, where land in occupation is sold prior to the issue of the grant, transfer duty shall be paid in like manner as upon sales which take place after the grant has taken place. If this view is correct, then the contention of the defendants must fail, which is that duty does not become payable until, in terms of section 2 of Act 5 of 1884, there is in existence, by virtue of a grant, some freehold property, or property held from Government upon quit rent or other leasehold tenure, which becomes the subject of a sale. In this case, at the time of the sale to the defendants, the sellers were actually in lawful occupation of 70,010 ft. of reclaimed land, with buildings erected thereon, a grant of which was in contemplation, and this land, together with the portion they were then engaged in reclaiming, formed the subject of the sale in question. A grant of this land was expected in due time, and it seems to me, whether such grant was ultimately made to the sellers, or, as a matter of convenience, direct to the purchasers, the defendants, whose title was acquired by purchase from Combrinck and Co., are liable to pay transfer duty. As a matter of fact, Combrinck and Company claimed and obtained transfer of all the reclaimed land, including the portion sold, and consequently, in the ordinary course, transfer to the defendants would have been necessary. It is not necessary to trace the subsequent history of this property, because it is not material to the issue. Now, in my opinion, in conformity with the view expressed in the above-mentioned Government notice, where a person is in occupation of land in anticipation of a grant from Government, and sells such land before the grant is issued, this constitutes a sale of land within the terms of section 2 of Act 5 of 1884, and the land so sold may be described as freehold property, or quit-rent property, in accordance with the promised or intended grant, although I do not say that it would be necessary to specify under what category it would fall. But it was argued there was no certainty that under the conditions of the original agreement any grant would ever take place. Now it does not follow that where upon failure of a condition a sale falls through, no transfer duty is payable, that would depend upon circumstances. But Act 5 of 1884 specially provides in sections 6 and 7 for cases of deferred possession and conditional sales, where transfer duty is payable notwithstanding, with provision for repayment under certain conditions. As a matter of fact, in this case all the con-

ditions were fulfilled to enable Combrinck and Co. to pass transfer to the defendants, and it was in their power to do so if the defendants had claimed it, as they were entitled to do. The plaintiff, in his capacity as Assistant-Treasurer, is, therefore, entitled to transfer duty as payable on the 4th of November, 1899, with interest at 12 per cent. from that date. Judgment is given for the plaintiff for the sum of £3,774 10s. 4d., with interest at the rate of 12 per cent. from the 4th November, 1899. Defendants to pay costs of suit.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's Attorneys: Van Zyl and Buissinné.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

HEYDENRYCH V. INSOLVENT ESTATE OF BUCHANAN AND OTHERS. 1907.  
 { Oct. 17th.  
 " 18th.  
 " 26th.

This was an action in which Benjamin Godlieb Heydenrych, a financier, of Observatory-road, sought an order compelling James Muirhead Potter Muirhead (in his capacity as sole trustee of the insolvent estate of William Preston Buchanan), Henry Sampson Martin, and Isidore Hanau, of Cape Town, to render a proper account, supported by vouchers, showing the manner in which certain moneys advanced by him to the Preston Buchanan Gold-mining and Developing Syndicate were expended, and a declaration of his rights in the venture.

The plaintiff's declaration was as follows:

1. The plaintiff is a financier residing at Observatory-road. The first defendant resides in Cape Town, and is sued in his capacity as sole trustee of the insolvent estate of William Preston Buchanan; the second defendant now resides without the Colony, and his general power of attorney is held by Messrs. Syfret, Godlonton and Low, attorneys, of Cape Town; and the third defendant resides at Wynberg.

2. In the year 1901 the said Buchanan and the second defendant were the joint owners of certain mining areas, claims, stands, and other interests at Millwood, in the division of Knyena, where they were employed in gold-mining work, and in or about December of that year, finding themselves in want of capital, they applied to the plaintiff for financial assistance for the prosecution and development of their said operations and of acquiring other stands, claims, and machinery.

3. The plaintiff agreed to render such financial assistance as aforesaid, upon certain terms and conditions, which are set forth in a document signed by the plaintiff and the said Buchanan, and dated the 19th of December, 1901, to which the plaintiff craves leave to refer at the trial.

4. By the said agreement, it was provided, *inter alia*, that the plaintiff should advance from time to time, for the said purposes, sums of money not exceeding in the aggregate £1,000, and that, in consideration of his so doing, he should, as security for such advances, have a lien on all the assets of the joint venture, upon which the said advances were to form a first charge. It was also provided that none of the parties to the said agreement should have a right to pledge or should pledge the credit of the concern or his share thereof without the consent of the others first had and obtained. It was further provided that all profits which might accrue either from gold produced or the rental or sale of any of the said interests should be divided between the parties in the proportion of half to the said Buchanan and quarter each to the plaintiff and the second defendant, but the plaintiff was not to become liable for any losses of whatsoever nature.

5. The said agreement was duly ratified by the second defendant on or about the 25th of March, 1902, when the terms were slightly varied in a manner not material to set forth here, and on or about the 19th of February, 1903 it was further agreed that, in consideration of further services rendered by the plaintiff, his holding in the said venture should be increased to 4-12, the additional 1-12 coming out of the share then held by the said Buchanan. The plaintiff is still the holder of the said 4-12 interest, subject to the terms of the said agreement.

6. After the execution of the said agreement and in pursuance thereof, the plaintiff from time to time advanced money to the said Buchanan and the second defendant for the purposes of the said venture, and he has in all advanced the sum of £2,500 therefor, all subject to the conditions of the said agreement, with which money the said operations were prosecuted, and additional property in the way of stands and other interests were acquired, the said Buchanan and the second defendant acting throughout as managers of the concern.

7. On or about the 10th of September, 1902, the said Buchanan passed a mortgage bond for £1,500 in favour of the third defendant, specially hypothecating certain landed property belonging to the said Buchanan, and containing the customary general clause, of which bond the third defendant is still the holder.

8. The said Buchanan assigned his

private estate on or about the 5th of November, 1903, in favour of his creditors, the third defendant becoming one of the assignees thereof, and on or about the 19th of March, 1907, the estate of the said Buchanan was sequestrated as insolvent, upon the petition of the third defendant.

9. For some considerable time past no active work has been done upon or in connection with the said claims or other interests of the said venture, and the parties interested therein are agreed that the affairs of the said venture should be wound up and its assets disposed of at the earliest convenient time, but the first and second defendants have neglected and failed hitherto to render the plaintiff any proper account, supported by vouchers, of the expenditure of the moneys advanced by him as aforesaid.

10. There is in the hands of the attorneys, Syfret, Godlonton and Low, of Cape Town, the balance of a sum of £600 paid by a company called the Preston Buchanan Gold Mining and Developing Syndicate as compensation for rent overdue and the cancellation of a certain lease entered into between the parties to the said venture and the said company, the said money being held by the said attorneys in trust for whomsoever it may concern. The plaintiff says the said money is the property of the said venture.

11. The third defendant claims that the assets of the said venture fall within the operation of the said bond, as being assets of the private estate of the said Buchanan.

The plaintiff claims: (a) That the first and second defendants may be ordered to render the plaintiff a proper account supported by vouchers showing the manner in which the moneys advanced by the plaintiff as aforesaid were expended. (b) A declaration of his rights in connection with the said venture. (c) A declaration that the first and second defendants are not entitled to any share in the assets of the said venture until the said sum of £2,500 with interest is repaid to the plaintiff. (d) A declaration that the said mining claims, stands, prospecting areas, machinery, plant, and other property acquired by the said Buchanan and the second defendant as aforesaid, as well as the said balance in the hands of the said attorneys are the property of the said venture. (e) That the third defendant be declared not entitled to any right over the property belonging to the said venture save and except upon the share of the said Buchanan therein, after the amount of £2,500, with interest, advanced by the plaintiff as aforesaid, shall have been repaid. (f) Alternative relief. (g) Costs of suit.

James Muirhead Potter Muirhead, in his capacity as sole trustee in the insolvent estate of William Preston Buchan-



an, Henry Sampson Martin, and Isidore Hanau, of Cape Town, in his plea stated:

1. Defendant admits paragraph 1 of plaintiff's declaration save that he has no knowledge as to the whereabouts of the said Martin, and that he has been informed by the said attorneys that they have ceased to represent him.

2. Defendant says that he has no personal knowledge of the allegations contained in paragraphs 2, 3, 4, 5, and 6 of plaintiff's declaration.

3. As to paragraph 7, it would appear from the proof of debt filed in the insolvent estate of the said Buchanan that the allegations in the said paragraph contained are correct.

4. As to paragraph 8, defendant says that a deed of assignment was entered into by the said Buchanan on the 5th day of November, 1903, to which deed, for greater certainty, defendant craves leave to refer when produced at the trial.

Defendant says the correct date of sequestration is 26th March, 1907. He says further, that the usual three meetings of creditors in the said insolvent estate have been held, and the third defendant is the only creditor that has proved.

5. As to paragraph 9, he has no personal knowledge of the allegations contained therein. Defendant says he has never seen the said Buchanan, who has, he believes, for some years past resided in Johannesburg; that in pursuance of his duty as trustee he has made inquiries of the said Buchanan, and has received from him a letter dated 22nd July, 1907, to which he craves leave to refer when produced at the trial, and although he has made diligent personal search among the papers and books of the insolvent, he has been unable to trace any proper record of the transactions referred to, and it is quite impossible for defendant to furnish the account demanded by plaintiff, and defendant says that no claim was ever made upon him so to do prior to the issue of summons.

6. As to paragraphs 10 and 11, defendant is aware that certain money is in the hands of the said attorneys, and of the contentions of the parties.

Wherefore, defendant submits to the judgment of the Court, and prays his costs of suit against plaintiff.

Isidore Hanau, in his plea, admitted paragraph 1 of plaintiff's declaration. He contended that the mining areas, machinery, and plant were the property of Buchanan. The agreements referred to in the declaration were not known to the public. He admitted paragraph 7, and further added that the bond was passed in terms of a certain agreement between Buchanan and himself, when he advanced the money to secure the repayment of a portion of which this bond

was passed, a certain schedule of his assets being exhibited to defendant by Buchanan. As to paragraph 6, defendant held that a deed of assignment was entered into by Buchanan.

[Mr. Upington (with him Mr. J. E. R. De Villiers) for plaintiff. Mr. Benjamin, K.C. (with him Mr. D. M. Buchanan) for defendants.]

The plaintiff stated he became acquainted with Buchanan and Martin in 1901. Martin was a prospector, and Buchanan had a bookseller's shop. He was asked to join in a venture for the discovery of gold at Knysna, and Martin took him to the Knysna to show him the concern. People knew that Martin and Buchanan were jointly concerned in the development of the place, and in purchasing machinery and plant. Witness went to see the area and after doing so, agreed to join in the venture, and an agreement was drawn up in December, 1901, and on the 26th March the agreement was altered and verified. Prior to the agreement, witness advanced sums of money in respect of the agreement. Witness produced the cheques paid by him. The total amount advanced by him for the venture was £2,500.

[Hopley, J.: You paid more than was agreed upon.]

I was applied to for it. They said there was no good spoiling the ship for the sake of a pennyworth of tar.

[Hopley, J.: But that was more than a penny. It was £1,500.]

Witness (continuing) said he was to receive three-twelfths of the profits, and that was afterwards increased to four-twelfths. Witness saw the machinery for the purchase of which he advanced the money. Subsequently 44 stands were purchased, and negotiations entered into for a lease of the properties. Witness thought the original lease was in the records of the Court as it was filed in another action. He produced a copy, which was handed to him at the time the lease was drawn, and in his opinion it was correct.

Hopley, J., said the original lease should be produced.

Mr. Upington said the case was a very peculiar one. The firm of attorneys who represented the Preston Buchanan Syndicate, of which plaintiff was a partner, in the previous action, now represented the two defendants in the present action.

Mr. Benjamin said he did not admit Mr. Upington's statement. He had only a copy of the agreement. He had no objection to Mr. Upington examining his witness on the copy, but he would reserve the right to object to the admission of the original when it was found.

Witness (continuing) said no rent was paid, and he would not handicap the syndicate by applying for any. He



wrote several letters to the secretary (Mr. Hazell), and received replies from him. He produced his letterpress copy-book.

Mr. Benjamin objected to the book being put in; the originals should be produced.

Hopley, J., said he would adjourn the Court, and it would be necessary for the plaintiff and defendants to have the proper witnesses present. He had to protest against people not making all proper arrangements out of court, and coming into court and wasting the time settling these matters.

Mr. Benjamin said he had to object to the book being put in.

[Hopley, J.: I cannot sit here and wait while you are squabbling about the letters. If the letters are not evidence, they will not affect the mind of the Court. Cannot you let the letters go in, and afterwards brush them aside as a cobweb?]

Cannot I object to them?

[Hopley, J.: Yes, but they will produce the originals.]

But I will object to them also.

[Hopley, J.: Do you think they would affect the mind of the Court if they went in?]

Then I will let them go in, but formally object to them.

Witness (continuing) stated that in July he received a letter from Mr. Hanau offering to dispose of the property on commission, and a 2½ per cent. commission was agreed upon. On August 31 a caretaker was appointed to look after the property. That caretaker was still in possession. Witness claimed that the sum of £2,500 should be paid back to him before Martin or Buchanan shared the proceeds.

In cross-examination, the witness said he had nothing to do with the ordering of the machinery. Martin did that, but witness paid for it. Witness took no active part in managing the venture. Witness was at Knysna, but that was before he signed the agreement.

Did you go and see any of the stores about the business when in Knysna?—No.

Did you pay any of the accounts?—No; I just gave the cheques to Buchanan.

Continuing, witness said he was claiming £2,500, with 2½ per cent. per month interest.

You said that you had advanced £5,000?—I said it roughly, because I advanced money to Buchanan to help him in his interest.

[Hopley, J.: How long does it take for money to double itself at 30 per cent. per annum interest?]

Witness (continuing) said that as they wanted to pay him nothing out of the estate, he wrote to Mr. Hanau stating he had supplied about £5,000.

In re-examination, witness said that Mr. Hanau was quite aware of his share in the company. The first time he mentioned anything was when witness was approached to join in an action against the syndicate.

In reply to the Court, the witness said he considered he was a partner in the concern. Witness did not know very much about gold mining at that time.

[Hopley, J.: You have learned something since?]

Witness: Yes.

Mr. Benjamin: Do you in any of your correspondence claim to be a partner?—The letters speak for themselves. Under the agreement of 1901.

I will put it to you that you have admitted that you had a lien, but where do you claim to be a partner?—They could not sell without my consent.

[Hopley, J.: Is it not a proof of partnership when he appears in the lease to sub-let?]

Mr. Benjamin: In your letter to Hazell you say you have a lien, but nothing about a partnership.

[Hopley, J.: But that letter is not put in, and until it is you cannot cross-examine.]

In further examination by Mr. Benjamin, the witness admitted writing to Mr. Trollip, stating that he got his holding in the concern as a financier, but that was in reply to a demand made on him for certain documents.

[Hopley, J.: What is there to prevent a financier working himself into a partnership?]

Mr. Benjamin: But he should have stated that.

Evidence was given by Mr. A. A. Dickmont to the effect that his firm acted for the vendors with regard to the property.

A clerk in the Deeds Office produced certain original documents.

Mr. Upington closed his case.

Mr. Isidore Hanau, the third defendant, examined, stated that in August, 1901, he gave a loan of £1,000 for operations at Knysna. In 1901 a further loan of £3,000 was wanted, and as Buchanan only offered as security a second bond on his landed property, witness obtained from him a schedule of his assets, stock, etc. In August, 1902, Buchanan made an application to cancel the large bond, and in September, 1902, the new bond was passed, witness obtaining a claim in preference over the assets of Buchanan's estate. Witness had no knowledge whatever that Heydenrych or Martin had any interest in the place. He inquired into Martin's position. The schedule was handed to witness, and he was perfectly satisfied with it, and he took a quarter interest in the mining area. Witness frequently saw Buchanan. When the estate was assigned claims came in *inter alia* from business houses at

Knysna, but nothing was heard of Heydenrych's claim. Martin proved in the ordinary way as a creditor for salary. Witness only heard of Heydenrych having anything to do with the areas in 1903.

In cross-examination witness said he was partly a director of the second syndicate. Witness as a bondholder was kept posted as to the assets at Knysna. It was to his interest that the syndicate should succeed. Witness lent Buchanan money privately, but it was paid back. He did not see the agreement with Martin. In February, 1903, he knew that Heydenrych was interested in the flotation of the company. Witness would have foreclosed his bond had he known. The property specially hypothecated in the bond was sold.

For what amount?—I cannot say without my cash-book. The bond will prove it.

[Hopley, J.: The amounts realised are not on the bond.]

Mr. Upington: At the time of the insolvency, was there any land hypothecated?—No.

In re-examination, witness said the stands were ceded and transferred to him.

[Hopley, J.: With regard to this ceding of stands, how is it done?]

Witness: They are issued by an Inspector of Mines there. Continuing, he said he only held one stand now: he had abandoned the others.

[Hopley, J.: You do not think they are worth paying 30s. a year each for?]

Witness: No, my lord. Continuing, he said that Buchanan's estate paid various claims, but not Heydenrych, Martin, and Buchanan. That was when the liquidation was proceeding.

Hopley, J., expressed the hope that this case would not go to appeal, for the sake of the parties concerned, because the documents, if printed, would make a bulky volume.

John Harden, manager of the branch of the Standard Bank at Knysna, stated Buchanan opened an account there, which was closed on July 24, 1903, having started in January, 1902. Buchanan told witness that Martin was to look after his business in his absence, and gave him a power of attorney to that effect. Witness did not know Heydenrych or anybody else but Buchanan.

Edward Bibby, of Knysna, said he knew the insolvent Buchanan from the time he first went to Millwood prospecting with Martin. Witness agreed to lend him £500 if he developed the mine with it. Witness was to get one-twentieth share of the Bendigo mine when it was floated. Witness provided the money. He knew nothing about plaintiff having any share in the venture. He only knew Buchanan as the owner and Martin as the manager.

In cross-examination, the witness stated that the negotiations took place with Martin. Witness was to get one-twentieth part of Buchanan's share. He bought some stands from Martin.

[Hopley, J.: Had the mines been cut up into stands?]

Witness: These are building lots.

Mr. Upington: What did you pay for them?—£40.

Have you anything to prove that sale?—I have the transfers. Continuing, witness said he did not know of anybody else having a share. He heard that there was somebody in Cape Town financing it.

What did you understand by Buchanan's share? Who else did you think had a share?—Martin told me he had a quarter share.

Witness did not remember having seen Heydenrych at Knysna.

But they called in to your house to see you?—I do not remember it.

[Hopley, J.: His features did not make any impression on you?]

Continuing, witness said he heard a couple of people were putting money into the venture.

In re-examination, the witness said that when his money vanished he put in a claim for it.

In reply to the Court, witness said he asked Martin what his share in the mine was, and he told him his was a quarter. He understood that he was to get 1-20th share of the whole mine, and not 1-20th of Buchanan's share.

David Craig, town manager for Messrs. Petersen and Co., stated that Buchanan made all the purchases for the mines, and they knew nobody else in connection therewith.

Arthur Ed. Perkins, chief clerk to Messrs. Cunningham and Gearing, stated Buchanan only dealt with their firm on behalf of the mine.

John F. L. Marston, manager of the Long-street branch of the Standard Bank, stated Buchanan had an account there prior to his insolvency. On one occasion he had an overdraft at the bank, and on witness making inquiries, he said he had interests in a gold mine at Knysna.

Gilbert Reid Shaw, who is carrying on the business of Mr. J. M. P. Muirhead during that gentleman's absence, testified to the liquidation of the Preston-Buchanan Syndicate. No books were available at all. It was impossible to make up an account, as was asked for. The assets consisted of £600, in the hands of Syfret, Godlonton and Low, and some machinery at Knysna.

In reply to the Court, the witness stated the area was useless.

Continuing, witness said there was nothing to show how the money had been applied.

In cross-examination, witness stated that Hanau was the sole creditor who had proved.

Mr. Benjamin: But there are others who have not proved.

[Hopley, J.: How does the witness know that?]

Witness: Several of them said they would not prove until they had ascertained if there were any assets.

Mr. Benjamin closed his case.

Mr. Upington submitted in argument that Heydenrych advanced this money on the understanding that he was to become a partner. The fact that Buchanan went to several firms and said that he had an interest in these mines was not sufficient to keep Heydenrych from availing himself of a partnership. He submitted that the £200 and the machinery were part of the joint venture. Now, they asked for an account. Well, he recognised that it was impossible to get that.

[Hopley, J.: Well, you had better drop that?]

Mr. Benjamin submitted that the Court had to decide the relationship between Martin, Buchanan, and Heydenrych. It was either a partnership or not. If it was not a partnership, and was the sole concern of Buchanan, then they must rank as creditors. He submitted that Hanau came in under his bond if there was no partnership. As to a claim of a partnership, one could not see it either in the pleadings or in the correspondence that passed between them. Nowhere was it set out the relationship that existed between them. Continuing, he contended that the money advanced by Hanau was advanced for the businesses of Buchanan, which was borne out by the latter's statement, in which he said the money raised on the Long-street business was devoted to the development of the Knysna property. He contended that before Heydenrych could recover that the claims of Hanau should be satisfied. Counsel, in support of his arguments, quoted the case of *Davidson v. Auret* (22nd vol., Supreme Court Reports, p. 10).

*Cur. Adv. Vult.*

*Postea* (October 26).

Hopley, J.: This action is brought by Heydenrych against the trustee of the insolvent estate of one William Preston Buchanan, against one Martin (the "second defendant"), and against Isidore Hanau (the "third defendant"). The plaintiff is a financier and money-lender, the insolvent Buchanan was a trader carrying on business in Cape Town; Martin, the second defendant, was a prospector, and the third defendant is a retired merchant, who now carries on business as a financier and money-lender in Cape Town. Before 1901 and early in

that year, Buchanan had acquired prospecting rights over certain areas, and mining claims, and rights over other areas in the district of Knysna, and early in that year he had borrowed (besides smaller amounts which do not enter into this case) a sum of £3,000 from the third defendant, Hanau, upon security of first mortgage bonds over certain landed property in Cape Town, such bonds presumably containing the usual general clause binding all the mortgagor's property and effects. There was, however, no specification or delivery of any of the movables or other assets, save only of the landed property specially hypothecated. It is said, and probably correctly, that a portion of the moneys so obtained from Hanau was spent by Buchanan in acquiring and prospecting the areas in the Knysna district; but there is no actual proof that he so employed such funds, or looked upon them as obtained for that specific purpose. I am of opinion that Hanau lent the money mainly, if not entirely, on the security of the Cape Town business of the mortgagor, but whether he did so or not, and whether he knew or thought, or did not know or think, that the money advanced by him was being employed in Buchanan's Knysna enterprise, it does not seem to me that the result of this case will be affected by such considerations. It is clear that after the mortgages were passed, as above stated, Buchanan had a perfect right to deal with or dispose, in any way he chose, of such of his assets as were not specially bound, and the further history of the case will show that he did deal with and dispose of some of them. Towards the end of the year 1901, Buchanan approached the plaintiff for financial assistance in the Knysna venture, with the result that the latter, after a personal visit to the alleged gold-bearing areas, and an inspection under the guidance of the second defendant, agreed to join the venture on certain terms and conditions, which are set forth in a written agreement, dated December 19, 1901. That document, supplemented by one of March 28, 1902, after reciting that Buchanan and Martin are jointly possessed of the Knysna interests in question, that they have determined to obtain financial aid to develop the areas and mines, and to enable them to acquire machinery, tools, etc., for the purpose, and to acquire further rights and interests, and that they had approached Heydenrych, who had agreed to render such pecuniary assistance and to advance money not exceeding £1,000, which advances were to form a first charge on all the assets, interests, buildings, mills, machinery, tools, areas, claims, mines, stands, etc., already acquired or to be acquired, proceeds to state that it had

been agreed that Heydenrych was to advance £1,000 for the said purposes, upon the security of a lien over all the said assets, and on the basis that the advances were to form a first charge on such assets, that further sums required were to be advanced by the various parties on a pro rata basis, and that such advances, by whomsoever made, should have interest at the rate of 2½ per cent. per mensem, that none of the parties should have the right to pledge the credit of the concern, or even his share therein, without the consent of the others in writing, and, lastly, that all profits which might accrue from the production of gold, sale of ore or metal, lease or sale of any of the areas, mines, rights, or stands, etc., or other interests, should be divided between the three parties in proportions of one-half to Buchanan and one-quarter to each of the others—Heydenrych and Martin—but that Heydenrych was not to be liable for any losses of any description. Thereafter Heydenrych began his advances, and he seems to have carried out his share of the obligations imposed by the above agreement. A banking account was started for this "Knysna concern" by Buchanan in his own name in the Knysna branch of the Standard Bank; Heydenrych gave his cheques payable to Buchanan "for Knysna concern," and Buchanan gave receipts for the various instalments "as per agreement re Knysna concern." Martin held Buchanan's power of attorney to operate on the said banking account, and remained at Millwood, or in the neighbourhood, prospecting, purchasing machinery and other assets, and generally directing the affairs of the venture. Meanwhile, during the first half of the year 1902, Hanau seems to have considered that he should enter into a fresh arrangement with Buchanan, and on June 18 of that year these two parties came to an agreement, whereunder Hanau agreed to cancel two bonds of £1,100 and £3,000, both passed in 1901 upon condition that Buchanan should pass a first mortgage bond for £1,500 over certain land specified, make a cash payment of £1,180, with interest thereon, at 5 per cent., added up to the end of January, 1904: make a certain cession of a lease (which, however, subsequently came to naught), and increase his business stock and keep it up to £2,000, insuring it for that amount and ceding the policies to Hanau. On the same date (June 18, 1902) Hanau took a power to pass the mortgage bond for £1,500, and such bond was subsequently passed and registered on September 10, 1902. It, of course, contained the general clause, and it is by virtue of such that Hanau now makes claim to the assets of the Knysna concern, of which the history has been partially given above. Hanau produc-

ed an undated memorandum in Buchanan's writing, wherein he gives a rough list of his assets; he is under the impression that this was given to him in 1901, and states that he was induced to advance some of his moneys, because of the Knysna assets shown. I am rather of opinion that it is more likely that this memorandum was made about June, 1902, when the negotiations for the fresh arrangements were pending—but I think the point of small importance since the Knysna assets were in no way bound, either in 1901 or in 1902, save as they might be embraced by the general clause. Towards the end of 1902, Buchanan informed Heydenrych that he was forming the "Preston Buchanan" Syndicate for the purpose of further developing the said concern, and he proposed that in lieu of the lien over the assets of the concern, Heydenrych should agree to take a lien over the vendors' shares, if the concern should be floated into a company, and to this Heydenrych agreed. In all that had happened thus far, it appears to me that Heydenrych's position was consistent with the role of either a money lender or a partner, and had there been nothing further I should have inclined to the view that he should be looked upon rather in the former capacity; but his position was somewhat more clearly defined in subsequent transactions and documents. Buchanan was apparently on the point of succeeding in getting together the syndicate, or he had already got one which was to be rapidly succeeded by another, when (on February 9 1903), he wrote a note to Heydenrych to confirm a conversation, wherein he had agreed that Heydenrych's "share in the properties and assets jointly held by us in the Knysna district more fully described in the agreement of December 19, 1901, shall be increased by one-twelfth, etc. . . ." This letter appears to recognise that Heydenrych had a share not only in the profits, but in the actual properties and assets at Knysna. This view is strengthened by the agreement which shortly thereafter followed with the "Preston Buchanan Gold Mining and Developing Syndicate" (which was also known as the "Cartwright Syndicate," from the fact that Mr. Cartwright was its chairman). It may here be noted that the defendant Hanau was a member of this syndicate, and that when it was registered under the Companies' Act in 1904 he was still a member and one of the directors. On February 19, 1903, Mr. Cartwright, acting for the syndicate, concluded an agreement with Buchanan, Heydenrych, and Martin, who are described as the owners of the properties and rights in question, and the vendors thereof to the syndicate. The properties and rights comprise all the assets and rights, including tools and machinery, etc., which formed the



Knysna venture, in which Buchanan, Heydenrych, and Martin were jointly interested, and the agreement in brief was that the whole of the undertaking was leased to the syndicate free of charge for six months, and thereafter at £50 a month; that the syndicate should develop it, spending at least £1,000 on such work unless they could float it into a company without incurring such a total expenditure, and that on such flotation they were to give the three vendors one-third of the gross amount for which any company or companies might be floated in full settlement and satisfaction of all the vendors' rights to the said property, claims, rights, plant, machinery, battery, tools, and all other movable assets on the said property. It seems to me hopeless to contend, after such a recognition of his rights, that Heydenrych was not a partner in the full sense in the Knysna venture. The "Cartwright Syndicate" did not, however, have a profitable career. After spending money on development of the mines and areas, they ceased apparently to work, were sued in 1905 for the rent, under their agreement, by the vendors, and compromised the action by a payment of £600 and costs. It should have been stated, too, that Buchanan had meantime been obliged to assign his estate. That took place in November, 1903, and Hanau and one Hazell were the assignees. So that, when the action was brought against the syndicate, Hanau, as an assignee of Buchanan's estate, figured as one of the plaintiffs, in conjunction with Martin and Heydenrych, while in his individual capacity he figured as a defendant. There is no particular significance in this, as the position was one into which he was carried by virtue of representing Buchanan's interests; but it is possibly of some importance on a branch of the case much relied upon in argument. Of the amount of £600 recovered from the syndicate, there is still a substantial balance in the hands of the attorneys, and of the assets of the Knysna venture, there are still some of some value. To these assets Hanau lays claim, by virtue of the general clause in the bond passed in 1902 in his favour by Buchanan, on the ground that all the assets of the Knysna venture were the sole property of Buchanan, and that even if Buchanan had partners in such venture, they were anonymous partners, and he the only ostensible one; and it is argued that if that were so, all the assets of such partnership could be treated as belonging to Buchanan, and that because Buchanan is insolvent — for Hanau had obtained a sequestration of his estate in March, 1907, therefore the venture is also insolvent, and all its assets claimable by

Hanau, who is the only creditor who has proved on Buchanan's insolvent estate. Now, it seems clear to me that the assets of the venture were not, after December 19, 1901, the sole property of Buchanan. At that date he or he and Martin had a perfect right to part with them, and the document of that date and the subsequent documents show clearly that they did dispose of the whole of their assets to a firm consisting of themselves and Heydenrych. I do not think that Heydenrych and Martin, or either of them, can be properly described as anonymous partners in this concern. It is true that the most prominent and ostensible partner was Buchanan, but when any matter arose which required the concurrence of all the members of the firm, they all appeared and acted. Each member of the firm was busy in his own way all the time. Heydenrych was supplying the funds, Buchanan was transmitting them to Martin and scheming to dispose of the matter to advantage, and Martin was on the spot working at the fields, whence they all hoped to derive fortune. There was no necessity for any of them to do more; but when Buchanan had managed to find people to take the concern off their hands and when it was necessary to hand over the undertaking to them, then all three partners appeared and joined in the necessary acts. Hanau at all events knew of this state of affairs, and recognised it. He says that the first he knew of Heydenrych's connection with the venture was when he became aware that he was one of the vendors thereof. Well, be it so. At that time there was nothing to make the partnership at all objectionable or defeasible, and the general clause in his bond had not come into operation over any of the assets involved in the transaction. It is clear that he raised no objection at that time, nor could he do so, and even subsequently when the estate was assigned he acquiesced in the position. It is also clear that he has subsequently and comparatively recently forced an insolvency of Buchanan's estate purposely to make the general clause in his bond effectual, and so to get a claim to the assets of the Knysna venture; but before he took that step he had approached Heydenrych and Martin as vendors of the Knysna venture asking them to allow him to try and dispose of its assets for a remuneration, and asking what rate of commission they would allow him; to which they replied that they would allow him to dispose of the assets, that he should have 2½ per cent. commission, but that no sale should be concluded until the vendors had approved of the terms. To my mind there is nothing in the evidence to show that the Knysna venture was not entered into as a Buchanan, Heydenrych, and Martin as an ordinary partnership, such as is

commonly met with for such a transaction. That partnership has never been made insolvent, nor did Hanau ever advance any moneys to the partnership qua partnership, and I cannot see how any claims against Buchanan's insolvent estate can be satisfied out of its assets, save in so far as there may be amounts coming to Buchanan upon a liquidation of the affairs of such partnership. Now, the partnership, as such, owes nothing to anyone outside its own members, and the rights of its members are *inter se*, and must be regulated by the agreement existing between them. It would appear that the partnership owes the plaintiff a considerable sum, and that the agreement between the parties is that anything realised from sale or lease of its assets should be appropriated in the first instance to payment of the debt due to the plaintiff. If there should be anything over upon a liquidation of the affairs of the partnership after the amount due to Heydenrych and Martin has been paid out, then such amount would, of course, belong to Buchanan's insolvent estate. The plaintiff is therefore entitled to a declaration that the first and second defendants are not entitled to any share in the assets of the said venture until such sums as the plaintiff has advanced shall have been repaid to him with interest, according to the agreements existing between the said parties, and to a further declaration that the third defendant has no right to the assets of the said venture, save and except to the share of the said Buchanan after such advances and interest have been repaid to the plaintiff as above set forth. The plaintiff is likewise entitled to a declaration in terms of clause (d) of his claim. And the Court orders accordingly. The contentions of the third defendant—Hanau—and his claim in reconvention, must fail, and the costs of the action must be paid by him.

[Plaintiff's Attorneys: Van der Byl and De Villiers. Defendant's Attorneys: Syfret, Godlonton and Low.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

SYFRET AND CO. V. MAC- { 1907.  
FARLANE. } Oct. 17th.

Mr. Swift moved for provisional sentence on a promissory note for £297 13s.

4d., with interest from the 14th August last, and costs.

Order granted.

### *Ex parte* MARSH.

Mr. Inghold moved, as a matter of urgency, on the petition of the Rev. T. E. Marsh, as the holder of a mortgage bond passed by one Samuel Jacobs, for an interdict restraining the sale by auction, at the instance of Rachel Jacobs, of certain lavatory basin connections and gas fitting in property specially hypothecated under the bond, and for costs against the said Rachel Jacobs.

Rule granted calling upon respondent to show cause to-morrow (Friday) why an interdict should not be granted, rule to operate as an interdict meanwhile.

### MATRIMONIAL CASES.

#### VAN WYK V. VAN WYK.

This was an action brought by Petrus Jacobus van Wyk, of Vondelingsfontein, district of Calvinia, against his wife, Johanna Hendrika Petronella van Wyk, also of Vondelingsfontein, for divorce on the ground of her alleged adultery with one Jacobus Petrus Bergh.

Mr. H. S. van Zyl was for plaintiff; defendant did not appear.

Mr. Van Zyl read affidavits in support of the case, from which it appeared that the defendant left her husband at the end of 1904 and went to live with Bergh, and that she had since given birth to two children, of whom the plaintiff denied paternity. Plaintiff prayed for dissolution of the bonds of marriage, custody of the four minor children of the marriage, and a declaration that defendant had forfeited her half share of the benefits of the marriage in community.

Order granted in terms of declaration.

### GENERAL MOTIONS.

LEWIN AND ANOTHER V. { 1907.  
BURGER } Oct. 10th.

Mr. Close (with him Mr. Louwrens) moved for a certain rule nisi to be made absolute, in terms of consent paper, pending an action to be instituted by applicants.

Rule absolute in terms of consent paper.

*Ex parte* EAST LONDON BOARD OF EXECUTORS AND TRUST CO., LTD.

Dr. Rainsford moved for an order confirming a certain resolution so as to amend the memorandum of associa-

tion, in order to enable the company to carry on its business more efficiently, and carry on certain classes of business in regard to receiving deposits of and lending money, which, under the circumstances, may be advantageously combined to the business of the company. Counsel cited section 28 of the Companies Act of 1892, and section 3 (sub-section b), of the company's memorandum of association.

Order granted as prayed.

LANGE V. GROBLER.

Mr. H. G. Lewis moved, on behalf of petitioner, for an interdict restraining respondent, Barend P. F. Grobler, of Keimoes, division of Gordonia, from disposing of certain landed property, and the Registrar of Deeds at Vryburg from allowing transfer of the said property to be passed by Grobler to any person, pending an action to be brought by petitioner to recover a sum of £84 5s. 3d. owing to him by respondent.

De Villiers, C.J.: I see that Mr. Justice Hopley has refused to grant an order in this matter in Chambers. The best course for the applicant is to go on with his action, and if he gets judgment he can take an execution. There is no ground for the Court's interference.

No order.

SIEPKER V. GROBLER.

Mr. H. G. Lewis said that this was a similar application to the previous one.

De Villiers, C.J.: It does not follow that because a debtor intends to sell his property he proposes to do so in order to defeat the claim of his creditor. There may be special circumstances in which it is clear that a sale takes place with a view of defeating the creditor, but those circumstances should be stated specially, and it is not enough for the creditor to say that he believes that that is the object. He must state the reasons for his belief, and no reasons for the belief are stated in the present matter. The applicant's best course is to go on with his action.

No order.

*In re* B.S.A. ASPHALT AND MANUFACTURING CO., LTD.

Mr. Molteno presented the official liquidator's third report, and applied for the usual order.

Usual order granted.

*Ex parte* HEUNIS.

Mr. Marais moved, on behalf of petitioner, for leave to sue *in forma pauperis*, John McKenzie Johnson, of Mossel

Bay for damages for breach of contract or marriage, lying-in expenses, and maintenance, and support of an illegitimate child, of which respondent is the father. Counsel said he was prepared to certify.

Upon counsel's certificate of *probabilis causa*, rule granted, returnable on October 31, service by registered letter addressed to defendant at Vogel Vlei, near Mossel Bay.

*Ex parte* MATHEWSON AND WIFE.

Husband and wife—Antenuptial contract—Registration.

*In order that a mutual agreement arrived at by parties before marriage may be registered after marriage as an antenuptial contract, there must be proof of the agreement, and the application for registration must not be delayed unreasonably.*

Mr. Marais moved for leave to register a certain ante-nuptial contract of marriage excluding community of property.

Counsel, in argument, cited *In re Lezard and Wife* (16, C.T.R., 1,019).

De Villiers, C.J.: I quite adhere to what I said in the case of *Lezard and Wife*—that if the parties clearly showed that it was their agreement before marriage that there should be no community of property in that case, the Court could assist the parties. But I think a timely application should in every case be made. There the application was made within four months after the marriage; in the present case the application is made more than a year after the marriage. True, there is some explanation by Mr. Hugo that he himself did not consider at the time that such an application could be made. I think that his first thoughts were better than his second. His second thoughts were raised by the decision in *Lezard and Wife's* case, but if he had read the same report as I have read now, he would have seen that the two cases were different. At all events, there is nothing in the affidavits of the petitioners to show that there was a definite agreement before marriage that community of property was intended to be excluded. The parties say that they vaguely understood what the consequences were, and they thought it advisable that their contemplated marriage should be without community of property, but there is a great deal of difference between thinking it was advisable and actually making an agreement. It must be proved that

there was an agreement before between the parties to the marriage, a binding agreement upon both parties, and that it was only in consequence of circumstances for which they were not responsible that that agreement was not placed in the form of an ante-nuptial contract before their marriage. I do not think these decisions can possibly be extended to a case like the present. No order will be made upon the present application.

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*Ex parte DUMBLETON.*

Mr. H. G. Lewis moved for leave to petitioner to sue his wife by edictal citation. Petitioner has been residing in the district of Bredasdorp during the past few years, having come to this country from New Zealand for the benefit of his health. His wife, however, remained in New Zealand, and refused to join him.

Ordered to stand over for proof of domicile.

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*Ex parte CHRISTENSEN.*

Mr. Inchbold moved for the amendment of petitioner's name in the Debt Registry and certain mortgage bond, and for registration of the bond. The Registrar of Deeds reported favourably.

Order granted as prayed.

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*Ex parte ROSSOUW.*

Mr. Louwrens moved for leave to mortgage certain estate property to enable petitioner to pay a bill of costs incurred in an action wherein petitioner was defendant. The matter had previously been before the Court, and had been standing over for proof as to the costs. Counsel now produced the bills of costs, which amounted to £1,501 14s. 5d.

De Villiers, C.J.: It seems that the money has been expended. That is all one can say. The costs are enormous, and out of proportion to the importance of the suit. Notwithstanding the taxation, I am satisfied that the costs are enormous, and out of proportion to what they should be.

Order granted as prayed.

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*Ex parte CELLIERS.*

Mr. P. T. Lewis moved for leave to petitioner to take transfer of certain property in an estate of which he is one of the assignees.

Order granted as prayed.

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*Ex parte GORMAN.*

Mr. W. J. van Zyl moved for leave to petitioner to sue her husband, Robert Roderick Gorman, *in forma pauperis*, and by edictal citation for restitution of conjugal rights. Petitioner resides at Lady Grey, division of Aliwal North.

Leave to sue by edictal citation granted, and rule granted calling upon respondent to show cause why petitioner should not sue him *in forma pauperis*, citation and rule returnable on the 12th January, 1908, personal service, if possible, of rule and citation, failing which one publication in the "Northern Post."

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*Ex parte MASON.*

Mr. Sutton moved for leave to petitioner to sue *in forma pauperis* one Cornelius J. S. de Villiers, farmer, Stellenbosch, for £20 damages for loss of a horse, which died while in respondent's possession.

Upon counsel's certificate of *probabilis causa*, rule granted, returnable on the 25th October.

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*Ex parte BIRCH.*

Mr. Watermeyer moved, on behalf of petitioner, who resides in Cape Town, for leave to sue her husband, Edwin Otto Birch, *in forma pauperis*, for restitution of conjugal rights.

Rule granted, returnable on the 24th October.

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*Ex parte VAN RIET.*

Mr. Ingram moved for leave to petitioner to sue Joseph A. Nicholson, of Johannesburg, by edictal citation, on certain kustings brief, and to attach certain property at Vryburg *ad fundandam jurisdictionem*.

Leave to sue by edictal citation granted, and property mentioned attached, citation to be served personally, and to be returnable on the last day of term.

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*Ex parte REBSTEIN.*

Mr. Close moved, on behalf of petitioner, for leave to sue one George F. Schmidt by edictal citation, for damages for breach of promise of marriage. Respondent was stated to be now residing in German South-West Africa.

Leave to sue by edictal citation granted, returnable on the 7th November, personal service to be effected.

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*Ex parte ESTATE BAKER.*

Mr. W. Porter Buchanan, K.C., moved for leave to petitioner to transfer



certain property at Port Elizabeth in terms of an agreement entered into between the trustees and the parties interested in the estate. Counsel (in answer to the Court) said that the reason why the application was made to the Court was to protect any children that may possibly be born hereafter to the heirs.

Order granted as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HOFFMAN V. CAPE TOWN TOWN COUNCIL. { 1907.  
Oct. 18th.  
" 21st.  
" 22nd.

This was an action for damages brought by Abraham Hoffman against the Town Council of Cape Town.

The plaintiff's declaration was as follows:

1. Plaintiff is a jeweller and speculator in soft goods, residing and carrying on business in Cape Town. Defendants are the Town Council of the City of Cape Town.

2. At all times material hereto, plaintiff was in lawful occupation of the rooms at certain premises situate at 53, Harrington-street, Cape Town, the one on the ground floor of the said premises as a store-room, and the other on the first floor as a bedroom.

3. On or about the 15th day of June, 1906, a fire broke out on the said premises. At the time of the said fire there was a quantity of goods and merchandise of the value of £139 5s., the property of the plaintiff, lying in the said store-room.

4. The said fire was completely extinguished on the afternoon of the said 15th June, 1906.

5. On the morning of the 16th day of June, 1906, plaintiff made arrangements for the removal of the said goods to other premises. While making the said arrangements plaintiff provided a special constable to guard his goods, which were then entirely undamaged.

6. On the said 16th day of June, 1906, and between the hours of 1 and 2 p.m., certain workmen in the employ of the defendant Council and acting for and

on behalf of the defendant Council as agents thereof, entered the said premises, and though warned that plaintiff had valuable goods upon the said premises as aforesaid they (the said workmen) wrongfully and unlawfully, or in the alternative improperly and negligently knocked down a portion of a certain wall upon the said premises, that is to say, a wall between the kitchen of the said premises and plaintiff's store-room, and forming portion of the said storeroom. The said wall was on the said 16th day of June prior to its destruction as aforesaid in a thoroughly sound and undamaged condition.

7. The said wall fell upon plaintiff's goods in the said store-room, completely burying same, and causing great damage thereto. The said goods are now of the value of £5.

8. By reason of the wrongful and unlawful, or, in the alternative, the improper and negligent conduct of defendant's agents as aforesaid, plaintiff says he has suffered loss and damage in the sum of £134 5s.

9. Defendants neglect and refuse to pay the said sum of £134 5s., or any part thereof, though requested so to do.

Wherefore, plaintiff claims: (a) Judgment for the sum of £134 5s., as and for damages; (b) interest a tempore morae; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows:

1. Paragraphs 1 and 2 of the declaration are admitted.

2. As to paragraphs 3 and 4, the defendant Council admits that on or about the said 15th June a fire broke out in the aforesaid premises, and that it was extinguished on the afternoon of the said 15th June. Save as above, paragraphs 3 and 4 are denied.

3. Defendant has no knowledge of the allegations in paragraph 5, and does not admit them.

4. As to paragraph 6, the defendant admits that on the said 16th June its workmen entered upon the said premises, but denies the remaining allegations therein.

5. The defendant says specially that on the said 15th June the Superintendent of the Fire Brigade, duly acting under the powers conferred upon him under the Provisions of Act No. 26 of 1893, ordered the demolition of certain parts of the said premises, and that in pursuance of such orders certain workmen in defendant's employ, on the 16th June following, entered on the said premises, and duly carried out the said order for demolition, and if the said wall referred to in paragraph 6 was demolished by them (which defendant does not admit), the said demolition was a work of necessity within the meaning of sections 159 and 161 of the said Act, and the defendant by the last-named section is indemnified and ex-

empted from all claim by the plaintiff herein.

6. The defendant says that the said wall collapsed and fell upon plaintiff's goods in the said store-room, but save as aforesaid denies the allegations in paragraph 7.

7. Paragraphs 8 and 9 are denied, save that the defendant admits its refusal to pay.

Wherefore the defendant Council prays that the plaintiff's claim be dismissed with costs.

The replication was as follows: As to paragraph 5 of defendant's plea, plaintiff specially denies that the demolition of the said wall was a work of necessity within the meaning of sections 159 and 161 of the said Act No. 26 of 1893, or that the defendant is by the last-named section or otherwise indemnified or exempted from all or any claim by the plaintiff herein. Plaintiff craves leave to repeat the allegations in paragraph 6 of the declaration contained. Save as above, and save as to admissions, plaintiff denies all and singular the allegations of fact and conclusions of law in the plea contained, joins issue therein, and again prays for judgment in terms of the declaration.

Mr. Lewis was for the plaintiff; Mr. McGregor, K.C., with him Mr. Guteche, was for the defendant Corporation.

The plaintiff was called, and gave evidence bearing out the allegations made in the declaration. He said he begged the officials of the Town Council to allow him to remove his goods, but he was told the Council's orders must be carried out. He engaged police to protect the goods. He detailed the damage done to the goods. Some goods were stolen.

Police Constable Fowler said that on June 16 he was sent to take charge of the building. He heard plaintiff ask one of the Town Council officials to give him time to remove his goods, but the official gave no answer.

Cross-examined by Mr. McGregor, witness said he saw little marks of fire. Morton was the foreman, and he was associated with everything that was done. He was not there when the wall was specially tapped. Hoffman asked witness to protect him against any collapse of the wall, as he was hard of hearing.

Sub-Inspector Kane, Urban Police, said he was at the building during the fire, and saw it extinguished. He saw the wall at the back of Hoffman's bedroom, and there was nothing unsafe about it, as far as he could see. There was a lot of water in the passage. Hoffman made application for special protection, and had, of course, to pay specially for it. Witness received a telephone message on Saturday, and as a result of that, went up to the premises. He saw Morton, and two or three other men, who appeared to be arranging to pull

down the wall by Hoffman's bedroom. He said to Morton: "Don't you think you are very unwise to pull this man's walls down before giving him an opportunity of removing his goods?" Morton seemed very high-handed about the matter, and then witness advised Morton to see the City Engineer before doing anything further. Morton desisted after that. He did not hear that the wall had fallen down until some time after.

Cross-examined: He simply went over the building as he generally went over all buildings after fires. He did not suggest to Hoffman that he should get a special constable, in fact, witness demurred at granting a special constable, but afterwards this was allowed. He could not have mistaken Morton as the man who spoke to him, because he had a peculiar cast in his eye.

Re-examined by Mr. Lewis: He did not pose as a building expert, but he did not see anything visible which would point to anything being wrong with the wall.

Andrew Schultz stated that he saw a man striking at the continuation of Hoffman's bedroom with a crowbar.

Henry Rowe Rowe, architect, of Cape Town, said he made an inspection of premises in Harrington-street. He saw a lot of goods under a window, and under the debris of the wall. Hoffman's bedroom was sound with the exception of certain cracks in the wall. From the appearance of the walls, he thought that they might have been taken down. They could quite as well have been shored up as the rest of the building.

Cross-examined by Mr. McGregor: Will you say that the wall was pulled down?

Witness: I cannot say whether it was pulled down or collapsed.

Do you think the water came from the room above?—I don't think so.

Have you had any intimate knowledge of the effect of fire on walls?—I have had a good deal to do with fire assessment.

What is the effect of fire upon walls when a powerful jet of water is playing upon it?—Well, if the wall were not very substantially built, and a hose water had washed the clay out of the joints then there might be a danger that the wall would collapse, but if the wall were reasonably built the stability of the wall would only be impaired to such an extent that the owner might insist that a new wall should be supplied in place of the damaged one, but that would not necessarily mean any immediate danger.

John Henry Tunncliffe, builder and contractor, Cape Town, said he remembered going to the premises in Harrington-street. He confirmed generally what Mr. Rowe said. He examined what was left of the walls. In his opinion

it was not necessary to pull down the wall in question, because it was Dutch built and substantial. He could not say whether there were holes in the ceiling or not.

James Gray, a builder, carrying on business in Cape Town, said he visited the premises in Harrington-street. He saw two men knocking down the walls of the place, and a portion of the building fall in.

Morris Joseph, a traveller, whose evidence was taken on commission, stated that he lived at one time in the building. He noticed no cracks on the wall of Hoffman's bedroom. He saw several quantities of goods lying about and noticed a man knocking down a wall.

Mrs. Kline, wife of Sima Kline, carpenter and builder, said she occupied the building and let part to Hoffman. After the fire she went through the back-yard, and she examined Hoffman's bedroom, and was glad to see that it was comparatively undamaged.

Mr. Lewis closed his case.

Felix Mitchell, superintendent of the Cape Town Fire Brigade, stated that he went with the brigade to the fire. In all three minutes elapsed between the alarm and the time the brigade was on the scene. Before he left the premises he made an inspection. He found the wall "B" on the plan in a very shaky condition. The wall "C" fell during the progress of the fire. Mr. Mitchell described the effects of the fire in detail. The wall "B," in his opinion, was dangerous to life and property. They used 40,000 gallons of water in putting out the fire. There were several small holes in the ceiling. He gave instructions to have the wall "B" pulled down, on account of its dangerous condition. That was the only order he gave for the demolition of the walls. He noticed that people were removing things while the Fire Brigade was at work.

In reply to Mr. Lewis, witness said the whole of the building was waterlogged, and the heat was very severe. He gave instructions to have the wall "B" removed, because he was afraid it might be dangerous to people in the neighbourhood.

Mr. Lewis: When does your control of a building cease?

Witness: When I report to the Council.

Richard J. Geoffrey Herd, station officer in charge of the Chapel-street branch station, stated that the wall "B" on the plan after the fire was in a very tottering condition; the wall "C" fell during the progress of the fire. He did not give any instructions as to the pulling down of the walls.

James Morton, general foreman, employed by the Corporation of Cape Town, said he visited the building. He had received instructions to put up a boarding round the building, for the

purpose of preventing any accidents. He noticed that certain of the walls were in a very dangerous condition, especially the wall "B" on the plan. The wall was removed bit by bit by the hammer. The old Dutch brick was simply clay, and would absolutely run when water was poured on it. He noticed a great deal of goods in Hoffman's room, but they were of little value. In fact, the room was simply a dumping-ground for all sorts of rubbish that could not be sold on the Parade.

Cross-examined by Mr. Lewis: He received instructions to pull down the wall "B," and to remove any slates that were dangerous. Hoffman didn't beg witness to give him an opportunity to remove his goods; in fact, he had no conversation with plaintiff, and only saw him when he came running out of the building.

Further evidence was led for the defence, corroborating that given by previous witnesses. Building experts were called, who gave it as their opinion that the wall slid down.

After hearing counsel in argument, on the facts,

The Court gave judgment for the defendant Council.

*Postea* (October 22nd).

Maasdorp, J., reviewed the evidence, and said that none of the theories advanced on both sides were of great assistance to the Court. The conclusion he came to was that the wall was in such a state that it might have fallen, or, on the other hand, it might have stood for a day or two longer, and might have been broken down before it was actually on the point of falling. It was necessary therefore to go into the direct evidence to find whether it was established on either side that the wall fell, or that it was taken down by the defendant's servants. Now, the Court had the positive evidence of Morton, Johnson and Liddle that the wall was not taken down. The positive direct evidence on the other side was that of Scholtz and Joseph. Now, the evidence of Joseph, he (the learned judge) must criticise as unsatisfactory. It seemed to him that the Court would have to regard the servants of the Municipality, not only as negligent and reckless, but as wholly wicked and criminal, if Joseph's evidence were to be accepted. As to Scholtz's evidence, it seemed to him that Scholtz did not give much attention to the man he saw on the roof. Scholtz's evidence did not give the Court much assistance. The conclusion I come to is this: that there is no doubt that the wall was in a dangerous, tottering condition, owing to its exposure to the fire and heat, and if the photographs are looked at, it will be seen that the inner main walls of this parti-

cular bedroom are honeycombed, as described by the witnesses, and all the plaster is removed, and it seems to me that if such force is used to two sides of the wall, it may be reduced to such a condition that it might collapse at any moment. The probabilities are therefore in favour of its falling, and although these probabilities may be removed by direct evidence that something else caused the fall, the plaintiff has not satisfied the Court that the servants of the defendants pulled the wall down, and judgment must be given for the defendant Council.

[Plaintiff's Attorneys: Wahl, Fuller and De Klerk. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

OLIVIER V. GOOSEN. { 1907.  
{ Oct. 18th.

Mr. Swift moved for judgment for £7 7s. 8d., balance owing of a judgment debt of £369 1s. 3d., with costs from the 11th January last.

Order granted.

AFRICAN MUTUAL TRUST AND ASSURANCE CO. V. DU PLESSIS.

Mr. Roux moved for provisional sentence for £1,971 3s. 2d., balance of a mortgage bond with interest from the 1st January, 1907, bond due by reason of notice having been given. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

STRATHSOMERS ESTATE CO. V. { 1907.  
COLONIAL GOVERNMENT. { Oct. 18th.

Transfer duty — Purchase by promoters as trustees for company.

*The promoters of a company about to be formed purchased land on behalf of such company, but the company was formed and registered under a different name from that originally intended. The Court, being satisfied that the pur-*

*chasers had bought, as trustees, for the intended company, and that the change of name did not affect the identity of the company, authorized transfer to be effected directly by the seller to the company.*

This was an application for authority to the Registrar of Deeds to pass transfer direct from the Guardian Assurance and Trust Company (Port Elizabeth) to the Strathsomers Estate Company of certain property known as the Sunday's River Estate.

The question raised in the matter was whether double transfer duty should be paid or whether the applicant company was entitled to take transfer direct from the Guardian Company.

The Registrar of Deeds, in his report, said that, in view of the fact that the property forming the subject of the petition was purchased on the 23rd February, that the letter by which the purchase was concluded described the purchasers as being Messrs. O. P. P. Hoole, Wm. Macdonald, John Scrimgeour, Daniel MacLaren Brown, John Whyte, and John Pyott, that some of these gentlemen made themselves personally responsible for the payment of £7,000 of the £22,000 forming the purchase price by signing promissory notes for that amount, all of which fell due before the formation of the company, and that the latter event did not take place until the 28th November, 1903, some nine months after the property had been acquired, he did not feel justified in accepting the responsibility of permitting the proposed transfer to be effected. He did not actually, as petitioners alleged, insist upon the payment of double duty, and the passing of two transfers, but he stated that he would, in consequence of the unfortunate terms in which the contract had been concluded, probably not feel justified in permitting the transfer to be effected without the sanction of the Court. He had little doubt that the purchasers did actually acquire the property with the express object of forming the company which eventually came into existence, but, although the circumstances were favourable to the petitioners' contention, he thought they were not conclusive, and that it would be best to allow the petition to proceed. For the delay and any inconvenience which had resulted, petitioners had only themselves to blame, for had it been made clear in the correspondence that the purchase was for a company in the process of formation, and had they proceeded to registration within a reasonable time, no question would, in the absence of a consideration, have been raised by him.



Mr. Schreiner, K.C. (with him Mr. Close) moved. The respondents did not appear.

Mr. Schreiner said that fundamentally the Court had to inquire whether there had been two sales of this property or only one. On the facts, it seemed—and the Registrar's report corroborated that—to have been clearly the expressed intention in purchasing the property to form the company, which was subsequently formed and registered. The company was registered after some delay, but the delay was sufficiently explained in the affidavits. It was not an afterthought to form the company. He submitted that the affidavits and the original documents clearly showed that there was one purchase, and one transaction only, viz., on behalf of the company. Counsel cited *Ex parte Botha* (13, C.T.R., 1,142). Certain privileges were given to certain large holders of shares, but the Registrar seemed to be satisfied that this had nothing to do with the acquisition of the property by the company. The Registrar was right in bringing the matter before the Court, but he submitted that in this case there was no question as to whether the revenue would be duly protected if the property were transferred direct to the company. He cited *Ex parte Blaauwklip Garden Co.* (20 S.C., 383), *Union-Castle Steamship Co.'s Case* (19 S.C., 180), and *Liquidator, Cape of Good Hope Bank v. Registrar of Deeds* (9 Juta, 144).

De Villiers, C.J.: Applications of this kind should, I think, be carefully scrutinised, because there can be no doubt that they are liable to be abused in future. Persons who are promoters of companies like this might sell their property to these companies, and realise a profit upon the sale, there would be no ostensible profit, because if they, after the formation of the company, receive a kind of bonus for having allowed the company to have the property at the same price which they paid for it. In the present case, however, it appears to me that the whole transaction was *bona fide*. The intention clearly was to buy for the company, which was subsequently formed. The company subsequently formed had a different name from what was originally intended, but it was ostensibly the same company, and it seems that when, subsequently, the shareholders agreed to give the original purchasers and another gentleman (Larson) certain privileges, it was quite independently of their being the original purchasers, because Larson himself was not one of the original purchasers. The original purchasers were intended to be in the position of trustees, and the Act clearly recognises that where transfer is actually made in favour of persons who are only trustees, there may be a re-

transfer without payment of transfer duty. Therefore, under these special circumstances, I am of opinion that the application should be granted. It appears to me that the case falls under the principles laid down in the case of *Botha*, which is referred to, but I must repeat that every case will have to be fully scrutinised before the Court would be justified in treating the sale as a single sale, instead of two sales. I consider that the Registrar was perfectly justified in raising the question, and, therefore, as to costs, I do not think there should be any costs given to the applicants.

Mr. Schreiner: We do not ask for costs.

De Villiers, C.J.: An order will, therefore, be made as prayed.

[Applicants' Attorneys: Findlay and Tait. Respondents in default.]

#### ATTENBOROUGH V. ATTENBOROUGH.

This was an action brought by Amelia Attenborough, of Stellenbosch, against her husband, Louis Henry Attenborough, of Sydney, N.S.W., for restitution of conjugal rights, failing which a decree of divorce.

Mr. Gutsche, was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Plaintiff said that she was married to defendant at Brixton, England, on the 19th December, 1897. They lived together in England for about four years. In 1901 defendant came out to this Colony, and remained about four years in the employ of Messrs. Ohlsson, losing his situation because of his intemperance. Witness also came out in 1901. In November, 1905, defendant left for Australia, giving her £15 to maintain herself. He had not since contributed towards her support or invited her to go and join him. After the present proceedings had been commenced, he wrote saying that there was nothing to prevent her from joining him. Witness could not have done so because she had no money, and had not known his address.

Decree of restitution granted with costs, defendant to return to or receive plaintiff on or before the 12th January, 1908, failing which, rule to issue calling upon defendant to show cause on the 1st February why decree of divorce should not be granted with costs, same order as to service as in the previous process.

#### BOFFEY V. BOFFEY.

This was an action brought by Cossie Johnson L. L. Boffey, late of Wynberg, against her husband, Henry Sutton Boffey, an hotelkeeper, for divorce, on the ground of his alleged adultery with one Kitty Murphy.

Mr. Schreiner, K.C. (with him Mr. Struben), was for plaintiff; defendant did not appear.

Mr. Schreiner said that defendant had filed a plea, but he now appeared to have withdrawn from the proceedings.

Plaintiff said that she was married to defendant on the 21st August, 1902, defendant having come to England to her for the purpose of being married. The marriage took place at St. Mark's, Clerkenwell, Islington. After their marriage, witness came out to this country. Defendant kept the Railway Hotel and the Royal Hotel at Wynberg. For three years they lived together on pleasant terms. Witness went to England. At that time Miss Kitty Murphy had not been engaged as a barmaid. On her return, she found that Miss Murphy had been engaged as barmaid at the Railway Hotel. For a time her relations with her husband were of a pleasant character, but she eventually had reason to complain that her husband was too friendly with Miss Murphy. Witness and her husband resided at the Railway Hotel. Miss Murphy was dismissed from defendant's service in May, 1907. Defendant asked her to drive out Miss Murphy in her trap. At first she did not suspect that anything was wrong between defendant and Miss Murphy, but afterwards, knowing what she did, it became very distasteful to her to have to drive out Miss Murphy. Witness had returned from England in September, 1905, and about three months afterwards she first became suspicious of the relations between the defendant and Miss Murphy. Witness continued to reside at the hotel with her husband until the 17th August, 1907. Defendant used to persuade her to go out alone for a drive in the afternoon. On her return she had noticed indications that there had been improper relations between her husband and Miss Murphy. So recently as Saturday last, the defendant came to see her and asked her to forgive him. She declined, and told him to go away. Witness had not been led by others, as the defendant had suggested in his letter. Her life had become intolerable, and about the second week in May she told defendant that he must choose between her (witness) and Miss Murphy. Miss Murphy was dismissed, and she subsequently went to reside in a boarding-house in Wynberg.

A private detective, Miss Shalders (sister of the plaintiff), John James Woodlands, of Wynberg, and Alfred Dexter, of Wynberg, also gave evidence. Miss Shalders, who is a professional singer, stated that on the night of the 16th August, in order to observe the conduct of the defendant and Miss Murphy, she blackened her face and attired herself as a Malay woman.

Mr. Schreiner said that if the Court thought the evidence sufficient, he would close his case. Otherwise, he would have to apply for a postponement, in order to procure the evidence of a girl named Phyllis Jacobs, who was believed to have been paid by defendant to go away.

De Villiers, C.J., said that there was a certain amount of vague evidence, and Mrs. Boffey's evidence was not so specific as it might be.

Plaintiff was recalled, and gave further evidence in answer to questions by the Chief Justice in reference to illicit intercourse between the defendant and Miss Murphy.

Hannah Peterson said that she had written on behalf of Phyllis Jacobs to defendant for money. She had seen money received by Jacobs from defendant. Witness had written a letter on behalf of Mrs. Jacobs asking for money to enable Phyllis Jacobs to go up-country, as she might get into trouble, seeing that she had given evidence first for one side and then for the other.

Arthur G. Syfret, of Messrs. Syfret, Godlonton and Low, plaintiff's attorneys, spoke to efforts which had been made to trace the whereabouts of the girl Jacobs at George and Great Brak River. Plaintiff was very anxious to have her evidence for the trial, and had employed an inquiry agent (Detective Osberg) to make an investigation, but up to the present it had been impossible to find the girl. A Kafir named Michael, who saw the girl go away by train, had, however, been found, and was prepared to give evidence if necessary.

De Villiers, C.J.: In the earlier proceedings the defendant filed affidavits, and denied the statements made by the plaintiff in this case. He has also filed a plea, in which he positively denies the charge of adultery. But to-day, when the case comes to trial, the defendant does not appear, and there is no witness on his behalf to deny the allegations which are made by plaintiff. If there had been any counter-balancing evidence on behalf of the defendant, I should have thought that the evidence given on the part of the plaintiff is not very strong, but certainly a sufficiently strong case has been made out in the absence of any counter-balancing evidence to justify the Court in coming to the conclusion that there has been adultery in the present case. At the time when this lady, Miss Murphy, was watched that night, she had left the defendant's service, and it is wholly inexplicable what business could have brought her to the hotel at that time of night, when she was seen to enter the front door, the door of the tap, which communicates by a door with the billiard-room. I have no doubt that the defendant did

enter the billiard-room that evening, because he was seen by Miss Shalders, who had a position from which she could clearly watch him. We have the evidence of Miss Shalders, who said that she heard the laugh of Miss Murphy in the billiard-room while the defendant was there. Where a young lady meets a man in such circumstances, as I am satisfied she did meet the defendant, it could only have been for improper purposes. Well, then, in addition to that, I cannot lose sight of the evidence given by plaintiff herself as to the signs which she had noticed on two separate occasions. There would have been nothing to explain the existence of these signs, unless there had been improper conduct between these parties. We have also the fact, deposed to by plaintiff and her sister, Miss Shalders, that when defendant had this interview with the plaintiff, he asked her to forgive him. Well, there is nothing he could have asked her to forgive him for, unless it were the adultery. That was the charge made, and I cannot conceive of anything else being in his mind when he asked her to forgive him, unless it were this adultery. It is unfortunate that the witness Phyllis is not here, and I think that that evidence as to the money payments, which were made to her at all events, required some explanation from the defendant. He must have known that that question at all events would be raised as to this girl being spirited away, and he must have known how essential it was that he should explain for what purpose that money was given to Phyllis, and he does not come here even to explain so much. So that, under all these circumstances, I think that the Court is justified in coming to the conclusion that there was this improper conduct between defendant and Miss Murphy. In addition, Miss Murphy I suppose has had notice of these proceedings, and she does not come forward to deny the allegation. The Court will, therefore, grant a decree of divorce, with costs, including costs of the previous application. Then, as to the joint estate, the contention of plaintiff's counsel is that the parties were domiciled here, and that the law of community of property would apply. There is no reason to question that view. The Court will grant an order for the division of the joint estate, and for that purpose appoint a receiver, with power to administer and divide the proceeds between the parties, but I think that the appointing of a receiver should be postponed for a week to enable the defendant to make an offer to the plaintiff of a sum of money in lieu of dividing the estate. It would be in the interests of the defendant himself to make a fair and reasonable offer so as to save a stranger from intruding into his affairs, and I think it

is in the interests of Mrs. Boffey to accept a reasonable offer. She will have to bear in mind the depression that now exists, and the fact that a forced sale of property now would not realise what it would if times were better. I shall postpone the appointment of a receiver to enable the defendant to make an offer to the plaintiff of a sum of money in lieu of half the estate.

## SUPREME COURT

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* LOUW AND OTHERS. { 1907.  
Oct. 19th.  
„ 22nd.

*Fidei-commissum*—Leave to sell property.

*The applicants, being fiduciary legatees of certain farms, bequeathed to them subject to a fidei-commissum in favour of their children, applied to the Court for authority to sell the same. The Court, being satisfied that the sale, if concluded, would be extremely advantageous, not only to the born issue, who were minors, but also to the unborn issue of the applicants, authorized the sale and directed that, in case of a sale, the proceeds should be paid into the Guardians' Fund, to be administered for the benefit of the fiduciary and of the fidei-commissary legatees respectively of the farms.*

Mr. W. Porter Buchanan, K.C. (for petitioners), moved for leave to enter into a contract for the prospecting of certain farms in the districts of Carnarvon and Fraserburg, with a view to purchase being given by the applicants to the prospector. Counsel said that the

applicants were sons-in-law of certain two testators, who were legatees of the farms. The farms had to go after the death of the legatees to their male children, according to the will, and in default of male children the properties were to be sold amongst the heirs, who were also the six children of the testators, for the benefit of the spouse and daughter, and if there were no such to be sold amongst the heirs for their brothers and sisters, who were co-legatees. The petitioners proposed to enter into a contract with one Wm. Ford, managing director of the North-western Prospecting Syndicate, Ltd., for rights of prospecting for petroleum and other oils, and an option of purchase. The will imposed a prohibition against the sale or mortgage of the farms bequeathed. The offers made by the syndicate in case of purchase were as follows: Petition J. N. Louw, £12,000 (Divisional Council valuation, £2,500); petition A. J. S. Maritz, £12,000 (valuation, £1,600); petition M. J. C. Lotriet, £15,000 (valuation, £1,000); petition J. A. Louw (two farms), £7,000 (valuation, £1,000), and £12,000 (valuation, £2,000). Counsel read an affidavit by Mr. Ford, who stated that it was not proposed to prospect for gold or diamonds, but solely for oils. Counsel submitted that it was clear that the prohibition of alienation was for the benefit of the heirs, and also for the benefit of the children—the male children first, and in default of male children, then for the spouse and daughters, and in default of such for their brothers and sisters, who were co-legatees. It was to the interests of the minors that this scheme should go through, and the sanction of the Court in its capacity of Upper Guardian was, therefore, sought. Counsel quoted Sande, on Restraints (Webber's Trans., p. 274, sec. 37, p. 265, secs. 25, 26, and 27), and Voet, 37, 9, 8.

*Cur. Adv. Vult.*

*Postea* (October 22).

De Villiers, C.J.: The offer is clearly for the benefit of the fideicommissary legatees, and if they were all *in esse* and of age they certainly would have consented to its acceptance by the fiduciary legatees who are the applicants. Some of the fideicommissary legatees are minors and, so far as they are concerned, the Court would have no hesitation in sanctioning the acceptance of the offer. The difficulty is that more children may be born to the applicants, who would be entitled to share in the fideicommissary bequest, and the question is whether the Court should sanction any alienation of the property until the time has arrived when all those who are entitled to share in the property shall be in being. This is not a case in which the testator has prohibited the alienation out of

the family or in which an entail has been created beyond the first degree of descent. An offer has been made such as is not likely to be made again, and it is for the interest of the unborn as well as the born issue of the applicants that it should be accepted. The Master approves of it, and under all the circumstances, this Court will not withhold its assent: but the proceeds must be paid to the Master for the benefit of those concerned under the will.

## GENERAL MOTIONS.

ESTATE STEPHAN V. ESTATE { 1907.  
STEPHAN. { Oct. 19th.

Appeal from Supreme Court to Privy Council—Quorum of judges.

*A divisional Court, presided over by a single judge, has no jurisdiction to grant leave to appeal to the Privy Council from a judgment of the Supreme Court given by more than one judge.*

This was an application for leave to appeal to the Privy Council from a judgment of the Supreme Court.

Mr. H. S. van Zyl was for applicants; Mr. Benjamin, K.C. (with him Mr. Louwrens), appeared for respondents.

Mr. Benjamin raised a question as to the competency of a Divisional Court of the Supreme Court to deal with this matter, and quoted section 50 of the Charter of Justice and section 5, Act 35, 1896. He submitted that one judge did not constitute a quorum of the Supreme Court.

De Villiers, C.J.: It is clear that there must be more than one judge to hear this matter. If two judges should be sitting on Monday, the application may be mentioned then.

## STEYTLER V. STEYTLER.

Mr. Bisset (with him Dr. Greer) moved as a matter of urgency for the appointment of a commission *de bene esse*, to take the evidence of Mrs. Charles Alexander Horne, of the Palmerston Hotel, Cape Town. Mrs. Horne was indisposed.

Mr. Benjamin, K.C. (for respondents), opposed.

Order granted, appointing Mr. Roux as commissioner, costs to be costs in the cause.



*Ex parte* ESTATE LATE LEHMAN.

Mr. Benjamin, K.C., moved, on the petition of Charles Friedlander, attorney, Cape Town, as representing certain persons claiming to be heirs *ab intestato* of the late E. A. Lehman, in his lifetime of Middelburg, Cape Colony, for an order calling upon all persons concerned to show cause why a sum of £1,055, in the hands of the Master, to the credit of the estate, should not be paid out to petitioner for distribution among the heirs, according to the law of inheritance *ab intestato*. Efforts had been made to trace the wife of deceased, but without avail.

De Villiers, C.J., suggested that the death notice filed in the Master's Office might disclose some further information.

Mr. Benjamin produced the death notice, which showed that Lehman died in the gaol hospital at Hanover, but no information was given as to his social status, or as to whether he had any children.

De Villiers, C.J., said it was extremely probable that Mrs. Lehman predeceased her husband.

Rule granted, returnable on the 12th January, 1908, rule to be published twice in an English newspaper and twice in a Dutch newspaper circulating in Middelburg.

*Ex parte* SMARTT SYNDICATE, LTD.

Mr. Close moved for an order authorising the reduction of the company's capital from £200,000 to £165,294 by cancelling 34,706 of the 40,500 £1 shares issued, and held by shareholders. Consents by the principal creditors were produced. Counsel cited the case of *E. K. Green and Co., Ltd.* (17 C.T.R., 668).

Rule granted in similar terms to *E. K. Green and Co.'s* matter, similar publication to be made as then ordered, rule returnable on the 23rd October.

*Ex parte* BOTHMA.

Mr. J. E. R. de Villiers moved for leave to petitioner to sue her husband, Daniel Andries Bothma, by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Petitioner had not heard anything as to her husband's whereabouts since 1899, when he was fighting in the Anglo-Boer War in the Orange Free State. He was last seen in a wounded condition. Counsel cited in *re Booysen* (Foord, 189).

De Villiers, C.J.: The man probably died from his wounds. I don't see how I can very well grant an order for leave to sue by edict for restitution

when the petitioner raises a strong presumption that the respondent is dead.

The matter was ordered to stand over for further inquiries and information.

SPARKS AND YOUNG V. BUFFALO SUPPLY AND COLD STORAGE CO., LTD. (IN LIQUIDATION).

This was an application upon notice, calling upon the liquidators of the respondent company to show cause why they should not be ordered to admit and rank against the assets a claim by applicants for £552 19s. 7d., proof of debt having been duly sworn and lodged.

Mr. Close (with him Mr. Swift) was for applicants; Dr. Greer was for respondents.

Having heard affidavits and argument, De Villiers, C.J., said the view he took was that it would be very difficult, if at all possible, to decide the applicants' claim on motion. The Court would order that the applicants' claim be tried by action, costs to be costs in the cause, respondents to reserve sufficient funds to meet the amount of any dividend that may be awarded on applicants' claim and costs, and applicants to give security for costs to the satisfaction of the Registrar.

SUPREME COURT  
FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

DISTRIBUTING SYNDICATE }  
FOR COLD STORAGE V. } 1907.  
IMPERIAL COLD STORAGE } Oct. 21st.  
AND SUPPLY CO., LTD. }

Mr. McGregor, K.C., appeared for applicants; Mr. Schreiner, K.C. (with him Mr. Upington), appeared for respondents.

Mr. McGregor said that this matter had been before a referee, and he had reported, and two special cases stated by him at the request of one of the parties came up. There was also an appeal on some reference from a judgment of Mr.

Justice Maasdorp. The parties were anxious that the appeal, the referee's report, and the two special cases should be heard on the same day.

De Villiers, C.J., said that leave would be granted for the hearing of the other matters on the same day as the appeal. The Court would consider the question of fixing a date for the hearing.

#### MOLLER V. HAMMAN AND OTHERS.

This matter came on appeal from a judgment of the Water Court, Worcester, arising out of an application brought by the present respondents for an order upon appellant to allow respondents a right of abutment of water from the farm Patrys Kloof.

Mr. Schreiner, K.C. (with him Mr. Sutton), was for appellants; Mr. W. Porter Buchanan, K.C., was for respondents.

Mr. Schreiner said the appellants' case was that the Nonna Irrigation Board was constituted under the Act for the purposes of irrigation. Mr. Moller was owner by sub-divisional transfer of a portion of the farm Nonna. The whole of the farm Nonna was included in the area of the Board, but Mr. Moller was also owner of the adjoining farm Patrys Kloof. At the top, near the Lange Bergen Range, the Irrigation Board desired to establish a weir from which they dammed an abutment to enable them to bring water by pipes to their properties lower down. The Board, without having any contract or agreement, without having any servitude or prescriptive right, and without alleging any right whatsoever in them over against the farm Patrys Kloof to go and make their abutment at the point shown on the plan, and from there to lead water, decided that the applicants were entitled to this abutment. The Water Court, without attempting to say that Mr. Moller should have a share of the water, as a riparian proprietor, had dealt with an application under the Act, and said that Mr. Moller was obliged to allow an abutment at a point marked "diversion weir."

[De Villiers, C.J.: And allow the respondents to take all the water?]

Mr. Schreiner: That they do not decide; they would not decide whether the respondents were to take all the water, but, of course, the effect would be that they would take all the water.

[De Villiers, C.J.: The declaration says "the water," and judgment is given in terms of the prayer.]

Mr. Buchanan submitted that the effect of the judgment would be that appellant would still be able to obtain his proportionate share of the water. The whole of the water had not been awarded by the Water Court to the

respondents. He quoted section 67 of the Irrigation Act, No. 32 of 1906.

Mr. Schreiner submitted that the Act did not give any lower proprietor the right to go upon the lands of the upper proprietor to obtain an abutment of water. In this connection, he paid a tribute to the valuable work on the irrigation laws recently compiled by Sir H. Juta.

De Villiers, C.J., intimated that the Court were anxious, if possible, to make a success of this, the first case under the Act. Could counsel assist the Court in arriving at what was a reasonable share of the water?

Mr. Schreiner said that the difficulty was to make a fair statement as to the fractional quantity. In further argument, Mr. Schreiner referred to the case of *Greeff v. Keller* (16 C.T.R., 510), and *Greeff v. Le Roux and Others* (15 C.T.R., 958). He submitted, as a first ground for upholding the appeal, that there was no right whatever in the respondents to take these proceedings; secondly, that the respondents had produced no evidence at all to show that they had any right to take the water within the meaning of section 36; thirdly, that on the proceedings themselves, the Water Court had erred entirely in refusing to consider the question of distribution, in refusing to allow the appellant to declare that he was entitled to a reasonable share of the water, and in not determining what a reasonable share was; and, fourthly, that the Court erred in admitting certain correspondence and refusing to admit other correspondence.

Mr. Buchanan said he would submit that it was clear, having regard to what passed during the course of the trial, that the judgment of the Water Court did not give the respondents all the water. The judgment of the Court was that the respondents had riparian rights, and were entitled to a certain amount of the water, and therefore the Court gave the servitudes of aqueduct and abutment. If the Appeal Court decided to go into the question of the distribution, he would ask that the matter should be postponed in order that it could be ascertained what would be an equitable distribution.

De Villiers, C.J.: It is quite clear that the judgment of the Water Court cannot stand in its present form. The declaration, if I may so call it, in effect claims a servitude of abutment and a servitude of aqueduct in respect of all the water of the Nonna River. The word "all" is not used; "the water of the Nonna River" are the words used, but it is quite clear that was the claim of the applicants, and the judgment of the Court gave these servitudes in terms of the application. The evidence does not support that claim in the least. There is some evidence that the lower

proprietors have for a long period, at the point "B," taken the water out of the Nonna River, but the point "B" is a considerable distance below the point "A," and between the point "A" and the point "B" the respondents have a considerable extent of irrigable land, which they would be wholly prevented from irrigating if the point at which the water is taken out is diverted from point "B" to point "A." The judgment of the Water Court gives all the water at the point "A," and this deprives the respondents of very important and valuable rights, and it is quite impossible for this Court, therefore, upon the evidence before it, to support that judgment. That seems a fatal objection to the judgment, but further questions have been raised, which, however, the Court considers for the present it had better not decide. It decides at present that the Water Court was wrong in giving all the water, and that the costs of appeal should be paid by the respondents; but the matter will be postponed to enable the parties to arrive at some settlement of this dispute, and we consider that the best settlement would be to allow the judgment to stand as to the diversion of the water at the point "a," and to fix the quantity of water which the respondents should be allowed to use, or, rather, to fix the quantity of water which the applicants should be allowed to take out at the point "a." It is impossible upon the evidence before the Court now to decide what the proportion should be, but I have no doubt that after this expression of opinion, there will be no difficulty on the part of the parties in coming to some settlement, and if that is arranged, then the Court, in its final judgment, would be in a position then to support the judgment to the extent of allowing the works to proceed, but diminishing the quantity of water which the applicants will be allowed to take out at the intake. The case will, therefore, be postponed for the purpose of enabling the parties to come to some arrangement. If no arrangement is arrived at, then it will be necessary for the Court to decide the further question as to whether this application could be made before the Water Court at all, considering there was a dispute about the right to the water, and also the further question as to the construction of sec. 67 (sub-sec. e). There are no regulations yet in force, and the question may arise whether, if such regulations should be made, there was a right on the part of the lower proprietor to claim these rights under sub-sec. e. But that question does not arise now in the absence of regulations. Certainly, an important question would arise as to the construction of sec. 86 (sub-sec. 4), If the sub-sec. 2 were not in

existence, I should have been inclined to hold that that dispute referred to in sub-sec. 4 is a dispute in a competent court, but, unfortunately, sub-sec. 2 refers to a dispute in a competent court, and upon that ground there is much force in Mr. Schreiner's contention that sub-sec. 4 refers to questions in dispute, which have not yet come before the Court. But then again, that construction would be somewhat inconsistent with that other sub-section I have quoted, by which the Water Court alone has jurisdiction. However, for the present that point need not be decided, because it is quite possible the parties may come to some settlement upon the basis of allowing the judgment of the Water Court to stand, subject to a reduction in the quantity of water, which the applicants shall be entitled to lead out at the intake which has been awarded to them. Whatever the result of the case may be, the Court is of opinion that the respondents will have to pay the costs in this court, and in the court below.

Buchanan, J.: In concurring with these remarks of the Chief Justice, I think it should be clearly understood that the Court now is not expressing an opinion on the construction of the Act. That is an important question which must remain open.

Hopley, J., concurred.

The Chief Justice said that by point (a), referred to in his judgment, he meant the point of intake.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLY.]

ESTATE STEPHAN V. ESTATE STEPHAN. { 1907.  
Oct. 21st.  
.. 23rd.

Supreme Court — Quorum of judges—Leave to appeal to Privy Council—Amount involved.

*Two judges sitting together form a quorum of the Supreme Court.*

*Where it had been agreed between the parties that a matter involving £250 should be submitted for the judgment of the Supreme Court as a test case which would decide the disposition of £25,000.*

*Held, that as the sum in respect of which the Court had given judgment was less than £500, it had no power to grant leave*

*to appeal from that judgment to the Privy Council.*

This was an application made by the executors of the estate of the late Henry Rudolph Stephan for leave to appeal to the Privy Council from a judgment of the Supreme Court given on the 9th August, 1907, and for an order suspending execution of the judgment, pending appeal.

Mr. H. S. van Zyl was for the applicant; Mr. Schreiner, K.C., with him Mr. Benjamin, K.C., and Mr. Louwrens, was for the respondent.

Mr. Van Zyl said that the applicants offered as security the half-share of landed property in the partnership estate of Carel Stephan and another. This property was valued in the inventory at £74,000, and the one half of this was registered in the name of Carel Stephan, while the amount involved in the appeal was £25,000.

Mr. Schreiner said that a point of practice arose as to whether the Court which decided the action was sitting as a Court of Appeal, or as a Divisional Court. If the Court sat as a Divisional Court, then the appeal must go to the Court of Appeal and the Supreme Court. He wished to bring this point of practice to the notice of the Court, though he was not instructed to press it strongly. Counsel referred to section 2 of Act 35 of 1904, and said that though two judges sat in this case, other divisions were sitting at the time, and the question was whether the applicants could come in the way they now did? On the merits of the case, Mr. Schreiner said the attitude he took up was that before leave to appeal was given, the whole of the undisputed amounts due to the heirs, amounting to about £50,000, should be paid out, and that security should be given for the disputed balance.

Mr. Van Zyl said provision would be made for the payment of the undisputed amounts.

[Buchanan, J.: You undertake to pay those amounts over!]

Mr. Van Zyl said the estate would have to be realised before payment could be made, and all the immovable property was in the hands of the Board of Executors. The executors would now have to begin the liquidation of the estate, and as this was done, the heirs would be paid.

Mr. Schreiner said there was a judgment against a usufructary, who was bound to give security. There was a judgment against him in favour of the heirs, and though he did not say the actual cash must be paid, he did say that to the extent of every item in H. R. Stephan's estate security should be given. He urged that the interests of the minors must be protected by the depositing of every available security.

Moreover, the final and definitive sentence of the Court was only for £250 which did not carry the right to appeal.

Mr. Van Zyl said it was understood that the judgment affected the whole amount; it affected three-quarters of Hy. Stephan's estate.

*Cur. Adr. Vult.*

*Postea* (October 23rd).

Buchanan, J.: An application has been made to the Court for leave to appeal to the Privy Council against a judgment delivered by my brother Hopley and myself, sitting as the Supreme Court. To this application two objections were taken. The first is that the Court as so constituted was not the Supreme Court, but should be considered a Divisional Court, and that, consequently, the appeal should be to the Supreme Court. On this point I would remark that from the Charter of Justice through all the subsequent Acts which have been passed relating to the administration of justice, though the number of Judges of the Supreme Court, originally three, has been from time to time increased, at all times, and in all the Acts, two of the Judges of the Supreme Court are recognised as forming a quorum of that Court. Having referred to section 5 of the Consolidating Act, No. 35, of 1896, and the formation of Divisional Courts under Act 35, 1904, Mr. Justice Buchanan went on to say: We are of opinion that it could not be said that a two Judge Court must be considered as only a Divisional Court. The practice of this Court has been in previous cases that where two Judges have been sitting they sat as the Supreme Court, and the practice has also been that where any appeal is had from two Judges so sitting as the Supreme Court the appeal is not to the Supreme Court, but to the Privy Council. Consequently, the first objection is overruled. The second objection is that the amount in dispute is only £250. The 50th section of the Charter of Justice gives a litigant right to appeal to the Privy Council, where the matter at issue amounts to or is the value of not less than £500. Though this case referred only to £250, it was said that the judgment involved a very large sum, amounting to about £27,000, being portion of an inheritance of £80,000. It was agreed between the parties that the decision of the Court in this one case should determine the distribution of assets in all other cases. But the Court is bound by the records in this case. We must look at the case stated to us to ascertain what amount is in issue. The parties having agreed that the one decision should govern other decisions, cannot justify the Court in going beyond the record, and in taking unto itself the power of granting leave to appeal where it does not exist.



as of right. Such power lies only in the Privy Council. I have looked at different cases, and find that the Privy Council jealously retains the right to grant leave where there is no appeal as of right, and there have been frequent instances where the Privy Council has refused to hear appeals where leave has been granted by an inferior Court in cases where there has been no right to grant such leave. It is, of course, open to the parties, if they feel aggrieved, to apply to the Privy Council. But this application for leave to appeal must be refused with costs.

Hopley, J.: I am of the same opinion for the same reasons.

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SMALE BROS. AND CO. V. DUNBAR. { 1907.  
Aug. 26th.  
Oct. 21st.

This case originally came before the Court on the 26th of August, in the present year. It was then remitted back to the Resident Magistrate of Elliotdale for further information on certain specified points. On October 21st Maasdorp, J., gave judgment as follows:

Maasdorp, J.: On the 3rd day of August, 1906, Smale and Dunbar, who carried on a business in partnership under the style of Messrs. Smale and Dunbar, dissolved partnership in terms of a written agreement. At that time Dunbar individually was indebted to the firm on account of goods sold and delivered. The plaintiffs now sue the defendant as alleged in the summons, for an amount for goods sold and delivered. This is not a quite accurate statement of the ground of indebtedness, as it now appears upon the evidence. Some items are for moneys which, it is said, should have been accounted for by Dunbar upon the partnership accounts. The form of the summons is not now material as it appears that at the trial the parties were fully aware of the nature of the issues raised. The defendant pleaded by way of exception that novation of the contract upon which the defendant's indebtedness rested had taken place, and the plaintiffs' claim was wrongly founded. The Magistrate found, in my opinion correctly, that there was no proof of this, and having regard to the larger item in dispute, it is impossible to see how such novation could have taken place. There is no reason to question the finding of the Magistrate upon the account

generally, and ultimately the dispute centred round the question whether an amount of £154 5s. 10d. for cash received by Dunbar had been accounted for to the partnership. The Magistrate's finding upon the point was not quite clear, and the evidence upon which his finding was based was uncertain in its character. The matter was referred back in order to have these points cleared up. Upon the further information furnished, it is now quite clear that Dunbar failed to pay in to the business of Smale Bros. an amount of cash received by him amounting to £154, which, upon the dissolution of the firm, it was his duty to pay. The finding of the Magistrate is therefore supported by the evidence, and the appeal must be dismissed, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

STEYTLER V. STEYTLER. { 1907.  
STEYTLER V. STEYTLER { Oct. 22nd.  
AND OTHERS. { " 23rd.  
" 24th.

### Divorce—Proof of adultery.

This was an action in which Mrs. Margaret Henrietta Steytler (born Home) sued her husband, Charles Rhenius Cruywagen Steytler, for judicial separation. The parties reside in the district of Ceres. It was alleged that for the past six years the parties had lived together unhappily owing to defendant's violent and ungovernable temper. Plaintiff said that she has suffered greatly owing to defendant's habitual cruelty to, and ill-treatment of, her. He had repeatedly cursed and sworn at her, using language of intolerable violence, and had twice assaulted her, once in or about the year 1904, and again with much violence on the 3rd March, 1907. By reason of defendant's continued and habitual violence, cruelty, and ill-treatment, further cohabitation with him had become intolerable to plaintiff. Wherefore the plaintiff prayed for: (a) A decree of separation *a mensa*

*et thoro*; (b) a division of the joint estate; (c) alternative relief; (d) costs of suit.

Defendant admitted the allegations in paragraph 1 of the declaration. He admitted that the parties had lived together unhappily during the last six years, but he denied that such unhappiness was due to his violent and ungovernable temper, or to any fault upon his part. He denied the allegations in paragraphs 3 and 4, and more particularly that he had been guilty of any cruelty or ill-treatment, that he had at any time cursed or sworn at her, using language as alleged, or that he assaulted her in the year 1904 and on the 3rd March, 1907, or at any time. Wherefore, he claimed that the claim may be dismissed, with costs.

There was a cross action for divorce, plaintiff alleging that on divers occasions during the years 1905, 1906, and 1907 defendant had committed adultery with one Charles Alexander Horne, and on divers other occasions during the said years with one Harry Horne. Wherefore plaintiff prayed for: (a) Decree of divorce *a vinculo matrimonii*; (b) division of the joint estate, together with an order declaring defendant to have forfeited all and every benefit conferred by the community of property aforesaid; (c) such further relief as may seem fit, together with (d) costs of suit.

For a plea to the declaration, defendant said she admitted paragraphs 1, 2, and 3. As to paragraph 4, she denied that she committed adultery with Charles Alexander Horne or Harry Horne during the years 1905, 1906, and 1907, or at any time. Wherefore she prayed that the plaintiff's claim may be dismissed, with costs.

For a replication, the plaintiff said that save in so far as the plea he admitted the allegations in the declaration. He again prayed for judgment thereon, with costs.

Mr. M. Bisset and Dr. Greer appeared for plaintiff in the action for judicial separation, and for the defendant in the cross action for divorce. Mr. L. N. Benjamin, K.C., and Mr. Close appeared for the defendants in the judicial separation case, and for plaintiff in the divorce action.

It was agreed to take the divorce case first.

Mr. Benjamin asked leave to make an amendment in the divorce action in the fourth paragraph, to insert the years 1903 and 1904.

Mr. Bisset objected on the ground that particulars of these charges had been received after the 24 hours settled by his lordship.

Mr. Benjamin submitted that particulars had been offered before the expiry of the 24 hours, but they had not been considered full enough. They had then offered fuller particulars two hours after the expiry of the period.

The amendment was allowed. All witnesses in the case were asked to leave the court.

Evidence having been led at considerable length, counsel were heard in argument on the facts.

Mr. Benjamin, in the course of argument, submitted that the plaintiff had made out a perfectly strong case. There was ample proof of adultery from the very compromising situations in which the defendant and the co-defendants were discovered on various occasions. Apart from that, the evidence given by Mr. Steytler himself was sufficient to rouse very strong suspicions. There was also the statement made by Mrs. Steytler with regard to the tableaux vivants, when he had to complain of his wife's dress before young Horne. With regard to the evidence given of adultery, counsel submitted that the manner in which the various witnesses entered into detail was proof of the truth being told. Several of the witnesses had only given evidence of the parties being found in compromising positions. Now, if this evidence had been given through malice, the witnesses would not have stopped at compromising positions, but would have accused them of adultery. It was well known with what respect, amounting almost to fear, that the lower classes in small villages regarded the magistrate. They would either say nothing or too much, but their restraint in giving evidence gave rise to the strongest suspicion of misconduct, and was a powerful reason for believing their evidence. Had the witnesses come into court to lie, they would not have been so restrained in describing what they saw. Rather, they would have gone "the whole hog," and declared that they had actually witnessed actions between respondent and the Hornes which could not leave a shadow on the mind of the Court that misconduct had actually taken place. Counsel, in conclusion, urged that the petitioner had placed the utmost confidence in the virtue of his wife, but that confidence, he submitted, had been misplaced. He contended that the petitioner had made out his case, and was entitled to the relief he desired.

Mr. Bisset commented upon the mass of accusations that had been made against the respondents, who had been dropped one after another. No doubt, the whole reason why such a mass of accusations was made was that it was felt that it was necessary to have such a quantity of that class of evidence, because of the fear of the case being made out. It had been said that in 1904 and 1905 Harry Horne had misconducted himself with Mrs. Steytler. At that time Harry Horne did not know Mrs. Steytler. He was in Barotseland, and as soon as he got down, he was laid up with fever. There

was no doubt that both Mr. and Mrs. Steytler were fond of a Bohemian life. The fact that Mr. Horne more than once went into the bedroom and remained there alone with Mrs. Steytler, counsel would freely admit that under ordinary circumstances the Court would attach importance to it, but it was admitted here by Mr. Steytler that he himself not only allowed Mr. Horne to go into the bedroom, but he had permitted other men to do so. Mr. Steytler had admitted that Mrs. Steytler had sponged young Horne down as a nurse would do, and Mr. Steytler actually on one occasion assisted his wife to undress young Horne when he had a sudden attack of fever. With regard to the dress, it was no unusual thing for ladies in this country to appear in the morning in a light gown, and it must be remembered that it was always within Mr. Steytler's power to put an end to this. Not a person except Mr. Steytler was aware of this alleged scandal of the tableaux vivants. With regard to the first kissing incident, Mr. Steytler's evidence stood out in absolute contradiction to every other person who was present at the time. If all these acts had been seen going on for a period of four years repeatedly in the most public places and in the most open way, and detected time after time by witnesses, surely the whole of Ceres would have been literally buzzing with the scandal. The witness Johanna van Wyk had the strongest possible motive to make up a story against Mrs. Steytler, and the strongest possible motive to please Mr. Steytler. After reviewing the evidence of several of the witnesses, who, for the most part, he said, had a grudge against Mrs. Steytler, counsel submitted that there never had been a more extraordinary string of improbabilities put before a court. If Johanna van Wyk's evidence was not to be believed with regard to the boudoir, then no credence could be placed in her statement as to the incident in the drawing-room. Mr. Horne was a Magistrate of long experience, and by virtue of his position he would lay himself peculiarly open to attack, and he must of necessity make a very large number of enemies in a place like Ceres, and these witnesses asked the Court to believe that the Magistrate had acted as none other than a madman would do. Mr. Horne must have known if there was a mere suggestion of impropriety that there would be a rigid official inquiry, which might result in his dismissal from the Service.

[De Villiers, C.J.: What is your suggestion with regard to the witnesses for the plaintiff? Is it your suggestion that Mr. Dyason or Mr. Steytler induced them to give that evidence?]

Mr. Bisset: Of course I cannot say what inducement has been held out to these witnesses or what pressure was brought to bear upon them.

De Villiers, C.J., said he would like to ask Mr. Dyason a few questions.

Have you paid any of these witnesses anything?—I paid to Lena van Wyk a month's wages due to her daughter. She came to me and told me they were very much in want of money, and that Mr. Steytler owed her the pound: I acted for Mr. Steytler and paid the pound. Shortly after I paid the pound, he said: "That is quite right. I will return it to you." I paid ten shillings to Sarah Noble. She came to me in a very dilapidated condition, and said she could not go to Cape Town with the clothes she had, and asked me to lend her ten shillings. I said, "Yes." I have not paid anything except when the witnesses were here and required a little money to buy tobacco. I have paid them a shilling each.

I suppose you are a friend of both parties in this case?—I used to be. I do not look upon either of them with enmity now.

Mr. Bisset: You do not suggest you have been a friend of Mrs. Steytler for a considerable time?—Mrs. Steytler cut me.

Since when?—Since I took up Mr. Steytler's case.

You simply gave this pound at Lena's own request?—Yes.

Without reference to Mr. Steytler?—Yes.

Did you make any inquiry into it?—I believed her.

You took her statement that a pound was due to her?—Yes.

Is it usual for a solicitor to pay out moneys to persons without ascertaining whether they are due or not?—I trusted her.

Is it usual?—It would not be unusual.

You gave a loan of five shillings to Johanna van Wyk?—I knew I would get it back from her.

When did you make the loan to her?—Long after she made her statement.

For what purpose did you make that loan?—I knew she would be a witness in the case.

You haven't collected all the evidence in this case yourself?—Yes.

You have employed other persons to work up the case?—Yes.

Do you know anything of the representations Winterbach made to persons whom he had endeavoured to get to give evidence?—No.

Winterbach is a man not employed at present?—He has got very good employment.

What employment has he got?—The fencing in of Mr. Ohlsson's farm.

How was it he gave up his job in order to collect evidence in the case?—I asked him to do so.

Who paid his bill at the Ceres Hotel?—I did.

Did the bill include all his drinks?—No, it did not include all his drinks.

It included some of his drinks?—Yes.

He had no money at the time he went to stay there?—I do not know.

Did you ask him?—No.

While he was staying at the hotel he had plenty of money to spend?—I do not know.

You never had any drinks with him at the hotel?—Yes.

More than once?—Yes.

And he paid for them?—Yes.

Where is Winterbach now?—I suppose he is at Ohlsson's farm.

You said that some of his drinks at the Ceres Hotel were paid for by him. What did you mean by that?—He signed a card.

So that practically Winterbach had free drinks at your expense at the hotel?—He did not have free drinks. He had to sign a card.

What was the amount of the bill?—I cannot say.

Did you provide him with a cart and horses to go out to the farm to collect evidence?—Yes, I paid for the cart and horses.

You do not know what representations he made on behalf of your client?—No.

[De Villiers, C.J.: Did you authorise him to make any representations?]

No.

[De Villiers, C.J.: Or did you tell the witnesses what they were to say?]

No, I only said I want the truth and facts.

[De Villiers, C.J.: And you say you held out no inducement to any witness to say what is not correct?]

None whatever.

Mr. Bisset, resuming his argument, submitted that the witnesses for the plaintiff did not come from what might be called the respectable coloured class, and that some of the allegations made were so horrible and revolting as to be incredible. They should only be accepted on the production of indisputable proof. It was against one's sense of all that was right to believe for a moment that father and son could have so behaved, each being cognisant of the other's actions. Counsel drew particular attention to a circumstance which he held was conclusive proof of the innocence of the respondent. It was this: That knowing (if petitioner's case was true) that she and the Hornes had been guilty dozens of times and in the open light of day—knowing all this, yet they had Mrs. Steytler actually taking the initiative in bringing an action for judicial separation. She deliberately challenged an inquiry into the whole of her married life, knowing that a searching scrutiny must be made, and that if she had not clean hands, she would not be successful. She came to Court strong in the consciousness of her own innocence. Her

crime might have been folly, but her folly was not crime.

De Villiers, C.J.: This case originated from an action brought by Mrs. Steytler against her husband for judicial separation, on the ground of his cruelty. Now, I shall first of all deal with this question of cruelty. There are only two occasions alleged by Mrs. Steytler on which cruelty was perpetrated on her, or supposed to have been perpetrated by her husband on her. The first occasion was when each of the parties, whilst in bed, had some dispute about the charge which she had made against Mr. Steytler, and I fully accept Mr. Steytler's version of what took place on that occasion. I believe that he was very much annoyed by an unfortunate charge which was made against him, and that in the heat of the moment, without any intention of striking the woman, without any deliberate intention, he gave her a blow with the back of his hand on the side of the face; but I am satisfied from his conduct that he immediately afterwards regretted it, and that he took every means to satisfy her that it was not a deliberate act on his part, and that there was no cruelty on his part. The second action was after a dispute had arisen about some judgment that had been given in the Licensing Court, and there again Mr. Steytler did lose his temper, and he candidly admits that he did lose his temper; but he received considerable provocation from his wife, and she admits that the alleged assault was committed in her attempt to snatch from his hands a letter which he had written to Mr. Charles Horne. There is some evidence as to marks of violence being subsequently seen upon the throat of Mrs. Steytler. But I do not think that there was any attempt on the part of Steytler to squeeze her throat; but if there were marks—of which I am not satisfied—it must have been while attempting to push her away, while she was attempting to seize a letter he had written. The only part of her body which he did hurt, and on which he made a firm grip while she was attempting to seize the letter, was her arm. She clearly had no right to seize that letter. He was quite within his right in writing to Mr. Horne not to come there that afternoon, and it is unintelligible to me why she should have lost her temper because her husband, who had a perfect right so to do, was writing to Mr. Horne not to come there. It was not conduct that one can approve of on the part of the husband to give that grip, but I am not prepared to call that cruelty, considering the provocation. The only other occasion on which there was anything approaching to cruelty is the occasion on which Mrs. Steytler came to Cape Town to undergo an operation, and she says he never came



to see her. I am quite satisfied that he did come. There is no doubt that he did come, and there is consequently no proof of neglect. I am perfectly satisfied that throughout his married life, with the exception of these two occasions, it appears to me that Mr. Steytler has in every way been an indulgent husband. He has given his wife everything she needed and every comfort that she required, and I consider it is her own uncontrollable temper which has led to these disputes between her and her husband, and if it was not for that temper, I do not think these two assaults would have been committed. The charge, therefore, Mrs. Steytler has made of cruelty on the part of Mr. Steytler falls to the ground. Even if there had been two acts of the nature described, they would not be sufficient to justify the Court in granting a decree of judicial separation. The cruelty must be of such a nature as to make it intolerable for the wife to live with the husband, and I think that these two consolidated acts are not sufficient to justify any Court that the husband's treatment of the wife has been so intolerable that she cannot continue to live with her husband as his wife.

The more difficult question is to decide on the question of adultery. There are distinct charges of adultery made against the wife by the husband, and Mr. Bisset has argued that this action in itself is proof conclusive of her innocence, because she would not have exposed herself to having her whole previous life ripped up if she were guilty of adultery. Of course, she must have been aware that the action was brought on what proofs the husband would have been able to obtain against her. Supposing in this case the proofs had been perfectly clear, still she might not have believed that the evidence could be conclusive so as to justify any Court in giving judgment against her for adultery. The point to be borne in my mind is that before any charge was laid against Mrs. Steytler of adultery she had instituted proceedings for judicial separation. Now, it appears to me that in a case of this kind proof of adultery should be conclusive. The effects upon a spouse against whom adultery is proved are of a very serious nature, and I have always considered in these cases that the Court should require the same clear proof as in criminal cases, as the honour of a woman is at stake, and not only the honour of a woman, but the honour of the men with whom adultery is charged. The Court which has to consider the case has to be perfectly clear that there can be no doubt whatever that the offence has been committed, and where there is serious doubt the Court should give the benefit of that doubt, and treat the case as not proved. It is un-

fortunate in this case for Mr. Steytler that the class of witness he has had to call has been somewhat disreputable.

I do not think there is any truth in the suggestions that his advisers have done anything to persuade the witnesses to give evidence. That is not correct. It is necessary for a person to conduct his case to collect his evidence, and he may have to employ agents to do so, and the fact that a person has taken great pains to collect the requisite evidence to conduct his case does not prove that there has been anything improper done in the collecting of that evidence. The suggestion of money having been paid to witnesses to give evidence, therefore, falls to the ground. I do not believe that any money was given to any of the witnesses for the purpose of inducing them to give evidence. There is one woman who had 10s. given to her because she had not the clothes to come from Ceres to Cape Town. I can quite understand that a woman coming from the country wishes to have something decent to appear in, and there certainly is nothing wrong in that. As to the other small sums of money advanced by Mr. Dyason, I do not think that there is anything improper in that. That does not dispose of the witnesses themselves. The witnesses, by their previous careers and the mode in which they gave their evidence, show that they are influenced by motives other than those which induce people to give evidence for the sake of telling the truth, and if such motives exist, the Court should be very slow to accept such evidence. The chief witness in the case is Johanna van Wyk. As to Johanna van Wyk, we know her history. She was charged before the Magistrate—before this very Magistrate who is now one of the parties charged. We know how she was convicted by him, and how it was upon the complaint of her mistress (the present defendant) that a prosecution and conviction took place, and she seems to me throughout to have shown considerable animus against her mistress, not only in giving the evidence which she did, but also in trying to induce others to come forward and give evidence. Johanna van Wyk's evidence is of very great importance upon the incident which is alleged to have taken place in the boudoir. She speaks of what took place between Charles Horne and Mrs. Steytler on a previous occasion, but what took place there is quite consistent with there having been no adultery—undue familiarity, but no adultery. What she says she saw in the boudoir is quite inconsistent with innocence. According to her own evidence, she says she was told to do certain work in the kitchen, and then come to the boudoir for orders. If Mrs. Steytler knew that, as undoubtedly she did, and she

wished to commit adultery, one would think that the door would be locked before she committed adultery with young Horne, but, according to the witness, the door was unlocked, and she peeped through the keyhole and saw the adultery committed. If it be true that the couch was not visible at the door, that would go far to disprove what was said, and the whole story seems to me so improbable that I think it would be even if one thought there was truth in it, to find what would be a conviction on evidence of that kind. Well, the next witness, who really gives evidence quite inconsistent with innocence on the part of Mrs. Steytler and Mr. Charles Horne, is Sarah Noble. Sarah Noble is positive that the occurrence to which she swore took place in July, 1903. I put it to her before she left the box that much depended on it whether she was positive that this occurrence, to which I need not refer, but which pointed to adultery having been committed, took place in July, 1903. She was positive, because she connected it with the service which she entered, and which made it July, 1903, and that it took place in the house Venetia belonging to Mr. Steytler. At the time I put it to Mr. Steytler when he first occupied the house, and he thought it was within the last five years. That would make it the end of 1902, but he candidly stated this morning that occupation of this house was only taken early in 1904, so that it is impossible to reconcile the evidence of Sarah Noble with the true facts. It is not one of those cases in which the witness might be mixed with dates, because she connects the dates with the circumstances of her employment, which brings the dates back to her mind, and if she fails in proving that she was there in 1903, she fails in proving that adultery was committed. Then there is the other witness Vergatini, who speaks of what took place at the reservoir. Well, that evidence would be inconsistent with innocence. I must confess that that witness did not impress me as speaking the truth, besides there were so many other places and so many other opportunities that these people could have availed themselves of to commit adultery, that I am of opinion that they did not avail themselves of this, and from all the circumstances, I am not quite satisfied that the man is speaking the truth. Then another incident, deposed to by Christina Solomon, would indicate guilt, in the attitude which Horne and Mrs. Steytler adopted, and would be inconsistent, I will not say with modesty, but with innocence. Unfortunately, Christina has not been perfectly consistent in her statement, because she did tell other witnesses that she had seen nothing at all improper, and the fact that she is quite a girl now proves that she must have been

very young in August, 1905. I consider it would be extremely dangerous on her evidence to convict young Mr. Horne and Mrs. Steytler of having been guilty of improper conduct. As to the other incidents that are said to have taken place, well, they may be acts of indency—of improper conduct—but they are quite consistent with adultery not having been committed. For instance, there is the evidence of Rosie. If it be true that she saw Mr. Horne and Mrs. Steytler lying under a quilt in the room in which Mr. Harry Horne was in bed, I cannot conceive that adultery was committed, because if the father knew that the son was lying in bed there, it is impossible to believe that actually in the presence of his son he would commit adultery. I do not say that I do not believe the girl. I am not prepared to say that I do not believe the girl, because there were many indecent things done, many improper things done. They may have been lying under the quilt without actually committing adultery. If there had been adultery it is impossible to believe that the son would have told the girl to come in. Then there are other occasions on which there was undue familiarity. Mr. Steytler himself was a witness of it on one occasion. The explanation of the kissing incident is all very well, but it seems strange that a man should be kissing another man's wife in this way, when her husband is not present, however, Mr. Steytler does not seem to have had any particular objection to him kissing his wife on special occasions, such as birthdays, etc., but one cannot understand a man kissing another man's wife in the absence of the husband. It is undue familiarity. But all these things are not sufficient to satisfy me that there has been actual adultery committed by Mrs. Steytler with either Mr. Charles Horne or his son. I do not consider that the evidence which has been given before me would satisfy any jury, and the judge has to perform the functions of a jury, and after he knows all the facts of the case to decide on the probabilities of the case. The result of my judgment will be that there must be absolution from the instance on both sides. Mrs. Steytler must fail in her application for judicial separation, and Mr. Steytler must fail in his claim for divorce for adultery, and the only question now is whether the parties wish to have a judicial separation, that is, an order for the separation of the property, or whether they wish to come back again and be reconciled. I do not believe that Mr. Steytler himself has done anything to bring any witnesses forward to swear what is not true, but, at the same time, I am satisfied that he rather eagerly grasped at the evidence against his wife, after she had brought this action for judicial separation against him. Up

to that time his faith in her was supreme, but after the action was brought, I think he seized on every circumstance touched with suspicion. If he can dispose himself of the idea that his wife had been guilty of adultery, and if his wife can dispose herself of the absurd opinion that her husband had been guilty of cruelty to her, then there is no reason why they should not live together. If they are irreconcilable, the best course is to have a decree of judicial separation at once, and a division of the estate. If so the costs of this action must come out of Mrs. Steytler's share of the joint estate. I consider that she is responsible for this action, she is responsible first of all for bringing the action against her husband, which was not justified, and she is also to some extent responsible for the suspicions which her husband has entertained against her by reason of many indiscretions—I will call them by no other name. She has been guilty of indiscretions which might have led her husband to believe were more serious than indiscretion—acts of infidelity. If there is a judicial separation, I believe that the whole costs of this action must come out of her estate. If the parties wish for an order I will make it.

Mr. Bisset: Mrs. Steytler says it would be impossible for her to live with him again, and will accept a judicial separation.

Mr. Benjamin: Mr. Steytler is agreeable to that course.

[De Villiers, C.J.: On the whole, if the parties are irreconcilable, that is the better course.]

A decree of judicial separation was then recorded by consent, and Mr. A. Dyason and Mr. Charles Home, attorneys, were appointed receivers of the joint estate to arrange an equitable division.

[Attorneys for plaintiff in the action for judicial separation: Walker and Jacobsohn; for defendant: Faure, Van Eyk and Moore.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN]

ADMISSION.

( 1907.  
( Oct. 22nd.

Mr. H. S. van Zyl moved for the admission of Cornelius de Klerk Botha as an attorney and notary.

Applications granted, oaths to be taken before the R.M. of Queen's Town.

### PROVISIONAL ROLL.

ALFORD, WILLS AND ABBOTT V.  
KOPELOWITZ.

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

EATON, ROBINS AND CO. AND OTHERS  
V. KRAMER.

Mr. Howes moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

AFRICAN BANKING CORPORATION, LTD.  
V. NORTON, TRADING AS NORTON  
AND CO.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MAITLAND V. LOUNDAR.

Mr. Joubert moved for provisional sentence on a mortgage bond for £350, with interest at 8 per cent. from the 6th September, 1902, less £1 paid on account, principal due by reason of non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

### REHABILITATION.

Mr. H. S. van Zyl applied for the rehabilitation of Pieter Johannes Coetzee.

Granted.

SANDERSON V. RAVEN.

Mr. P. S. T. Jones (for defendant) mentioned this matter, in which his client had been arrested to found jurisdiction in an action for provisional sentence on a Magistrate's Court judgment. Counsel said that he was prepared to consent to judgment.

Mr. Inchbold (for plaintiff) asked whether it would not be possible to detain defendant for a little while, as he might go away and evade judgment.

Buchanan, J.: You can't keep the defendant in gaol. Judgment will be given as prayed, with costs. You may now execute at your earliest possible opportunity.

## GENERAL MOTIONS.

INSOLVENT ESTATE RIEL V. ( 1907.  
SCHOEVEERS. ) Oct. 22nd.

Mr. Watermeyer moved, in terms of a consent paper, for reduction of respondent's proof of debt from £121 9s. 6d. to £27 16s. 3d.

Order in terms of consent paper.

INSOLVENT ESTATE RIEL V. STEYTLER.

Mr. Watermeyer moved, in terms of consent paper, for reduction of respondent's proof of debt from £391 9s. 2d. to £261 6s. 9d.

Order in terms of consent paper.

*Ex parte* SAAYMAN.

Mr. Marais moved for an amendment of a deed of award in certain arbitration proceedings in the matter of A. P. Blignault v. Hendrik A. Wapenaar and others, to be made Rule of Court. Counsel (in answer to the Court) said that he had a document which contained about 60 names, and if this were put in as an affidavit all the names would have to be stamped. He desired that it should be accepted as a consent paper.

Buchanan, J.: If it is stamped as a special power of attorney, you may take your order.

*Ex parte* DALY.

Mr. Douglas Buchanan moved for leave to petitioner to sue her husband, Patrick Daly, formerly of Woodstock, by edictal citation for restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits of the marriage in community. Defendant's whereabouts had been unknown for some years to the petitioner, but it was stated that he had a brother at Southampton.

Leave to sue by edictal citation granted, citation returnable on the 12th January, personal service, if possible, failing which one publication in the "Government Gazette," and one publication in a Southampton newspaper.

## HANNAY V. HANNAY.

Mr. Upington moved for the appointment of a commission *de bene esse* to take the evidence of certain two witnesses at Vryburg in a divorce suit.

Order granted appointing the Resident Magistrate of Vryburg, or officer acting as such, to be commissioner, to take the evidence of Thomas Slatter and Annie Slatter, costs to be costs in the cause.

*Ex parte* SYMONS.

Mr. Alexander moved on the petition of Solomon Symons, as father and natural guardian of Rose Symons, for leave to sue one Isaac Cohen *in forma pauperis* for £250 damages, for breach of promise of marriage. Counsel said that he was prepared to certify *probabilis causa*.

Referred to counsel for report, and upon certificate rule nisi to issue, returnable on the 29th October.

*Ex parte* DIVISIONAL COUNCIL OF MOSSEL BAY.

Mr. Toms moved for a certain rule to be made absolute, authorising an amendment of an order, granted under the Derelict Lands Act.

Rule absolute.

*Ex parte* WESSELS.

Mr. Philipson Stow moved for a certain rule to be made absolute authorising petitioner to sue *in forma pauperis* the executor dative of the estate of the late James Jacobus Gabriel for damages for alleged seduction and maintenance of an illegitimate child.

Rule absolute, Dr. Greer appointed counsel, and Messrs. C. and A. Friedlander attorneys to the petitioner.

## PEARSON V. FIG.

This was an application calling upon respondent to show cause why she should not be directed to remove an obstruction to a certain natural watercourse running through his property at Wynberg, the said obstruction causing applicant's property to be flooded.

Mr. P. S. T. Jones was for applicant; Mr. Upington was for respondent.

Before the affidavits were read,

Buchanan, J., raised the question as to whether this matter could be decided on motion.

Mr. Upington submitted that it would be impossible to dispose of the matter on affidavit.

Mr. Jones admitted that there was a good deal of force in his learned friend's contention, though he said it would be desirable, if possible, to determine the matter on motion, as the value of the property was small.

Applicant was ordered to proceed by action, notice of motion to stand as summons, costs to be costs in the cause.

## ESTATE LATE VAN DER MERWE V. RAAN.

This was an application to set aside a certain temporary interdict restraining



the present applicant from passing transfer of property in the Britstown district in the estate of which he was executor, to one W. H. van Niekerk, alleged in the petition to have been recently sold to Van Niekerk.

Mr. P. S. T. Jones was for applicant; Dr. Rainsford was for respondent.

Voluminous affidavits having been read,

Mr. Jones submitted that if his lordship, who granted the interdict, had been informed of the whole of the facts, he would have refused the application. Van Niekerk had merely been exercising his rights under an option granted by Van der Merwe two years previously. It was not a sale proposed to be made in fraud of creditors. If Du Raan had any remedy at all, it was under the 84th section of the Ordinance. Counsel cited *Cilliers' Trustees v. Cilliers* (13 S.C., 68).

Dr. Rainsford said that the lease was entered into in 1906 after the respondent's bond had been granted, and subject to any rights which he had under the general clause. The case came under the 83rd section of the Ordinance. The lease was entered into on the eve of insolvency, giving an option at a figure which was far below the proper value, to the prejudice of creditors. The fairest course in the matter would, he submitted, be to allow the interdict to continue until the end of November, pending an action by the present respondent, or a motion by applicant to set aside the interdict.

Buchanan, J.: An application was made to me on behalf of the present respondent for an interdict, on an affidavit alleging that he held a mortgage bond over certain properties belonging to the estate of the late Mr. Van der Merwe, that the respondent (the present applicant, Mrs. Van der Merwe), who is executrix of the estate of her late husband, had recently sold the principal asset in the estate, and that the sale was made for a price below its real value, to the prejudice and detriment of the present respondent and the other creditors. At the time this affidavit was made it was within the knowledge of the respondent that Mrs. Van der Merwe had not recently sold this property, but that two years before her husband, in his lifetime, had leased this property to Van Niekerk, and that in this lease he had given Van Niekerk an option for purchase at a price stated. Van Niekerk had exercised this option, and it was not a sale recently made by Mrs. Van der Merwe, but a sale made in exercise of an option granted by Mr. Van der Merwe two years before. I had some hesitation in granting this order originally, but certainly, had this fact been before me at the time, I think I should not have granted the original order in this case. The order was granted in the

nature of an interim interdict in August last, to last until the end of the following term, evidently indicating that the present respondent was bound to take some action before then to establish his rights. He has taken no such action, and the estate is still as it was at Mr. Van der Merwe's death, and I think this, I won't say intentional misstatement, but this non-statement of facts to me now having been cleared up, this interdict must be set aside. All that was necessary on behalf of the present applicant to have the interdict set aside was to bring the facts not stated on the original affidavit to the notice of the Court, and the Court would thereupon have been prepared to set it aside. Instead of that, a mass of affidavits have been filed, which are utterly irrelevant. In ordering that the interdict be set aside, with costs, costs will only be allowed for the affidavits of Mrs. Van der Merwe, of the 28th August, and of Van Niekerk, on the 22nd August. The Court cannot have all its time taken up with a mass of records which have nothing to do with the case before the Court.

#### KATZ V. NELSON.

This was an application upon notice to respondent to have a certain award of arbitrators made a Rule of Court, with costs.

From the affidavits, it appeared that an arbitration had sat at the Paarl in regard to disputes between applicant and respondent, and that £27 18s. 1d. had been awarded to applicant. Respondent's position was that the applicant had accepted a cheque for £20 in settlement of his claim, upon respondent undertaking to pay taxed costs. Applicant denied that he had received the cheque.

Mr. Alexander was for applicant (A. Katz); Mr. P. S. T. Jones was for respondent (D. Nelson).

Mr. Alexander submitted that the applicant was entitled to have the award made a Rule of Court, with costs, and that the onus lay upon the respondent to prove the alleged settlement.

Without calling upon Mr. Jones,

Buchanan, J.: This is an application to make a certain award a Rule of Court. The award does not provide for its being made a Rule of Court, and I have not been referred to anything in the Act (No. 29 of 1898) which authorises the Court to make a deed a Rule of Court, but as Mr. Alexander states that this practice has been followed in previous cases, I will not decide this application upon that point. It appears that the applicant and respondent had some dispute, and their friends, with a very laudable desire to prevent costs and settle the dispute, were appointed

to go into the matters in dispute between the parties, and draw up a statement of accounts between them. They did do so, the umpire, or "chairman," as he is called, of the three, being Mr. Mathews. The amount these parties said was due by respondent to applicant was about £27. After this amount of £27 had been so awarded, the affidavits state, applicant visited the place of business of one Binder, in company with Mathews, and applicant said if the respondent paid £20 and taxed costs to date, he would withdraw all proceedings, and be perfectly satisfied. Thereupon Binder, on behalf of the respondent, agreed to this, and handed a cheque, at applicant's request, to Mathews for the sum of £20. True taxed costs have not yet been paid, but that is a question which may yet be brought for hearing. Upon the affidavits as they stand, permission was given to settle the matter for £20, and a cheque for £20 was handed over. It has not been returned, and is still in the possession of the applicant or his agent. Under these circumstances, I feel that it is impossible for me to order this award to be made a Rule of Court. I think this is not a case in which I can interfere or give any order. The application will, therefore, be refused, with costs.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

DE VRIES V. DU PLESSIS. { 1907.  
Oct. 23rd.

Costs—Magistrates' Court scale—  
Rule 325.

*By Rule 325, if the plaintiff in a Supreme Court action resides in a Magisterial district different from that of the defendant, the Supreme Court must award costs on the higher scale, even though the sum recovered could have been sued for in the Magistrate's Court, provided that no part of the*

*cause of action arose in the district in which the defendant resides.*

*Where a part of the cause of action did arise in the district of the defendant and the plaintiff recovered only £6, the Court, in the exercise of its discretion, allowed only Magistrate's Court costs.*

This was an action brought by Abraham Hermanus de Vries, of Willowmore, against Daniel Jacobus du Plessis, of Aberdeen, to recover certain sums of money alleged to be owing by defendant to the plaintiff on a promissory note, and balance of account, with interest and costs.

The plaintiff's declaration was as follows:

1. The plaintiff is Abraham Hermanus de Vries, a farmer, of Zoetendals Vlei, in the district of Willowmore, in this colony.

2. The defendant is Daniel Jacobus du Plessis, of Middelplaats, district of Aberdeen, in this colony.

3. The plaintiff is the legal holder of a certain promissory note, dated at Aberdeen on the 27th November, 1902, for the sum of £110, made and signed by the defendant to and in favour of Messrs. De Vries Bros., and by them endorsed in favour of the plaintiff, which promissory note is hereto annexed. The said plaintiff is the legal successor of the aforesaid firm of De Vries Bros., and is the holder of a cession whereby the said De Vries Bros. have ceded to him on the 12th April, 1907, all their right, title, claim, and interest in all debts due to them, as will appear more fully from the said cession hereto annexed.

4. The sum of £64 15s. has been paid on account of the said promissory note, leaving a balance of £45 5s., due to the said plaintiff, which amount has been demanded and claimed from the defendant in a provisional case heard before this Honourable Court on the 11th June, 1907, at the hearing whereof the defendant raised a counter-claim for an amount alleged to be due to him upon an open account between himself and the firm of De Vries Bros., whereupon this Honourable Court refused provisional sentence as prayed, with costs, but leave was given to plaintiff to go into the principal case, and to claim the costs of the provisional case in the principal case.

5. On an open account between the parties to this suit, extending from on or about October 1, 1903, to June, 1905, or thereabouts—(which such account has been duly rendered to the defendant)—as will more fully appear from copy of

the account hereto annexed, there is a balance of £35 14s. 6d. due by the defendant to the plaintiff.

Plaintiff therefore claimed judgment for (a) £45 5s. on the promissory note; (b) £35 14s. 6d. on the account; (c) interest thereon *a tempore morae*; (d) alternative relief; (e) costs of suit (including costs incurred in the provisional case); and (f) the sum of £23 9s. 10d., being the defendant's taxed costs of the provisional case, paid to his attorney under security "de restituendo."

The account annexed to the declaration showed a number of items on the debit and credit side, the credits to defendant consisting for the most part of amounts due for grazing.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, and 3 of the declaration.

2. He admits paragraph 4 of the declaration, save that he says that a sum of £68 has been paid on account, leaving a balance of £42, which said balance of £42, together with the interest due under the said promissory note, was satisfied and extinguished by certain debts incurred by the said firm of De Vries Bros. to the defendant long prior to the date of the said cession of debts to the plaintiff; as will more fully appear from account annexed.

3. He denies paragraph 5, and says that by certain transactions taking place between defendant and the said firm of De Vries Bros. long prior to the date of the said cession of debts to the plaintiff, there was a balance in defendant's favour of £80 10s., as shown in the account annexed to the plea. Wherefore he prays that the plaintiff's claim be dismissed, with costs.

The account annexed to the plea was made up of a number of items alleged to be owing by De Vries Bros. The majority of the items was for grazing of cattle.

Mr. Upington (with him Mr. Pohl) was for the plaintiff; Mr. J. E. R. de Villiers (with him Mr. Swift) was for the defendant.

Matthys Andries de Vries said he was a speculator, and in 1903 was carrying on business with his brother at Prince Albert. His account was guaranteed by plaintiff in the present case. Defendant was indebted to the firm in the sum of £110, and of this amount £64 15s. was paid off in August, 1903. The witness gave evidence relating to the defendant's claim for grazing. He said that in August, 1903, he had purchased and was taking 53 head of cattle to the Transvaal to be sold. On arriving at defendant's farm, he was told by Mr. Du Plessis that there would shortly be a stock sale at Aberdeen. He suggested that the cattle should remain on his place and that they should make up a lot for the sale. Shortly afterwards witness went to Aberdeen, saw an auctioneer, and arranged that his cattle

should be sold at the stock sale, which was to take place in October. Mr. Du Plessis said that he would not charge witness for the grazing. Witness returned to Prince Albert. From there he intended to return to Aberdeen. He drove to Aberdeen, and arrived at his brother's farm, where he was seized with illness. His brother wired to the auctioneer, but while his brother was away with the telegram, witness got up and drove to Aberdeen, arriving there half an hour before the sale. Witness had previously given reserve prices for the stock. Fourteen head of cattle only were sold at Aberdeen. Three cows had died at Du Plessis's place. The remainder of the stock were taken back to the farm at Du Plessis's suggestion. Nothing was said as to what witness was to be charged for grazing. The cattle were grazed on the mountain. At Du Plessis's suggestion, witness employed a man named Pearson to look after the cattle. The grazing was very bad. He could have got good grazing in the neighbourhood by paying for it. In August, 1904, he gave Du Plessis permission to kill one of the cattle. For this, the plaintiff claimed. In June, 1905, the cattle were removed. The matter of payment for grazing was not then discussed, nor at any time was any demand made for payment for grazing. Shortly after the removal of the cattle Du Plessis sent an account for £58 for grazing. Witness wrote stating there had been no agreement to pay for grazing beyond a promise made by witness to pay a fair price. He asked Du Plessis to reduce the charge for grazing from 1s. 6d. to 1s. per month per head. Du Plessis now charged grazing for a month of 53 cattle. This witness disputed. He also charged 2s. a head for grazing and custody of 39 head of cattle for another period, but three of these had died before the sale. Witness contended the charge should be only in respect of 36 head, and that the defendant's account should be reduced throughout the whole period by the deduction of three head. Witness paid Pearson for looking after the cattle, and he considered a fair price for the grazing was 1s. a head per month. In addition to the 39 head, there was a charge of 2s. a head for 14 calves born while the cattle were on the farm. All of these were under 12 months when witness took them away. They were charged only for a certain period. No charge was made for them in the first accounts sent to witness. A cow and three calves were left on the farm because they were too poor to be removed. He told Du Plessis to sell these and pay the expenses out of the purchase money. He sent afterwards for these, but one of the cows remained as it had a broken leg, and a charge in respect of this cow was made for grazing up to the present. A charge of 2s. was made for grazing a

calf of that cow. Witness did not know that the cow had a calf. There were other charges which he disputed. Witness particularised these items, and gave evidence in regard to them. Other charges in the defendant's account he admitted.

In cross-examination by Mr. De Villiers, the witness denied having made an arrangement with the defendant's son to pay for grazing at a specified rate of 1s. 6d., and to allow payment for herding to be made by means of allowing a portion of the butter from the cows, for which butter plaintiff now claimed in his account. He was willing to pay for grazing for the 14 calves at the rate of 1s. per month.

Mr. Upington closed his case.

The defendant said that Matthys de Vries agreed to pay 1s. 6d. a month per head for the grazing. It was arranged to pay Pearson, by giving him part of the buttermilk, but the plaintiff claimed for all the buttermilk, and therefore witness claimed a further 6d. a head for the herding of the cattle. De Vries made him a present of the bull which he killed. The witness gave further evidence relating to other details in the account.

After further evidence for the defence, Mr. De Villiers closed his case, and counsel were heard in argument.

Mr. Upington said he would admit that there was a total of £66 13s. due by the plaintiff to the defendant. On the other hand, he urged, plaintiff had proved that defendant's indebtedness to him was £76 19s. Then there was interest for three years on the promissory note, amounting, roughly, to £10, so that there was a balance due to the plaintiff of £20 6s.

Mr. De Villiers contended that from this balance should be deducted £10, being the value of the bull slaughtered by the defendant. He submitted that there was proof that this was a gift to the defendant. Counsel further argued that a greater allowance for grazing should be made than was admitted by the plaintiff, inasmuch as the evidence showed that there was a greater number of cattle grazing than was allowed for in the computation just made by counsel for the plaintiff. He urged also that the plaintiff's claim, as now reduced by his counsel, should be further reduced in certain particulars. On the point of interest, counsel contended that, at the outset, it was not more than £5.

Maasdorp, J.: I may say I approached the figures in this case from a somewhat different point of view from that taken by the plaintiff, and the result I arrived at was that there would be due to the plaintiff in this case a sum of £6 10s. 9d. In that calculation, I did not bring up interest, having regard to the nature of the set-offs that are made in this case and the difficulty of arriv-

ing at the particular amount that might be due for interest after these set-offs are taken from time to time to have wiped out portions of the claim, I think the Court is not now in a position to make any allowance in respect of the interest. It seems to me that the plaintiff should never have made any claim for provisional sentence in this case. He was fully aware at the time that there were disputed accounts between himself and the defendant, which would seriously affect the result, and it appears that Matthys de Vries, whose responsibilities were taken over by the plaintiff, had admitted virtually that he was indebted to the defendant in respect of certain grazing; but he was rather unwilling to pay the larger sum claimed by the defendant. He desired that it should be reduced to a less sum, but he undoubtedly admitted that some moneys were due, and I think the plaintiff attempted to take advantage of the defendant by trying to get his claim on the promissory note settled, and delaying the defendant in the recovery of the moneys due to him. The question between the parties is, what should be allowed for grazing, and I come to the conclusion that 1s. 6d. would be a fair allowance to make in respect of all the cattle. I think that is a full and liberal allowance, and under the circumstances of the case, I think the defendant is entitled to it. In making that allowance, and taking into consideration the other items of debits and credits which are admitted by the parties, I come to the conclusion that the plaintiff is now entitled to receive a sum of £6. And now, rather a nice question arises with respect to the costs. Under the Rules of Court, if a claim is made for a sum which might have been the subject of a suit in the Magistrate's Court, it is within the discretion of this Court to allow only Magistrate's Court costs. Under Rule 325, there seems to be some exception made to the reduction of the costs in certain cases. One of the cases is where the plaintiff resides in a different district from that in which the defendant resides. But, at the same time, it is also necessary that in that case no part of the cause of action should have arisen in the district in which the defendant resides. Well, in this case, certainly part of the cause of action arose in the district in which the defendant resides, and the plaintiff is therefore not entitled as a matter of right to claim the costs of the Superior Courts, and under the circumstances, I will give judgment for the plaintiff for £6, with Magistrate's Court costs.

[Plaintiff's Attorney: P. A. M. Cloete; Defendant's Attorney: G. Trolip.]



### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### PROVISIONAL ROLL.

STANDARD BUILDINGS, LTD. { 1907.  
V. WHEELER. { Oct. 23rd.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

#### CAPE TOWN TOWN COUNCIL V. MARKS.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

#### FAULKNER V. SALIE.

Mr. Payne moved for provisional sentence on a mortgage bond for £500, with interest from the 1st January, 1907, plus 10s. arrear interest, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.  
Order granted.

#### POTGIETER V. POTGIETER.

This was the return day of a summons calling upon defendant (sister of the plaintiff) to show cause why she should not be declared of unsound mind, and a curator appointed of her person and property.

Mr. Sutton appeared for plaintiff; Mr. Watermeyer appeared as *curator ad litem* of the alleged lunatic.

Mr. Howes said that he desired to intervene on behalf of the grandparents (Johannes S. F. Potgieter and wife) to oppose the application.

Mr. Sutton said that, while he did not admit his learned friend's *locus standi*, he did not object to his appearing as *amicus curiae*.

It appeared from the affidavits that the defendant, who was now 17 years old, resided with her grandfathers at the farm Nooitgedacht, division of Oudtshoorn, to whose custody she was handed over when she was 10 days old. Plaintiff submitted that defendant was of unsound mind, and that it was desirable, in her moral interests, that she should be placed under proper care, plaintiff's intention being to have her removed to the Good Hope Home, at Wynberg. The grandparents both denied that the girl was insane, and strongly urged that it was against their own and the girl's desire that she should

be removed from the farm. Medical testimony was also given both in favour of and against the application.

Mr. Watermeyer, as *curator ad litem*, said he could not say that defendant was insane, though he considered that she was imbecile. She was incapable of managing her own affairs, and he (the curator) thought it advisable that she should be removed from the farm, if only temporarily.

Mr. Sutton and Mr. Howes addressed the Court.

Buchanan, J.: The circumstances in this case prevent the first part of the order asked for being granted, and the defendant being declared insane. It is alleged that the defendant, being of weak intellect, has been committing improper conduct with a bywoner on the farm of her grandparents. On this point I would have liked to have clearer evidence, but no direct evidence of this improper intercourse has been given. It is no use in this case making an order for custody of the girl's property, because it is in the Master's hands, and is perfectly safe and well looked after. But I am asked to appoint a curator for the purpose of having her removed from the farm and placed in a home. Alleged improper conduct is not a ground for taking a minor from her home, and placing her in a home, treating her as a kind of culprit, and putting her in a kind of reformatory. On the information before the Court, I am not justified in making any order in this case. I recognise that the action has been undertaken in the interests of the girl herself, and I am unwilling to visit the parties with costs, but I do not see out of whose funds the costs should come, and I am afraid, in refusing the application, I can make no order as to costs. The application will be refused. I would like to make one remark. It has been suggested that if there is any difficulty it may be obviated in the future by providing this girl with a companion, but I would suggest that a much more effective method is that the bywoner with whom it is alleged that the improper conduct took place should be removed by the grandparents from the farm, and not be allowed to remain.

Mr. Sutton applied for the costs of the *curator ad litem* to be paid out of the defendant's funds.

Mr. Justice Buchanan said that he would be prepared to make an order accordingly.

#### GENERAL MOTIONS.

SOUTH AFRICAN CONSERVATION OF MUSIC V. HOFFMANN. { 1907.  
{ Oct. 23rd.

Mr. Roux moved to make absolute a certain rule nisi restraining respondent

from giving lessons in music, and singing in the village or district of Stellenbosch to persons other than pupils of the Conservatorium.

Dr. Greer appeared for respondent to show cause against the rule.

Applicants based their case on an agreement for three years, entered into with them by respondent in July last, under which he was prohibited from giving music lessons on his own account in the village or district of Stellenbosch. They alleged that he had been giving lessons to private pupils since the agreement was entered into.

Respondent's contention was that it was a condition of the agreement that he should be supplied by the Conservatorium with 30 pupils at a time, and be paid at the rate of £1 15s. per quarter per pupil. Applicants had only supplied him with six pupils when he started, and had thus failed to give him anything like remunerative employment.

Applicants denied that they made any guarantee as to the number of pupils that would be forthcoming.

Having heard Dr. Greer in argument on the facts,

Buchanan, J.: A rule nisi was obtained, operating as an interim interdict, restraining the respondent from carrying on for his own benefit the teaching of music in the district of Stellenbosch, and this rule has been founded upon a contract entered into between the applicant and respondent. One clause of the contract is in dispute between the parties. As written, it says that the respondent agrees to take at least 30 pupils per quarter, or more if required to do so, by the Conservatorium. The respondent alleges that this was meant and was stated at the time to mean that it was to be a reciprocal contract, that he undertook to teach this number of pupils or more, and that applicants agreed to supply him with at least this number. That is a matter which is still in dispute between the parties, and which would have to be settled by action. It is not merely a construction of a document, or the Court might settle the matter now. Therefore, as a rule has been granted, to operate as an interdict, that rule will be made absolute, pending action to be instituted forthwith, and to be set down for trial before the end of next term, by the respondent, to determine his rights in reference to the contract, costs to be costs in the cause. I would suggest to the parties that there ought to be a reciprocal right to both sides on a contract such as this, and that the parties would be much wiser if they came to a settlement in the meantime. There seems to me to be no reason why the parties should not come to terms. In case respondent does not bring an action, the rule will be made absolute, with costs.

#### *Ex parte* WAINSTEIN.

Dr. Greer moved for leave to petitioner, who is a minor, aged nearly 20 years, to enter into a certain marriage and ante-nuptial contract. Applicant's parents reside in Russia, and consequently their approval of the marriage in this colony cannot be obtained. She has been residing with her grand-uncle at Dordrecht, and she desires to obtain the Court's leave to marry and to enter into an ante-nuptial contract with the assistance of the said grand-uncle.

Buchanan, J.: Under the Consolidation Act, No. 35 of 1896, the application should be made to the Chief Justice in chambers, or, in his absence, to the senior judge at present in town. The Chief Justice is in town, and the application had better be made to him.

#### KEMSHED V. KEMSHED.

This was an application for an order upon respondent to pay over to applicant a sum of £50 to enable her to defend an action for divorce instituted against her by respondent.

From the affidavits, it appeared that the parties were married in England in January, 1899 and came to the Colony in 1902. Applicant was sued for divorce by reason of her alleged adultery with one M. J. Kirschhoff. She denied the allegations of intimacy, and made counter-charges, saying that she intended to bring a cross action. Respondent said that he had no means that he could pay over to applicant, and that it was only by the assistance of friends that he had been able to bring the action.

Mr. H. G. Lewis was for applicant, Annie Kemsched; Mr. Alexander was for respondent, Arthur H. Kemsched.

Mr. Lewis, in argument, mentioned *Jopling v. Jopling* (16 S.C., 480), *Botha v. Botha* (21 S.C., 543), *Tyfield v. Tyfield* (3 C.T.R., 393), *Muller v. Muller and Another* (8 C.T.R., 5 and 45), and *Wilkie v. Wilkie* (17 C.T.R., ???).

Buchanan, J.: This is an application made for the purpose of having funds paid by the plaintiff to the defendant (his wife) to enable her to defend the action, and certainly under the circumstances set forth, and under the allegation that the plaintiff does not come into Court with clean hands, an order would be made in ordinary circumstances, but it seems to me, as far as the affidavits go, that the respondent would not be able to comply with any order for a substantial amount. The best solution under the circumstances of the case is to allow the applicant, which, I believe, is consented to by the respondent to defend *in forma pauperis*. Of course, this leave to sue *in forma pauperis* applies only to the applicant, and does not apply to the co-defendant in the

action. Mr. Lewis will be appointed counsel, and Messrs. Wahl, Fuller and De Klerk attorneys of the defendant, plea to be filed by the 4th November and the parties to go to trial this term.

DE WAAL AND ANOTHER V. DE JAGER AND OTHERS.

Insolvent Ordinance—Proofs of debt—Time of making supporting affidavits.

*The estate of one K. was placed under voluntary sequestration. Before the actual order of sequestration was granted, but after K.'s schedules were prepared, certain creditors swore affidavits in support of their claims.*

*Held, that the proofs of debt made by such creditors must be admitted.*

This was an application calling upon respondents to show cause why certain alleged proofs of debts in the insolvent estate of one Kritzinger admitted by the R.M. of Willowmore at the second meeting of creditors, should not be expunged; why De Waal should not be declared to have been duly elected sole trustee in the estate, and why respondents should not be ordered to pay costs; or, alternatively, why De Waal should not be appointed provisional trustee, with power to sell live-stock and perishables, and liquidate the estate.

It appeared that at the creditors' meeting a deadlock had occurred in regard to the appointment of trustee, Mr. De Waal having the support of a majority of the creditors in value, and Mr. Stone receiving the votes of a majority of the creditors in number. Applicants contended that the Magistrate should not have admitted certain nine proofs of debts filed by the respondents.

Mr. McGregor, K.C., was for applicants; Mr. W. Porter Buchanan, K.C., was for respondents.

Mr. McGregor, in argument, cited *Vaule's Executor v. Maritz* (19 S.C., 171).

Mr. Buchanan said that a technical objection was relied upon by the applicant, and that the proofs ought to be allowed to stand.

Buchanan, J.: This is an application, in the first place, to expunge certain proofs of debts filed in the insolvent estate of one Kritzinger. The order of sequestration was made on the 19th August, and two meetings of creditors were held under the Insolvent Ordin-

ance on the 2nd and 9th September. At these meetings Stone, the agent for several creditors, proved their debts. The proofs of debts were admitted by the Magistrate, and have been recorded. The proving of a debt by the 27th section of the Ordinance is required to be made by an affidavit, in which affidavit certain particulars are required to be stated. Affidavits were made in every one of these cases and all the requirements of the 27th section of the Ordinance were complied with, but it appeared that the affidavits were sworn to before the date of the order of sequestration. This was a voluntary sequestration, and the affidavits were made after the schedules had been prepared and notice given that application would be made for the sequestration of the estate. The question is whether this fact that the affidavits were sworn to after the schedules were prepared and before the actual order of sequestration was given, rendered the proofs invalid. Now, no doubt it is better that everything should be in order and in due form, and in these affidavits it is stated that the insolvent was at the date of the issuing of the order of sequestration indebted to the creditor. Strictly speaking, until the date of sequestration was fixed, the affidavit was in error in stating this a few days before the order was actually given, but at the time when the order was made, the allegations in the affidavit were quite accurate, and contained all the information which is required by the law. I am not prepared to say that the fact of swearing an affidavit when sequestration was impending, and before the actual order of sequestration was given, is an illegal practice. As counsel has pointed out in the argument, a creditor might see a notice that a debtor was going to surrender his estate; the creditor might be about to leave his place of business, and be absent for a time, and before he left he prepared his proof of debt and made his affidavit, which was to be filed at the meeting of creditors to be held after sequestration. No doubt the specimen forms given for this purpose are so framed as to imply that the affidavit would be made after sequestration, still I think this technicality should not prevent a creditor from having his remedy against the estate. The affidavits were thoroughly accurate, they contained all the information required to be given. The proofs here were accepted by the Magistrate, and have been recorded. Because the affidavits were sworn before the order of sequestration was made is not, I think, sufficient reason for ordering these proofs to be expunged from the record. The object of this application is to determine who is to be appointed trustee. If the

proofs stand, one candidate for the trusteeship gets a majority in number, and another candidate gets a majority in value of the votes of the creditors. If these proofs were expunged, then one candidate receives of the remaining votes the majority both in number and value. An application is further made for an order appointing a provisional trustee, as there is no chance of an election, and I think the fairest course in this case would be to order that Messrs. De Waal and Stone be appointed joint provisional trustees, with power to administer and finally liquidate the insolvent estate. As it was necessary to come to the Court under any circumstances to have a provisional trustee appointed, the costs may fairly come out of the estate.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

TROLLIP V. SOUTHERN LIFE ASSOCIATION. { 1907.  
Oct. 24th.  
„ 25th.

This was an action to recover money alleged to be due on a policy of insurance.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer, residing at Mount Prospect, in the district of Bedford. The defendant is the Southern Life Association, a joint stock company, duly incorporated and registered, having its chief office at Cape Town.

2. On or about the 18th day of May, 1899, the plaintiff effected a policy of assurance with the defendant, being No. 13,470, whereunder the defendant agreed in consideration of the sum of £7 paid to the defendant by the plaintiff on or about the 3rd day of May, 1899, and of a yearly premium of the said amount payable within fourteen days of the said date in any year, that if at any time within one year from the said last mentioned date, or during the continuance of the said policy the plaintiff should sustain any bodily injury, caused by violent accidental external and visible

means, then in case such injury should within three calendar months from the occurrence thereof directly cause the loss by physical separation of one hand, or of one foot, or the complete and irrecoverable loss of sight in one eye (such loss being deemed permanent partial disablement within the meaning of the said policy), the defendant upon satisfactory proof of such injury and of such loss being furnished to the directors thereof, would pay to the plaintiff the sum of £500, and in case such injury did not entitle the plaintiff to the compensation above provided for permanent partial disablement, but should, independently of all other causes, immediately and totally disable and prevent the plaintiff from attending to his business or occupation, then upon satisfactory proof of such injury and of such total disablement being furnished to the directors of the defendant, the defendant should pay to the plaintiff compensation at the rate of £6 per week during such total disablement, provided it should immediately and continuously follow such injury, and which disablement should be deemed temporary total disablement within the meaning of the said policy, and in case such injury should only partially disable the plaintiff, so that he could attend to some portion of his business or occupation, but not the whole thereof, or in case the plaintiff should have so far recovered from temporary total disablement so as to be able to transact some portion of his business or occupation, but not the whole thereof, then, in either of such cases, on satisfactory proof of such injury and of such partial disablement being furnished to the directors of the defendant, the defendant should pay to the plaintiff compensation at the rate of £2 per week during such partial disablement, and which disablement should be deemed temporary partial disablement within the meaning of the said policy. Thereafter on or about the 18th day of July, 1900, the defendant issued to the plaintiff, in substitution of the said policy, Policy No. 15,559.

3. The plaintiff annexes hereto a copy of the said Policy No. 15,559, to which he craves leave to refer for the full terms of the said agreement.

4. Thereafter on or about the 20th day of July, 1906, and during the continuance of the said last mentioned policy, the plaintiff sustained a certain bodily injury caused by violent external and visible means which directly caused within three calendar months from the occurrence thereof the complete and irrecoverable loss of sight in one eye, and immediately and totally and independently of all other causes, disabled and prevented the plaintiff attending to his business or occupation; full particulars thereof were, on or about the 12th day of September, 1906, duly furnished to the defendant,



5. The plaintiff has duly paid all premiums, given all notices and particulars, has furnished such proof as aforesaid, and has fulfilled all his obligations under the conditions of the said policy, and becomes and is entitled to claim from the defendant payment of the sum of £500 in respect of the premises, but the defendant, after lawful demand duly made, refuses to pay the said sum so due in respect of the said injury. Wherefore the plaintiff claims: (a) Judgment of the sum of £500, with interest a tempore morae; (b) alternative relief; (c) cost of suit.

The defendant's plea was as follows:

For a special plea in bar the defendant association says:

1. That notice was first received by the association on 12th September, 1906, and therefore not within 21 days after the alleged occurrence referred to in paragraph 4 of the declaration, and that a fair and reasonable explanation for the delay in giving such notice has not been made to defendant.

2. That a period of more than 12 months has expired since the said alleged occurrence, and that no settlement with the insured or his representative has been agreed upon, or ascertained, in terms of clause 8 of the conditions of the policy.

3. That plaintiff obtained proper medical advice only on or about the 4th day of August, 1906, and failed to procure proper medical advice, and to act upon same as soon as possible after the accident.

4. That plaintiff failed to make a written demand for arbitration within six months from the date of the alleged occurrence.

5. That by reason of one or more, or all, of the foregoing facts, plaintiff is barred by the provisions of clauses 5, 7, and 8 of the policy from any right of action which he might otherwise possess.

Wherefore he prays that the claim may be dismissed with costs.

And for a further plea, if this Honourable Court should find the foregoing plea insufficient in fact or in law, it says:

6. It admits the allegations in paragraphs 1, 2, and 3, save that it says that the association is not a joint-stock company.

7. As to the allegations in paragraph 5, it denies that the alleged bodily injury was caused by violent external and visible means within the meaning of the policy. It denies that the injury caused within three months from the occurrence, or at all the complete and irrecoverable loss of sight in one eye, and it also denies that it immediately, or at any time, disabled and prevented the plaintiff attending to his business or occupation; it admits that on or about 12th September, 1906, plaintiff reported to one H. W. Trollip (defendant's

agent), that he (plaintiff) had sustained injury in his right eye on 14th July, 1906, by poisoned dust, which blew into it while he was at work in the goat kraal on his farm; but otherwise, save as is herein admitted, it denies the allegations in the said paragraph, and especially that the alleged occurrence took place on 20th July, 1906.

8. It admits that plaintiff has paid all premiums, and that it refuses to pay the sum of £500, or any part thereof, but otherwise it denies the allegations in paragraph 5.

Wherefore it prays that plaintiff's claim may be dismissed, with costs.

The plaintiff, in his replication, admitted that notice was first received by the association on the 12th September, but said he had always had a fair and reasonable explanation in terms of clause 5. Such explanation, however, was never asked for. Thereafter, in or about the month of October, at Witmoos and Rosemead Junction, the defendant's duly authorised agent expressly waived any right the association had, in terms of the said clause. Plaintiff admitted that more than 12 months had elapsed since the accident, that no written demand had been made by him for arbitration, and that there had been no settlement with him, but otherwise he denied the facts and conclusions of law in the special plea.

Mr. Upington (with him Mr. Sutton) for plaintiff. Mr. W. P. Buchanan, K.C. (with him Mr. P. Jones) for defendants.

Roland James W. Trollip, the plaintiff, said he was a farmer, residing in the district of Bedford. He deposed to having taken out a policy of insurance with the defendant association in May 1899. Thereafter a new policy was substituted, which remained in force up to the time of the accident. Prior to the accident he had recovered £5 from the association for a slight injury to the eye, caused by some prickly pear thorn blowing into it. He was not then medically attended, and the injury was not serious. On the 20th July, 1906, while he was at an out-station, sorting his goats in the kraal, some dust was blown into his right eye. The wind was blowing, and the dogs were running up and down, causing dust to rise. The dust consisted of goat manure. The injury caused him great pain, and he had to go home at once. About three or four hours afterwards, matter formed in his eye. He remained at home for two or three days. Then he had some urgent business at Schoombie. He went there, his eye being bandaged. He returned on the 27th, but his eye got no better, and he consulted two doctors in Bedford. He also saw a medical man at Port Elizabeth and another at Cathcart. When he went to Bedford to see the doctor, he saw Mr. Henry Trollip, the local agent of the defendant association.

The latter asked him what was the matter with his eye, and witness said some dust had blown into it. Witness was not then aware that he was required to send in a written statement about the accident within 21 days. He had not read the policy. On the 12th September he again saw Mr. H. Trollip, who was his cousin, and the latter took down in writing a statement made by witness. (The statement was read. It referred to the date of the accident as being July 14.) Witness said he gave Mr. Trollip the date from memory, but when he got home he found he had given the wrong date. On September 13 a form was sent by Mr. H. Trollip to be filled in by witness, and another form to be filled in by the doctor. Both these forms were filled in and returned to Mr. Trollip on the 27th September. Mr. Cumming, the manager of the Port Elizabeth branch of the defendant company, subsequently wrote him, asking witness to meet him at Witmoos station. Witness met him at the station. That was, witness believed, in the middle of October. Mr. Cumming offered £24 in settlement. Witness declined to accept this. Cumming said he was entitled to £6 a week for four weeks. Finally the company repudiated the claim. He had another interview with Mr. Cumming at Rosmead, where they met casually. On that occasion Cumming said he had had a report from one of the doctors who attended witness, and it was not satisfactory. He offered witness £20. Witness was not blind in the right eye, but it was of no use to him. He could not distinguish faces with that eye alone. Previously the eye was a very good one. He had been a good shot, but he had been unable to shoot since. Witness's left eye had always been weak.

In cross-examination by Mr. Buchanan, the plaintiff said that on the 20th November he had an operation performed on his eye. Between September and November he did no work, beyond giving instructions to his boys. He never went to the out-stations. He did not engage anyone to take his place, but he had handed a couple of transactions over to other people. Mr. Cumming did not say at Witmoos that the association was not liable.

By the Court: Witness was 53 years of age, and had always been an active man. His right eye was now of no use to him in his business.

Dr. G. J. E. Pitman, of Bedford, said he saw the plaintiff when the latter came into Bedford on the 4th August. The account of the accident given by the plaintiff was consistent with the general appearance of the eye. Witness believed the present condition of the plaintiff's eye would be permanent. The injury arose from some external cause, because there was an abrasion of the eye.

Cross-examined by Mr. Buchanan: If plaintiff had got medical attention two or three days after the accident, the result would have been the same.

Other medical witnesses gave similar evidence, and evidence was also led corroborative in certain particulars of the testimony given by plaintiff.

Mr. Upington closed his case.

William Elliott, manager of the Southern Life Assurance said no reasonable explanation of the notice of the accident not having been sent within the prescribed time had been given, nor had any notice demanding arbitration been received. So far as he knew, there had been no waiver of any of the conditions of the policy. The association repudiated all liability.

Cross-examined by Mr. Upington: The association did not write asking plaintiff for an explanation of the delay. They naturally expected a man to read and understand his policy. The association did not want to take advantage of the notice if they found the case was a genuine one. He claimed that the repudiation took place at Rosmead Junction, and when Mr. Cumming's report was confirmed.

By the Court: The reason why the association considered the notice of the accident important was, for one thing, because the association was particularly watchful in eye cases, and would send its own medical officer.

Further cross-examined: Witness quite believed Mr. Trollip considered his claim a genuine one, but on the other hand the association took up the position that there was no proof such as they could reasonably require.

Re-examined: Even after plaintiff's attention was directed to clause 5, requiring that notice or a reasonable explanation should be given, he did not send any explanation.

By the Court: Witness considered that the delay prejudiced the association. It could have sent its own doctor if notice had been given.

Further evidence was led for the defence, among the witnesses being Mr. Cumming, the Port Elizabeth manager of the association, who denied that he had waived any of the conditions of the policy. He told plaintiff definitely at Witmoos that his explanation of the delay was not satisfactory, and that the association repudiated liability. He was prepared to make an ex gratia payment.

Medical evidence was also adduced for the defence, Dr. Wood giving it as his opinion that the sight of the plaintiff's injured eye could be restored to one-third of the normal by a further operation.

Counsel addressed the jury on the facts.

Hopley J., in his address to the jury, said that with regard to plaintiff's omission to give notice of the ac-

cident within 21 days, what he would ask the jury to find was whether there was a reasonable explanation given at any time. Supposing the jury came to the conclusion that there was no reasonable explanation given, then the next point they would have to decide was whether there was a waiver of the condition by the defendant association either by their conduct or by the express act of their authorised agent. It was for the jury to consider further whether there had been, in terms of the policy, a complete and irrecoverable loss of sight of one eye. If the policy had spoken of total blindness there would have been no trouble on this ground, but the medical evidence was that the eye was practically useless, that while he had the left eye he made no use of the right, and that he did not see out of it when both his eyes were open, and when he was going about in a normal way. If the jury found there was not complete and irrecoverable loss of sight, then it would be for them to consider whether there had been total disablement for the 20 weeks for which the association assumed responsibility, or partial disablement.

The jury found a verdict for the plaintiff for £500. They found that there was a waiver by the association of the condition requiring notice by the offer of £24 made by the agent of the company and by the terms of the letter from the company to Cumming; also that a reasonable and sufficient explanation was given to Mr. H. Trollip, the local agent at Bedford, and that the plaintiff completely and irrecoverably lost the sight of his right eye within three months of the accident.

Mr. Upington accordingly moved for judgment for £500, with costs.

Mr. Buchanan asked that under the 33rd section of the Act, judgment should be postponed on the ground that the first two pleas in bar had not yet been decided upon.

Hopley, J., said he would hear argument on these points.

Mr. Buchanan quoted the case of *Daries v. South British Insurance Company* (3 Juta, 416).

Hopley, J.: I have no doubt whatsoever as to the points now raised by Mr. Buchanan. Clause 7 of the conditions of insurance provides that the right to recover compensation in respect of any accident shall be forfeited on the expiry of twelve months from the date of its occurrence, on the completion of which period the liability of the association in respect of such accident shall cease and determine, unless a settlement with the insured or his representatives has been agreed upon or ascertained in terms of condition 8. All I can say as to that condition is that the claim here was instituted, summons was issued, and the process for the recovery of this compensation was begun well within a

period of twelve months from the occurrence of the accident, and I consider that is all that that clause means. It cannot possibly be taken to mean that, although you claim within twelve months, if the proceedings are protracted in some way or another beyond the twelve months, you cannot then recover the amount due to you. I feel no doubt as to that point. With regard to clause 8, it reads as follows:

"In case of any difference between the association and the insured regarding any claim under this policy, it shall be in the option of the association to have the said difference decided by arbitration or by action in the ordinary manner, and the association shall declare within 14 days after written demand has been received at the chief office from the insured whether the same shall be decided by arbitrators to be mutually chosen, and in case the arbitrators shall not agree, by an umpire chosen by them prior to commencing the arbitration, whose award in writing shall then be conclusive and binding on both parties, and whose award may be made a rule of the Supreme Court of the Colony or State wherein the policy is payable; and in case the association shall decline to refer the said difference to arbitration or shall give no answer to the demand therefor within the aforesaid fourteen days the insured may proceed by action in the ordinary manner in the Supreme Court of the Colony or state wherein the policy is payable."

Now, this clause does not say that it is agreed between the parties that in all cases of difference the matter shall be referred to arbitration. Had that been so it would have fallen within the scope of cases like the one quoted by Mr. Buchanan (*Daries v. South British Insurance Co.*, 3 Juta, 416), and the numerous other cases on the point. Of course, it is a perfectly good thing to say that before you go to the Law Courts you shall go to arbitration, but this insurance policy is not in those terms. The Insurance Company had the option of going to arbitration, but they did not choose to do so. They repudiated the whole claim, and there is nothing obliging the plaintiff to have gone to arbitration. Then the clause goes on to say: "Provided, however, that if no written demand for arbitration as above mentioned be made by the insured within six months from the date of the accident in respect of which the claim is made, the insured shall be held to have waived and abandoned, and he hereby agrees to waive and abandon, all claims against the association, whose liability, if any, to the insured shall thereupon absolutely cease and determine." I don't know what it means when it says "as above mentioned," except it be in the seventh section, and that only gives a man the right to proceed by action unless they agree to arbi-

tration under clause 8, and under clause 8 arbitration is left to the option of the company. I must rule against the defendant on both points. Judgment will be entered for the plaintiff for £500, with costs.

[Plaintiff's Attorneys: Dold and Van Breda. Defendant's Attorney: G. Trollip.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

*Ex parte* FOOT. { 1907.  
Oct. 24th.

Mr. H. G. Lewis moved, as a matter of urgency, for the appointment of Mr. A. N. Foot as provisional trustee in the insolvent estate of S. Henry, boot and shoe importer, of Cape Town and Wynberg.

Order granted, appointing A. N. Foot as provisional trustee, with power to carry on the business of the insolvent and collect outstanding accounts.

### PROVISIONAL ROLL.

POWBIE V. VAN DIEMAN.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £200, with interest from the 1st June, 1903, less £3 10s., paid on account; counsel also applied for the property hypothecated to be declared executable.

Defendant denied that he owed £200, and said that when he signed the document, he did not know what it contained.

Provisional sentence granted, and property declared executable, execution to be stayed until the first day of next term (February 1, 1908).

Mr. Justice Buchanan suggested to defendant that he should consult an attorney in the meantime.

### MATRIMONIAL CASE.

RAWBONE V. RAWBONE

This was an action brought by John Wm. Rawbone, engine-driver, Woodstock, against his wife Elizabeth Maria Rawbone, also of Woodstock, for restitution of conjugal rights, failing which, a decree of divorce, with declaration of forfeiture of the benefits of the marriage by defendant and custody of the children to plaintiff.

Mr. Alexander was for plaintiff; defendant did not appear.

W. T. Birch, of the Colonial Secretary's Office, gave formal proof of the registration of the marriage.

Plaintiff said that he was married to defendant on the 8th May, 1888. He was an engine-driver in the employ of the C.G.R., having been in the service about 19 years. Six of the eight children of the marriage were living with him at his home in Oxford-street, Woodstock. In February, 1905, he had to complain about his wife associating herself with other men. Later, she left him without any warning, taking with her two of the children. She hired another house in Oxford-street, Woodstock. He asked her to return, but she declined. She was now living with her sister-in-law in Argyle-street, Woodstock. Witness desired to have custody of the eight children of the marriage.

By the Court: Defendant had given him no reason for refusing to return to him.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 1st November, failing which, to show cause on the 12th November, why a decree of divorce should not be granted, defendant declared to have forfeited benefits of the marriage, and plaintiff declared to be entitled to custody of the children of the marriage.

### INTERDICT.

*Ex parte* QUINE.

Mr. Alexander moved, as a matter of urgency, for an interdict restraining Conrad Cohen and his wife Rachel Cohen, old-metal dealers, of Cape Town, from disposing of goods in their store, pending an action to be brought by applicant. Applicant said that he supported respondents in their business, that they owed him £109 3s. 2d., and that, in defiance of an agreement, respondents had been selling part of the goods in the store without first obtaining his permission.

Rule nisi granted, operating as an interim interdict, in the terms prayed, action to be instituted by applicant forthwith, leave reserved to respondents to move on due notice at any time to set aside this order, costs of this application to be asked for in the action.

### GENERAL MOTIONS.

*Ex parte* INSOLVENT ESTATE { 1907.  
ZIEPER. { Oct. 24th.

Mr. Douglas Buchanan moved for a certain rule nisi to be made absolute.

Rule absolute, subject to messenger's return of service on second defendant being certified to by affidavit.



*Ex parte* BIRCH.

Mr. Watermeyer moved for a certain rule to be made absolute admitting petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights.

Rule absolute, Mr. Watermeyer appointed counsel, and Messrs. Le Roux and Wege attorneys to the petitioner.

*Ex parte* SMARTT SYNDICATE, LTD.

Mr. Close moved for a certain rule to be made absolute authorising the reduction of the company's capital, and the alteration of the articles of association. Counsel also applied for directions as to publication of notice of the registration of the minute, in accordance with the terms of section 41 of Act 25, 1892.

Rule absolute, and notice of registration required by Act 25, 1892 (section 41), published in the "Government Gazette."

GREEVE V. KEAL.

Mr. Roux moved for the appointment of a Commission *de bene esse*, to take the evidence of applicant and her witnesses at Kokstad in an action in which she is suing Sydney Herbert Keal by edictal citation for damages for seduction and maintenance. Defendant was in the Argentine Republic, and service had been made upon him and upon his *curator ad litem* (J. B. Keal), as directed by the Court.

Order granted appointing the Assistant Resident Magistrate of Kokstad, or officer acting as such, to be Commissioner to examine the plaintiff and her witnesses, costs to be costs in the cause.

WILKINSON V. ESTATE WILKINSON AND ANOTHER.

Mr. Rowson moved, on the application of George Wilkinson of Cape Town, for the appointment of a Commission to take the evidence of his mother and others at Boston, Lincolnshire, in an action instituted by applicant against the respondents.

Mr. Howes (for respondents) opposed on the ground that an exception had been taken to the declaration that it disclosed no valid cause of action, and that this exception should be disposed of before the present application was dealt with.

Mr. Rowson: We intend to apply for an amendment when the exception is heard.

Order granted appointing the Registrar of the County Court at Boston, Lincolnshire, as Commissioner to examine the witnesses mentioned by applicant, Commission not to issue until after the exception taken to the declaration

has been heard, the exception to be set down before the 31st October, costs of Commission to be determined at the trial, and costs of this application to be costs in the cause.

ROWAN V. ESTATE LOUW AND ANOTHER.

This was an application upon notice calling upon respondents to show cause why applicant should not be admitted to sue them *in forma pauperis* for certain interest alleged to be due to her from the estate of her late parents.

Mr. J. E. R. de Villiers was for applicant; Mr. Douglas Buchanan was for respondents.

Affidavits having been read, and Mr. De Villiers having been heard,

The matter was referred to Mr. De Villiers for report, and upon his certificate of *probabilis causa*, the matter to be set down for hearing upon notice, as if it had been the return day of the rule.

*Ex parte* FIGLAN.

Mr. Ingram moved for leave to petitioner to sue his wife, Sarah Anne Figlan, by edictal citation, for divorce, on the ground of her alleged adultery. Respondent was last heard of at the Ndabeni Location, Cape Division, in June last, and her present whereabouts were unknown.

Leave to sue by edictal citation granted, citation returnable on the 12th December, personal service, failing which one publication in the "Imvo" newspaper.

INSOLVENT ESTATE KLAAS V. KLAAS.

Insolvency—Provisional order of sequestration — Ante-nuptial contract.

*By ante-nuptial contract K. had agreed to settle certain property on his wife, but delayed passing transfer until after a provisional order of sequestration had been obtained against his estate.*

*Held, that as by the provisional order his estate became vested in the Master, and as an ante-nuptial contract, apart from actual transfer conveys no rights in rem, the transfer from K. to his wife was null and void.*

This was an action brought by the provisional trustee in the insolvent.

estate of Isaac Klaas against Sophy Klaas (born Blumenfeld), of Oudtshoorn (wife of the insolvent), for an order declaring certain transfer of half-share of certain piece of land in the town of Oudtshoorn to be null and void.

From the pleadings it appeared that the insolvent and defendant entered into an ante-nuptial contract on the 20th August, 1905, under which he settled upon her the portion of land in dispute. On the 19th April, 1907, Isaac Klaas's estate was provisionally sequestered, and on the 26th April, 1907, insolvent purported to pass transfer of the ground to his wife.

The matter had been before Mr. Justice Buchanan on Circuit, and it was there agreed that no witnesses should be called on the removal of the hearing to Cape Town.

Mr. Howes was for plaintiff; Mr. Louwrens was for defendant.

Mr. Howes submitted that as transfer of the property had not been passed at the date of the sequestration, the land would be vested in the hands of the Master, and the insolvent would after that have no right to pass transfer to the defendant. He cited sections 5, 6, and 93 of the Insolvent Ordinance, and mentioned *Harris v. Buissinne* (2 Menz., 105).

Mr. Louwrens said that the estate was only provisionally sequestered. He cited *Ishmail v. Ally* (16 C.T.R., 266). He submitted that when the ante-nuptial contract was entered into *dominium* in the property passed to defendant, and that at the sequestration of the estate of Isaac Klaas, the land in question did not, therefore, vest in the Master. He cited Van Leeuwen's Cens. For. (1, 2, 4, 7), Van der Keessel (Thesis, p. 202), Voet (41, 1, 41), Act 21, 1875 (secs. 3, 4, and 7), and *Anstruther v. Chiappini's Trustees* (3 Searle, 91).

Buchanan, J.: Husband and wife had been married by ante-nuptial contract. On April 19, 1907, the estate of the husband was placed under sequestration in terms of section 5 of Ordinance 6, 1843. Seven days after, i.e., on April 26, a transfer was registered in the Registry of Deeds of this colony, transferring to the wife certain landed property which had belonged to the husband. Action is now taken to set aside this transfer on the ground that at the time it was made the husband, by his insolvency, was no longer vested with the property, and could not, therefore, transfer it. The defence set up is, shortly, that as the transfer was in compliance with the terms of the ante-nuptial contract, it cannot now be impeached, and it is contended that the registration of an ante-nuptial contract has the effect of passing *dominium* in property to which the contract refers. It is also argued that as the transfer was made before the final sequestration of the estate of the husband, though

after the provisional order had been obtained, *dominium* still vested in the insolvent. This latter contention, I think, cannot be supported. Section 5 of the Ordinance, which provides for what is called, in ordinary parlance, provisional sequestration, provides that when, on the application of a creditor, compulsory sequestration is prayed for, and an order of sequestration is granted, such order places the estate of every such person or persons under sequestration in the hands of the Master of the Court until the same shall, in manner hereinafter mentioned, be adjudged to be sequestered, or the said petition shall be discharged. Here is clear and precise language of the Act vesting the estate on the provisional order being granted by the Master. Section 46 of the Ordinance further says that every order made placing an estate under sequestration as insolvent, shall so soon as made have the effect of divesting the insolvent of the property, and after such an order has been made, the insolvent has no power to alienate such property. The fact, therefore, that at the time this transfer was made, only a provisional order of sequestration, and not a final order of sequestration, had been made, cannot support the passing of this transfer, as transfer was passed at a time when the insolvent was not vested with the property. The other question is, what was the effect of the registration of the ante-nuptial contract? Now, the registration of the ante-nuptial contract does not, in my opinion, have the same effect as the registration of a deed of transfer passing the *dominium* in the property. Though, by the contract, it may be stipulated between the parties that certain property shall be transferred, still until the actual transfer is made, the *dominium* remains in the person who holds the title to the property. The learned counsel for the defendant referred to Act 21, 1875, which protects property in certain circumstances, which is settled by ante-nuptial contract. Here it is not sought to impeach the ante-nuptial contract, the wife has all the rights under the ante-nuptial contract which she had before sequestration, but her remedy to enforce those rights is affected by her husband's insolvency. If the transfer had been effected before the provisional order of sequestration, it is possible it might have been a question whether the transfer, being a compliance with the terms of the ante-nuptial contract duly registered, could be attacked, but though the rights of the wife remain, her remedy to enforce those rights is affected by the divesting of the insolvent of his property before he effected the transfer. In this case, the transfer having been made after the insolvency, it cannot be considered a *bona fide* transfer, and the

trustee of the insolvent estate is entitled, therefore, to have the transfer declared null and void. The wife may insist upon her rights, and make any claim she may have on the estate. The transfer is set aside simply on the ground that at the date when it was passed it was passed by a transferee who had no *dominium* in the property. It was, therefore, an illegal transfer. Judgment will be given for the plaintiff as prayed, with costs.

[Plaintiff's Attorneys: Michau and De Villiers. Defendant's Attorneys: Not on record.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SIVERTSEN V. SIVERTSEN. } 1907.  
Oct. 25th.

Will—Ord. 15 of 1845 — Witnesses.

*Every will executed in this Colony to which Ord. 15 of 1845 applies, must be signed on each leaf by two witnesses who, when signing, must do so in the presence of the testator and of each other.*

*Semble: In English Law witnesses need not sign in presence of each other.*

Sullivan v. Sullivan (3 L.R. Ir. 299).

This was an action brought by certain children of the late Hans Sivertsen, for an order declaring a document null and void, in so far as it purported to be the last will and testament of the late Hans Sivertsen, and the setting aside of the defendant's appointment as executors, or for such other relief as the Court might seem meet, with costs out of the estate.

The plaintiff's declaration was as follows: (1) The plaintiffs, who reside in the Cape Peninsula, are Arthur Lawrence Sivertsen, Sivert Christian Sivertsen, Johanna Dorothea Sutherland (born Sivertsen), married out of community of property to Robert

George Sutherland, and Pieter Nelson, married in community of property to Maria Elizabeth (born Sivertsen). The three first-named plaintiffs and Maria Elizabeth Nilson are children of the late Hans Sivertsen, who died on or about the 6th August, 1907, and as such interested under a will executed by him on or about January 12, 1904. (2) The defendants, Hans Gerhardus Sivertsen and George William Steytler, who are sued in their capacity as executors testamentary of the estate of the late Hans Sivertsen, of Wynberg, hold letters of administration granted to them on or about August 15, 1907, by the Master of this Honourable Court, as executors testamentary, in accordance with a document executed on or about the 12th July, 1907, purporting to be the last will and testament of the late Hans Sivertsen. (3) The document, which purported to revoke all former wills and testamentary disposition, is not the legal last will and testament of the late Hans Sivertsen, by reason that, although it purports to have been signed in the presence of two witnesses, John Andrew Coetzee and Hendrick Fredrik van Eyssen, yet in truth and in fact it was not so signed, nor did the testator acknowledge his said signature to the said two witnesses, both being present at the same time. On the contrary, the testator acknowledged his signature to the document in the presence only of John Andrew Coetzee, who thereupon added his signature as a witness, and the said acknowledgment did not take place in the presence of Hendrick Frederick van Eyssen, nor was Van Eyssen present when Coetzee witnessed the document. Thereafter Hans Sivertsen brought the document to Hendrick Frederick van Eyssen, to witness his signature thereto, when Van Eyssen appended his name as witness, but the testator did not sign nor acknowledge his signature in the presence of Van Eyssen, nor was Coetzee present when the request was made, nor did Van Eyssen witness the document in the presence of Coetzee: wherefore, in terms of Ordinance 15 of 1845, the document is not the last will and testament of the late Hans Sivertsen. Wherefore the plaintiffs pray for an order declaring the document to be null and void, in so far as it purports to be the last will and testament of the late Hans Sivertsen, and the setting aside of the defendants' appointment as executors, or for such other relief as to this Honourable Court may seem meet, together with costs out of the estate.

The defendants' plea was as follows: (1) Defendants admit paragraph 1 of the declaration, save that they deny that the plaintiffs are interested under the will dated 12th January, 1904. They say that the will dated 12th January, 1904, was revoked not only by the will dated 12th July, 1907, but also by a

duly executed will and codicil dated 8th April, 1907, containing for the most part the same provisions and dispositions as the said will of 12th July, 1907. (2) The defendants say, furthermore, that they were appointed as executors of the late Hans Sivertsen, not only by the will dated 12th July, 1907, but also by the aforesaid will dated 8th April, 1907, and also jointly with one Paul de Villiers by the aforesaid will, dated 12th January, 1904, and codicil thereto dated 7th August, 1905. (3) The defendants admit paragraph 2 of the declaration, but they do not admit any of the allegations contained in paragraph 3 thereof, and put the plaintiffs to the proof thereof. Wherefore they pray that the plaintiffs' claim may be dismissed, with costs.

Plaintiffs' replication was as follows:

(1) They have no knowledge of the existence of a document executed by the late Hans Sivertsen on or about April 8, 1907, purporting to be a will and codicil of the late Hans Sivertsen. The document has not been filed with the Master of the Supreme Court, nor have the defendants applied for or taken up letters of administration thereunder. They do not admit that the document in so far as it purports to be a will and testament of the late Hans Sivertsen is legally and validly executed in terms of Ordinance 15 of 1945. (2) Save as aforesaid, and save in so far as it consists of admissions, they deny all and singular the allegations of fact and conclusions of law in the plea contained, join issue thereon, and again, as before, pray for judgment, with costs.

Mr. McGregor, K.C. (with him Mr. Sutton) for plaintiffs; Mr. De Villiers for defendants.

John Commaile, clerk in the Master's Office, produced the original will, dated 12th July, 1907, of the late Hans Sivertsen. Letters of administration had been taken out under that will by the executors testamentary.

John Andrew Coetzee, commercial traveller, of Observatory-road, who witnessed the will, said that the late Mr. Sivertsen called him into the house to do so, remarking that he was getting old, and as he was feeling unwell, he thought the best thing he could do was to make his will. Witness pointed out that Mr. Sivertsen had already signed it, and he replied that the ink was not quite dry.

By Mr. De Villiers: Mr. Sivertsen asked him to witness the will. When he witnessed the will he did not think that there should be two witnesses present.

Hendrick F. van Eyssen, a dairyman, of Wynberg, who also witnessed the will at the request of Mr. Sivertsen, stated that the latter brought the document to him, and asked him to sign it. The signature of the last witness was already on the document.

This concluded the evidence in the case.

Mr. De Villiers having been called upon, said he would leave the matter in the hands of the Court.

Maasdorp, J.: The executors in this case were quite right in coming to Court to see that the case for the plaintiff was clearly established, but it has certainly now been proved that the signature of the testator was not made or acknowledged by him in the presence of two competent witnesses present at the same time, and besides that it appears that one witness, Van Eyssen, did not attest and subscribe the will in the presence of the testator. The will and letters of administration are declared null and void, costs to come out of the estate.

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### ILLIQUID ROLL.

NEL V. DU PLESSIS. { 1907.  
Oct. 25th

Mr. Benjamin, K.C., moved for judgment, under Rule 319, for £76, rent due under a certain lease, with interest and costs.

Order granted.

#### GENERAL MOTIONS.

MASON V. DE MEILLON.

Mr. Roux moved for a certain rule calling upon respondent to show cause why petitioner should not be admitted to sue him *in forma pauperis* to be made absolute. Service had been made upon respondent, but there was no appearance on his behalf.

Rule absolute as prayed, and Mr. Sutton appointed counsel and Mr. E. J. Schultz attorney to the petitioner.

LIPSCHITZ V. KLEYN.

This was an application, upon notice, calling upon respondent to show cause why a certain portion of his plea in the action brought against him by applicant should not be struck out as embarrassing, bad in law, and disclosing no defence to the action.

Mr. Bisset was for applicant; Mr. Louwrens was for respondent. The parties reside in the Oudtshoorn district.

It appeared that an action had been instituted by applicant against respondent for delivery of the plumage of certain ostriches, or, in the alternative, for



£108 damages for breach of contract. Applicant desired to have the following paragraph of the plea struck out: "In paragraph 2 of the defendant's plea the number 68, and the words, 'but defendant did not at the time notice that the receipt erroneously contained the words, ses en tagentig (86), instead of the words, acht en zestig (68), the whole of paragraph 3; in paragraph 4 the words, 'though by law compelled to do so, and without receiving any further consideration.'"

Respondent was willing to consent to an amendment of paragraph 2 by inserting, 'defendant says that the agreement of sale was a verbal one, and never reduced to writing.'

Mr. Bisset, in argument, said that the application was brought under Rule of Court 320 (sub-section 8). Plaintiff was embarrassed because he did not know what defence he had really to meet.

Mr. Louwrens said the defence would be that the plumage of 86 birds had been delivered. The declaration raised the question of fraud, alleging that defendant fraudulently represented that he had delivered to plaintiff's agent the feathers of 18 more birds than was actually the case.

Buchanan, J., said that the plea was not artistically drawn, and did not make any specific attempt to answer the allegation of fraud.

Application granted, with costs, and defendant ordered to amend his plea.

Buchanan, J.: The affidavits which have been produced are altogether unnecessary, and no costs will be allowed for the affidavits. I wish it to be understood that I do not specifically say that these paragraphs should be struck out.

#### CONNOLLY, LTD. V. VAN DER MERWE.

This was an application for the personal attachment of respondent for contempt of Court by disobeying an order granted on September 20, directing him to render an account of all moneys and goods received by him from applicants for sale on their account, and all moneys disbursed and received in connection with the sale of the goods.

Mr. Swift was for applicant; respondent did not appear.

Mr. Swift produced an affidavit of service of no notice of motion upon respondent by leaving it at his last known place of residence at Wellington. Affidavits were also read to the effect that £300 worth of goods had been advanced to respondent, and that he had not accounted for any sales that he had made, or any goods that he still had in his possession.

Order granted for respondent's attachment, with costs.

#### *Ex parte* ESTATE FRASER.

Mr. Long moved, on the petition of J. B. Cleghorn, one of the curators bonis of the estate, for the appointment of G. W. Steytler and A. N. Foot as provisional trustees.

Order granted appointing Messrs. Steytler and Foot as provisional trustees.

#### *Ex parte* VENTER.

Mr. Roux moved for the release of petitioner, a minor, from tutelage to enable him to purchase one-third of a farm with his two brothers and pass a bond. Petitioner resides in the district of Hanover, and was born on the 10th January, 1888, and had carried on farming for some time past. Petitioner also prayed for an order declaring him to be a major at law, but counsel said that he did not now press this part of the application. The tutors testamentary approved of the prayers of the application. Counsel cited *in re Cuchet* (16 S.C., 5).

Ordered that the Registrar of Deeds be authorised to register any bond tendered by the minor without the assistance of his tutors.

#### *Ex parte* WIGG.

Mr. Howes moved on behalf of petitioner, P. W. Wigg, of Uitenhage, for an order for registration of a certain ante-nuptial contract. Petitioner said that he was married on the 4th September last. On the 2nd September an ante-nuptial contract was executed before Martin Edward Mackenzie, attorney, Uitenhage, and deponent paid to Mackenzie the estimated cost and disbursements to be incurred in the preparation and registration of the contract. Mackenzie had failed to have the contract registered within the period required by law.

Buchanan, J., said that no explanation was given in the petition as to why Mackenzie failed to see to the registration of the contract. He thought Mackenzie ought to be called to account.

Mr. Howes said that, of course, he appeared on behalf of Mr. Wigg.

Buchanan, J., said that he would grant an order, subject to notice of motion being given to Mackenzie calling upon him to show cause why he should not pay the costs of this application.

Mr. Howes said that he was instructed to give an undertaking accordingly.

Order granted authorising the Registrar of Deeds to register the ante-nuptial contract, saving rights of creditors which may have accrued in the meantime.

*Ex parte* DE MARILLAC.

Mr. Watermeyer moved for the cancellation of certain sales of land on the Cape Flats made by applicant to certain two persons, on the ground of failure to pay instalments of the purchase price as stipulated in the conditions. The present whereabouts of both respondents were unknown.

Rule granted calling upon respondents to show cause why the sales should not be cancelled, personal service if possible, failing which one publication in the "Cape Times," rule returnable on the 12th December.

*Ex parte* MILLER.

Mr. J. E. R. de Villiers moved for the appointment of a *curator ad litem* to represent Johannes Stephanus Burger, of Clanwilliam, in an action to have him declared of unsound mind. Petitioner is a creditor against Burger's estate, and Burger is at present confined in the Valkenburg Asylum. Previous proceedings had recently been taken on the petition of Mrs. Burger, and a temporary curator had been appointed, but no further action had been taken, and the curator (W. P. Burger) had not taken out his appointment.

Order granted, appointing Mr. Marais as *curator ad litem* in proceedings to have respondent declared of unsound mind, summons to be served on the alleged lunatic and the *curator ad litem*. Notice to be given of the set-down to Mrs. Burger and the temporary curator, summons returnable on the 12th November.

## MOSTERT AND SON V. TAHA.

Mr. Roux produced affidavits of service on the executors concerned as required and applied for the rule nisi to be made absolute.

Rule absolute.

## SONNENBERG V. MAITLAND MUNICIPALITY.

This was an application upon notice to the respondent Municipality for an order compelling them to authorise certain slaughter-house within the Municipality belonging to one Loubser, whereof applicant is the lessee as a duly-authorised house in terms of the Municipal regulations.

Applicant's case was that he had been refused permission to use the premises as a slaughter-house, and that the opposition was due to the fact that as a cattle dealer he was ready and willing to deal with Indian butchers. The European Butchers' Association had pass-

ed a resolution refusing to have anything to do with any dealer who traded with Indians. Applicant said that the refusal was made in the interests of the "meat ring."

Respondents said that they had no animus against applicant, and that they declined to give permission, in response to a circular from the Government, asking them not to licence fresh premises pending negotiations as to the establishment of public abattoirs.

Dr. Greer for applicant. Mr. Benjamin, K.C., for respondents.

Dr. Greer said that this matter was of considerable importance not only to applicant, but also to a number of Europeans, who were engaged in the butchering business, who were outside the "ring," which it was not denied had been formed. It was clear that, even if the question of public abattoirs were solved, and abattoirs of that kind were erected a considerable time must elapse before they were available to these people. The existing slaughter-houses had, within the past few months, passed into the hands of certain cold storage companies, who had refused to allow any person to slaughter there except those approved of by them. For the people outside the Butchers' Association this was almost a question of life and death. These premises were originally under the jurisdiction of the Cape Divisional Council, and subsequently came within the Municipality of Maitland, and were accepted by them as a slaughter-house, and inspected by their officers. The Municipality were now estopped from saying that these premises were unauthorised. Counsel also submitted that application having been made by Loubser to the Municipality, and their regulations having been complied with, respondents ought to have issued an authorisation such as was required. He cited *Clark v. Town Council of Cape Town* (4 C.T.R., 42), and contended that there had been an unreasonable refusal on the part of the Council to exercise the powers entrusted to them. It was said that the respondents had been asked by the Government to stay their hands pending a solution of the question of public abattoirs. Applicant was, however, willing to accept an order permitting him to slaughter in those premises until public abattoirs had been constructed. He cited *Tregidga v. Rondebosch Municipality* (6 S.C.R., 321).

Mr. Benjamin said that regulations 178 and 179 of the Municipality were framed under the Municipal Act, No. 45, of 1882 (section 109, sub-section 12). These premises had never been sanctioned by the Municipal Council.

[Buchanan, J.: I see no evidence of authorisation in this case.]

Mr. Benjamin submitted that there was no ground of estoppel in this matter. The sanitary inspectors could not au-

thorise this slaughter-house. The Council had used their powers *bona fide*, and were exercising the discretionary power vested in them in a reasonable manner. The Government had represented to the Council the extreme undesirability of sanctioning any new houses pending negotiations in connection with the establishment of public abattoirs. It was not for the purpose of supplying meat to the inhabitants of the Municipality of Maitland that this application was brought, but in order to supply meat in the city of Cape Town. There was nothing to prevent applicant endeavouring to set up a slaughter-house in some other Municipality.

Buchanan, J.: The applicant in this case has hired certain premises in Maitland, which he wishes to use for the purpose of slaughtering stock. These premises were built some 13 or 14 years ago, and were for a time used as a slaughter-house. The ground upon which they were built was then under the control of the Divisional Council. For trade reasons, several years ago the premises ceased to be used for slaughtering purposes. About a twelvemonth past the land upon which these premises were situated was brought within the Municipality of Maitland. On the 1st June last, for the first time since they were so brought within the Municipality, the owner of the property, or his tenant, began again to slaughter within these premises. One of the Municipal regulations framed under the authority of the General Municipal Act No. 45 of 1882, which is in force at Maitland, provides that there shall be no slaughtering of cattle, etc., within the Municipality, except in premises duly authorised by the Council. The Municipality had reports made, and are now prosecuting the persons who have contravened the regulations. The applicant meanwhile asks for a mandamus to compel the Council to authorise the slaughtering of stock in these premises. But in argument it is urged that they have already been authorised, if not expressly, at any rate by implication. The first question is whether these premises have ever been authorised by the Council. I fail to find any evidence whatever that there has been any authorisation. But it is argued that as the Municipal inspectors had inspected these premises and pointed out that certain alterations would be necessary before they would be fit for slaughtering purposes, therefore the Council was estopped now from saying that they would not recognise this place. If that Council has actually or impliedly given its consent to slaughtering in this place, then this application would be altogether unnecessary, for an order to compel the Council to authorise these premises for slaughtering purposes. The application is itself opposed to the idea that there was any previous authorisa-

tion. Then it is said that the Council has *mala fide* and unreasonably refused to authorise these premises. In the first place, it has been pointed out that the purpose for which it is sought to use this place for, slaughtering, is not for the benefit of the Municipality within which it is situated, but for the benefit of traders living in another Municipality, viz., that of Cape Town, and it is alleged that the traders of Cape Town have formed a "ring," as it is called, and have so co-operated that they have shut out a certain number of people from competing in the business of butchers. If there was any discrimination made by the Council between applicants who apply for licences from them, and this discrimination was to support the "ring," or to support other traders, I think that that would be *mala fide* and unreasonable ground upon which to refuse giving a licence. But in this case, before I can make an order in terms of the motion, it must be established that the Municipal Council of Maitland has acted unreasonably, or acted *mala fide*, in refusing to authorise slaughtering in these particular premises. I think the affidavit of the Town Clerk shows that, instead of any *mala fide* or unreasonable refusal, the Council considered that they had very good reason for their action. The Town Clerk says there has been considerable discussion, and the Government have recently addressed a circular to the Municipality in which they strongly discountenance the authorisation of fresh slaughter-houses, pending the establishment of public abattoirs. Well, the erection of abattoirs may take a long time, but if the Council have acted honestly and *bona fide* in this matter, I do not think the Court can compel them to give a licence which they on these grounds refuse to give. As I said before, if their refusal had been because they wish to support the "ring" in Cape Town, or that they wish to shut out small traders and Indian traders from carrying on business in competition with others, that would be an unreasonable ground for refusal. But on the affidavits it appears that that is not the ground on which the Council acted, and in the absence of *mala fides* on the part of the Council, I do not think that I can grant this application, seeing that it is not for the benefit of the inhabitants of the Municipality in question, but for that of persons residing and trading in some other Municipality. The Council has exercised its discretion honestly, and on what appear to be good grounds, and I think the Court cannot order them to depart from what they consider *bona fide* is the proper course to adopt. The case of *Tregidga v. Rondebosch Municipality* (6 Juta, 321) is somewhat in point here. In that case the applicant had been

slaughtering for some forty years within the Municipality of Rondebosch, and the Municipality, acting under the same Act, passed a regulation which prohibited the slaughtering of stock within the Municipality. The Court said they had a perfect right to do so, if they did not act unreasonably or *mala fide*, even though the applicant might have acquired what one might almost call a prescriptive right. That was a criminal case, it was a conviction for contravening Municipal regulations, and the Court sustained the conviction, and dismissed the appeal. In this case, I think the Court must, under the circumstances stated, refuse the application with costs.

#### DU TOIT V. DE SMIDT.

This was an application brought by Anna Susanna du Toit, married without community to Abraham G. N. du Toit, upon notice to Charles de Smidt to show cause why an award of a certain arbitrator (Attorney A. R. Truter) should not be made a Rule of Court.

It appeared that the applicant commenced an action against respondent upon a promissory note, but that before the case came on for trial it was agreed to submit the matter to arbitration. Mr. Truter was appointed arbitrator, and he called for papers and gave notice to respondent, but the respondent did not appear, and Mr. Truter proceeded to arbitrate in his absence. He had made his award, finding in favour of applicant for £300.

Mr. Long was for applicant; Mr. Howes was for respondent.

Mr. Howes said that the deed of submission did not contain any authority that the award should be made a Rule of Court. The arbitrator in this matter was not an official arbitrator. Counsel cited Act 28, 1898 (section 23). Respondent said that this was merely a friendly sort of proceeding. If he had regarded it as an arbitration under the Act it was hardly likely that he would have allowed the attorney to the other side to be appointed arbitrator. The deed of submission contained a clause that each party should pay his or her own costs. The respondent furthermore was not heard in the arbitration proceedings, and was not given a reasonable opportunity of appearing. Counsel quoted the schedule to the Arbitration Act (section O), and submitted that there had been no reasonable cause for the arbitrator to proceed *ex parte*.

Mr. Long argued that the clause in the deed of submission did not mean that each party should pay his or her own costs in the arbitration.

Buchanan, J.: The applicant sued the defendant in this court upon a promissory note. Before the case came on for trial the parties agreed to submit the

issue to the arbitrament of Mr. Truter, and abide by the result of his award. The consent paper to this effect, subject to certain conditions, was signed by the defendant. In the submission it is agreed that all papers were to be submitted to the arbitrator on or before the 10th June. Defendant did not submit his papers to the arbitrator, he was called upon to do so. He was given notice to attend the arbitration, but failed to appear. After repeated notice, he asked for a week's longer time; he got a week's longer time, but even then he did not appear. The arbitrator, in his absence, as he was authorised to do under the Act, proceeded with the arbitration, and made his award. He awarded the plaintiff £300, the amount of the promissory note sued upon, and costs. It is objected that there is nothing in the agreement signed by the parties authorising the award to be made a Rule of Court. There have been cases before the passing of the Act (No. 29, of 1898), in which it has been held that this is a necessary requisite, but under the 23rd section of that Act "the report or award of any officer of the Court, or official, or special referee or arbitrator, may, upon motion by any party, after due notice to the other parties, be made a judgment or Rule of Court." Section 3, which has been referred to, puts a submission by consent on the same footing as an order of Court. Under these circumstances, after the passing of the Act, there is no doubt that either party has a right to come to the Court to have the award made a Rule of Court. The only difficulty I see in this case is as to the portion of the submission, which says that the reference is "subject to the condition that each party pays his own costs, and that the case be withdrawn." As it stands, this might be held to be an agreement that each party was to pay his own share of the whole costs, and that being the case, while making the award a Rule of Court, it will be an award only for the amount awarded by Mr. Truter, with costs, of the order of Court, but without the costs of arbitration, and costs of the action. It will, therefore, be made a Rule of Court.

#### *In re* ASSETS REALISATION ASSOCIATION.

The Registrar handed in the final report of the official liquidator of the Assets Realisation Association.

Buchanan, J.: The official liquidator reports that this was a bogus company, and that there are no assets in the estate of any kind. The papers will be filed in the Court, and anybody who is interested can look at them. The report will be confirmed.



# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

REX V. STRATTON. } 1907.  
 } Oct. 28th.

Law of evidence—Admissibility at criminal trial of depositions—Illness of witness—Act 17 of 1874, Sec. 5.

*In a criminal trial before the High Court of Southern Rhodesia, medical evidence was given that a certain witness, who had made a deposition, on oath, at the preliminary examination, had left the country on account of ill-health, that it would have been dangerous to his life to remain in the country and that he would be unable, owing to his ill-health, to give evidence at his trial, although he was actually travelling, in order to make the change which the state of his health required. The presiding judge, being satisfied that the witness was too ill to be able to travel to the Court for the purpose of giving his evidence, allowed the deposition to be read under the 5th section of Act 17 of 1874.*

*Held on appeal, that there was no ground for holding that the discretion of the Judge had been improperly exercised.*

This was an appeal from a decision of the High Court of Rhodesia by which the accused, Thomas Stratton, a servant of the Beira and Mashonaland Railways, was found guilty of appropriating £39 odd and £100, and sentenced to six months' imprisonment with hard labour. The indictment set out that on 26th June, 1907, at Bulawayo, the accused falsely and fraudulently gave out and pretended to the stationmaster at Cape Town, and as such acting for and on behalf of the Cape Government Railways, that Robert Thompson Anderson, stationmaster at Bulawayo, and as such

acting for and on behalf of the Beira and Mashonaland Railways, authorised the expenditure of the sum of £10 sterling as the price of a second-class railway ticket from Cape Town to Bulawayo, together with an advance of fifteen shillings in cash, which ticket and sum of fifteen shillings were issued and granted to Johanna Subert by the stationmaster at Cape Town, in his said capacity, and did then and there, by means of false pretences, cause Robert Thompson Anderson, for and on behalf of the Beira and Mashonaland Railways, to become liable for the sum of £10 to the Cape Government Railways; whereas, in truth and in fact, Thomas Stratton well knew when he so gave out and pretended that the said Robert Thompson Anderson, in his capacity as aforesaid, did not authorise the issue of the ticket and the advance of the said sum of money to the said Johanna Subert by the said stationmaster at Cape Town aforesaid, or otherwise; and thus the said Thomas Stratton did commit the crime of fraud. Secondly: As also, in that, during the month of July, in the year aforesaid, and at Bulawayo aforesaid, the said Thomas Stratton did receive and take into his possession from divers persons, who are to the prosecutor unknown, money amounting to £142 7s. 1d., their property, which money it became the duty of the accused to pay to Robert Thompson Anderson for and on behalf of the Beira and Mashonaland Railways as aforesaid, yet the said Thomas Stratton, not regarding his duty in that behalf, did not pay the said money or any part thereof to the said Robert Thompson Anderson for and on behalf of the Beira and Mashonaland Railways as aforesaid; but, on the contrary, did afterwards, to wit, during the month of July, in the year aforesaid, wrongfully, unlawfully, and fraudulently convert and appropriate the same to his own use, and thus did commit the crime of theft. The grounds of appeal were: (1) That the admission of Anderson's evidence was illegal, and that without such evidence there was no evidence that the crime as charged in the indictment was committed by the prisoner; (2) that there was no evidence *aliunde* the prisoner's statements as contained in the books that the crime as charged had been committed.

Mr. M. Bisset was for the appellant, and Mr. Struben was for the Crown.

On the question of the admissibility of the evidence, counsel quoted section 5 of Act 17 of 1874. The question seemed to be, was the deposing witness in this case too ill to be able to travel? and it was on that ground that there was no proof that the objection in this case was taken. The interpretation of the Statute must be a very strict one, and the Court must not extend the words of the Statute. It was prejudicial to the prisoner that

the evidence of a material witness should be admitted merely on his deposition. The witness Anderson was not cross-examined, save on a very small portion of his evidence.

De Villiers, C.J., said the Court would then hear counsel for the Crown on the point of the admissibility of the evidence.

Mr. Struben submitted that the fact of a witness not being fit to travel had been held in the English Court not sufficient to bar the evidence from being put in. Counsel referred to 11 and 12 Vic., chapter 42, sec. 17, *Rex v. Wilson* (8 Cox, p. 38), *Rex v. Wicker* (8 Jurist, p. 252), *Regina v. Daly* (6 Cox, p. 55), *Rex v. Coburn* (7 Cox, p. 265). The question whether the evidence should be admitted or not had been decided in the case of *Rex v. Stevenson* (31 "Law Journal," p. 147) to be a question within the discretion of the judge. Counsel submitted there was good ground for admitting the evidence. The doctor showed that the witness was too ill to be able to travel to give evidence, without risk to his life, and he had sent him away for that reason.

Mr. Bisset, on the question of the discretion of the judge, referred to the case of *Rex v. Tate* (2 Foster and Finlayson, 565), and also *Rex v. Bull* (12 Cox, 31). He submitted there was no reason why the case should not be postponed until Mr. Anderson was able to come back to Bulawayo, when he could have been cross-examined.

De Villiers, C.J.: The judge at the trial has a large measure of discretion as to whether he should admit evidence of this kind or not, but the discretion must be exercised within the limits required by law. The question now is whether the learned judge exceeded those limits. The words of the section are: "That a deposition shall be admissible in evidence if it shall be proved on oath to the satisfaction of the Court that the deposing witness is too ill to be able to travel." A reasonable construction of these words, in my opinion, is that the witness was too ill to be able to travel to the Court for the purpose of there giving his evidence. The mere fact that he is able to be moved does not prevent the section from being put into operation, if the witness is too ill to be able to travel to the Court in order to give his evidence. Now, the learned judge was satisfied that the deposing witness was too ill to be able to travel to the Court, there to give his evidence, and the evidence of the doctor fully supports that view. The doctor had not seen him on the day he had to appear in court, but this was not a case of a sudden illness coming upon the witness. It was a long-standing illness, for which the doctor

had attended him, and the doctor says that "he left for home the Sunday fortnight preceding. He went on account of ill-health. He was suffering from debility and a severe rupture. In my opinion, it was necessary he should go at once. It was necessary for him to go home for his own safety and health. I would have given a certificate willingly as to his inability to remain here to give evidence. I do not think he would have been able to give evidence even last Tuesday. It was dangerous to his life to remain here, and he is actually travelling now because of the dangerous condition of his health." Under the circumstances I am not prepared to hold that the learned judge, in allowing the evidence to be read, exercised his discretion improperly, and the appeal must be dismissed.

Buchanan and Maasdorp, J.J., concurred.

Mr. Bisset then proceeded to read the record of evidence taken in the Court of first instance, from which it appeared that the accused was found not guilty on the first count, but was found guilty of appropriating £39, and recommended to mercy on the ground of previous good character. Counsel contended that there was no evidence, apart from the entries in the books, that the crime as charged had been committed. If the books were not conclusive, then the appellant was entitled to an acquittal; if conclusive, there was an end to the matter. He cited *Rex v. Chapman* (1 Carrington and Kirwan Reports, 119), *Rex v. Wolstenholme* (11 Cox's Criminal Cases, 313), *Rex v. Lloyd Jones* (8 Carrington and Payne's Reports, 288), and submitted that it would seem clear that, according to English law, it was not enough for the prosecution to say that it appeared from the books that he had received so much, and that he had paid out so much, and that therefore there was a deficiency for which he had not accounted.

Without calling upon Mr. Struben,

De Villiers, C.J.: The learned counsel has adduced some very strong arguments, which I have no doubt have been used before the jury, but the jury was satisfied that the accused had received the money, and that he failed to pay it over, and the only question is, was there sufficient evidence before the Judge and jury to justify that conclusion? Well, the evidence of the accused himself I think goes very far to prove the statements of the indictment. Then in addition to that there is the fact that accused himself, by the books which he kept, showed that he received these moneys. The station-master says that accused did not pay over these moneys, that he did not pay the whole of the moneys, and there was a deficiency of £100, and again of £39,

This is the evidence of the station-master, which the Court has held to be admissible. I do not consider that the English cases relied on go so far as to show that, where a jury is satisfied from the admissions made by the accused that he has received certain moneys, the jury would not be justified in holding that there was an embezzlement, if he did not pay over that money to the proper person to whom he had to pay it over. None of the decisions went so far as that, but whether they did or not, I am satisfied that there was sufficient evidence to justify the jury in coming to the conclusion that accused had received certain moneys on behalf of the Railway Department, and that he failed to pay over the whole amount which he had so received to the Railway Department. His books showed that he had received the money. There is no explanation how the books came to show that. Then there is the statement that he had made to certain persons that he was in trouble, and that he tried to borrow money. The only question is whether there was sufficient evidence before the jury to justify them in coming to the conclusion that he was guilty? I am not prepared to say that there was not. For these reasons, I am of opinion that the appeal should be dismissed.

Buchanan and Maasdorp, J.J., concurred.

#### REX V. HOP LEE.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town, who had convicted appellant, described as a Chinese laundryman, of contravening section 6 (subsection 1), Part 2, Act 36, 1902, in that between the 1st and 11th August, 1907, he wrongfully and unlawfully owned or kept a gaming house at 78, Castle-street.

The case for the prosecution was that the accused had carried on a gaming-house at 78, Castle-street, at which fan tan was played. Accused denied the charge, and said that he did not even know what fan tan was.

The Magistrate found accused guilty and sentenced him to pay a fine of £100, or in default three months' imprisonment with hard labour.

Mr. J. E. R. de Villiers was for appellant; Mr. Nightingale was for the Crown.

Mr. De Villiers, in argument, submitted that there was much doubt as to whether the man who was arrested—the appellant—was the banker; that the evidence was by no means conclusive as to his identity.

Without calling upon Mr. Nightingale, the Court dismissed the appeal.

De Villiers, C.J.: The accused was charged with being the owner

or occupier of a gaming-house. The words "owner or occupier" are defined in the third section of the Act, which says: "'Owner or occupier' shall be deemed to mean and include any 'owner' who is cognisant of the purposes for which or uses to which his property is being used or put, and also a tenant, occupier, lodger, manager, banker, dealer, croupier, secretary, clerk, messenger, or any person employed in any house or place in any capacity other than a menial or domestic capacity." These words are certainly so wide, in my opinion, as to include the accused, who was in this house taking a very prominent part. He was the most prominent figure there among these 28 Chinamen. Walker says he saw the accused standing on a box and counting out washers, while the others were around him. The suggestion is now made that the police constable made a mistake as to the man. Well, there could hardly be a mistake, because the officer says he at once arrested the accused, whom he had seen taking this prominent part. I could understand the difficulty of the identification of a Chinaman by an European who had only seen him once, but here the European then and there arrested the Chinaman, and took him to the police station, and I can hardly understand that there could have been a mistake, even in the confusion which is supposed to have taken place. The Magistrate believed the evidence of the constable, and had no doubt as to the identity of the accused. The appeal must be dismissed.

Buchanan and Maasdorp, J.J., concurred.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ABRAHAMSON V. GUARDIAN ( 1907.  
ASSURANCE CO., LTD. ) Oct. 29th.

Policy of insurance—Condition  
as to keeping proper books.

*In the body of a policy of fire insurance on stock-in-trade issued by the defendant Com-*

*pany in favour of the plaintiff, there was a condition that the plaintiff should keep proper books and accounts. Among the conditions indorsed on the policy was one requiring the plaintiff, in case of loss or damage, to produce to the Company all such books, vouchers and other evidence as may be reasonably required by the Company. A fire having taken place, the plaintiff demanded the amount of the policy, and upon being required to produce his books, he handed over to the Company certain books which, in the opinion of the Court, were improperly kept, as they contained important erasures which could not be satisfactorily explained, and were in other respects wholly untrustworthy for the purpose of shewing the amount and value of the stock at the time of the fire.*

*Held, that the plaintiff was not entitled to recover.*

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This was an action brought by Abraham Abrahamson, a general dealer, of Brackenfeldt, in the division of Stellenbosch, to recover from the defendants £500 on a policy of insurance issued by the defendants on the stock of the plaintiff, which was destroyed by fire in October last.

The plaintiff's declaration was as follows: (1) The plaintiff is Abraham Abrahamson, a general dealer, carrying on business at Brackenfeldt Siding, in the division of Stellenbosch. The defendant is the Guardian Assurance Co., a limited liability company, whose head office is situate in London, England, and carries on business in this colony from an office situated in Cape Town. (2) On or about the 29th November, 1905, the plaintiff effected an insurance with the defendant company under a policy bearing date November 29, 1905, and numbered 38,181,848, for the sum of £500 against loss or damage caused by fire to the goods or stock contained in the plaintiff's shop at Brackenfeldt Siding. The said policy was issued as subject to the terms and conditions in the said policy contained, and which the plaintiff craves leave to refer to when produced at the trial. (3) On or about October 11, 1906, a fire occurred on the premises at Brackenfeldt Siding, and the building, together with plaintiff's whole stock, was completely destroyed by fire, and the value of the plaintiff's stock so

destroyed was £955 7s. (4) From the issue of the said policy of insurance up till the time of the fire the plaintiff had duly and regularly paid the premiums stipulated in the said policy, and plaintiff further says that at all times he has fully complied with and fulfilled all the conditions of the said policy. (5) The plaintiff says that on the premises the defendant has become indebted to the plaintiff in the sum of £500 sterling in respect of the loss of stock by fire as aforesaid, but defendant refuses or neglects to pay the said sum or any part thereof. Plaintiff claims judgment in the sum of £500, with interest and costs of suit.

The defendants' plea was as follows:

1. Paragraphs 1 and 2 are admitted.
2. The defendant admits that on or about the 11th day of October, 1906, the plaintiff's building at Brackenfeldt Siding and the contents thereof were destroyed by fire, that all premiums due and payable under the said policy have been paid, and that it refuses to pay the amount of the plaintiff's claim or any part thereof. Save as above, the defendant denies each and every allegation in paragraphs 3, 4, and 5, as specifically as if herein set out.

3. By clause 1 of the conditions of the said policy referred to in paragraph 2 of the declaration, it is provided as follows: "If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the company (meaning the defendant) shall not be liable upon this policy, so far as it relates to property affected by any such misdescription, misrepresentation, or omission."

4. On or about the 8th day of November, 1905, the plaintiff signed and delivered, or caused to be delivered, to the defendant a certain proposal form, necessary for the purpose of the defendant estimating the risk.

5. The plaintiff in the said proposal form wrongfully and unlawfully, and in breach of the said clause, represented the construction of the said building to be as to the walls thereof of brick, and as to the roof thereof of iron, whereas the plaintiff well knew that the said walls were of iron, lined with brick, and thus materially misdescribed the building in which the property insured was contained, and misrepresented a fact material to be known for estimating the risk. By reason thereof, the defendant is not liable upon the said policy.

6. By clause 10 of the said conditions, it is provided as follows: "On the happening of any loss or damage, the insured (meaning the plaintiff) must forthwith give notice in writing thereof



to the company (meaning the defendant), and must, within 15 days after the loss or damage, or such further time as the company may, in writing, allow in that behalf, deliver to the company a claim in writing for the loss and damage containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively and of any other insurances, and must at all times at his own expense produce and give to the company all such books, vouchers, and other evidence as may be reasonably required by or on behalf of the company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith, and if the insurance is subject to average, the insured must within the aforesaid 15 days, or such further time as the company may in writing allow in that behalf, deliver to the company an account of all the property insured, together with the estimated value thereof at the breaking out of the fire. No amount shall be payable under this policy unless the terms of this condition have been complied with."

7. The plaintiff did not within the said 15 days deliver a claim in writing as provided by the said clause, but on or about the 7th day of November, 1906, delivered to the defendant a claim in writing, together with a solemn declaration, in both and each of which he alleged the amount of the loss or damage to be the sum of £580 ls. 8d., and further, did not, when reasonably required thereto by the defendant, produce true books and vouchers as evidence of the truth of the said claim, but produced books containing false and improper entries. The said claim did not contain a true account or an account as particular as was reasonably practicable of the articles or items of property damaged or destroyed.

8. Thereafter, on or about the 11th day of November, 1906, the plaintiff withdrew the said claim, and on or about the 23rd day of November, 1906, delivered to the defendant a further claim in writing, and a further solemn declaration, in both and each of which he alleged the amount of the said loss or damage to be the sum of £955 7s. 11d., and produced books prepared after the happening of the said fire as evidence of the truth of the said claim. The said claim did not contain a true account or as particular an account as was reasonably practicable of the articles or items of property damaged or destroyed.

9. By reason of the matters set forth in paragraphs 7 and 8 hereof, the plaintiff has committed a breach of the conditions of the said policy and in terms of the said clause 10, no amount is payable under said policy.

10. By clause 12 of the said conditions, it is *inter alia* provided that if the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured (meaning the plaintiff), or anyone acting on his behalf, to obtain any benefit under the said policy, all benefit under the said policy shall be forfeited.

11. The said claims were false and fraudulent claims, and the said solemn declarations, or one or other of them, were false declarations, and were made and used in support thereof, and the books produced were fraudulent means or devices used by the plaintiff to obtain benefit under the said policy, and the plaintiff has by reason thereof forfeited all benefit under the said policy.

Wherefor the defendant prays that the plaintiff's claim may be dismissed, with costs.

The replication was as follows: (1) As to paragraph 2 of the plea, the plaintiff denies that the building therein referred to was his property, and says that only his stock of goods in the said building was insured by him. (2) With reference to paragraphs 3, 4, 5, of the plea, plaintiff says that the proposal form therein referred to was filled in by the defendant's agent. Plaintiff further says he gave no information of any sort concerning the said building to the said agent, but that the said agent assured him that the description of the said building which had been previously given in the proposal form filled in by the owner thereof for the purpose of effecting an insurance policy thereon with the defendant, and on which the defendant granted a policy of insurance was the same description as that which was filled in on plaintiff's proposal form, and that plaintiff signed the said proposal form on receiving the said assurance from the defendant's agent. Plaintiff explicitly denies the allegation that there was any misdescription, misrepresentation, or omission of any material facts on his part in the filling in the said proposal form. (3) As to paragraphs 6, 7, and 8 of the plea, plaintiff says that within the time required by clause 10 of the conditions of the policy, he duly submitted to the defendant a statement showing the loss by the said fire amounted to £580 ls. 8d., and that the said statement was merely a rough statement, as plaintiff considered that it was sufficient to show that his loss was over £500, that being the limit covered by the insurance policy. Thereafter, at his request, the plaintiff caused a detailed statement of his loss to be framed by an accountant, which showed that plaintiff's actual loss by the said fire amounting to £580 ls. 11d. The plaintiff expressly denies that he at any time withdrew his first statement of loss, or that he has committed any breach of the conditions of the said

policy, or that the claims were false or fraudulent, or that the declarations were false declarations. (4) Save as above, and save for admissions in the plea contained, plaintiff denies all and singular the allegations of fact, and conclusions of law in the pleas contained, joins issue thereon, and again prays for judgment as before with costs.

Dr. Greer for plaintiff. Mr. Uppington (with him Mr. Lewis) for defendant.

Abraham Abrahamson, the plaintiff, stated that his shop originally belonged to his brother. In 1905, witness purchased the stock of the shop from his brother. There was about £600 worth of stock in the shop. Roughly, he paid £330 for the stock. After he had met Mr. Malan in the train, the latter, who was an insurance agent, came to see the shop. Witness admitted that he had no knowledge of the building, and Malan said he would find everything out through the company. Subsequently he received the policy of insurance, and in October, 1906, a fire broke out in the premises. Witness was not at home when the fire broke out. When he returned, he wired to the police and the company. Mr. Hay, of the Guardian Company, came and inspected the premises, and the books, which were locked up in the safe. The books were subsequently handed over to the company. Mr. Walker, an accountant, made up the value of the destroyed stock at £582. The books put in showed a true and full account of all his dealings in the shop, and they showed the stock to be worth over £900.

Cross-examined by Mr. Uppington: Prior to his taking over the business, he was a clerk in the employ of his brother. He did not keep his brother's books. The bookkeeper, who kept witness's books up to September, was at present in Laingsburg. On the 1st, 2nd, or 4th October, his books were last made up by Williams, his brother's bookkeeper. His brother Simon Abrahamson was tried at the Paarl for fraudulent insolvency. There was £4 odd in the bank at the time of the fire. He did not know that almost from the start of the business he was paying out more money than he was receiving.

Jacob J. Hammond, who owned the shop at Brackenfeldt Siding, stated it was insured with the Guardian Company, and the outside of the walls was of corrugated iron and the inside of bricks, and the roof was also of corrugated iron. He gave the description of the property to the insurance people, who had paid him in full for the loss by fire. When he insured the building he had to give the name of the tenant.

Cross-examined by Mr. Uppington: The property was described in a document as iron-built, with brick lined under and iron roof.

Dr. Greer closed his case.

William Hay, fire loss assessor, who acted for the Guardian Assurance Company, stated he had about four years' experience in this business. He saw the premises on the 12th October, and went out again on the following Saturday. On the first occasion he did not see the books, but they were produced to him from the safe on the second visit. The books were represented to him as the books of the business. When witness met plaintiff in the Guardian Office he explained to him that the correct description of the building did not tally with the proposal form. It was on the 7th of November that he received an account of the loss. Witness went into the books very carefully, and he did not consider them to have been properly kept. The plaintiff's cash account showed that he was paying out more than he received. To begin with, the plaintiff was buying far more goods than he was selling. The cash sales towards the date of the fire were falling off, and the purchases were increasing. From the books witness was under the impression that the plaintiff did not enter up the cash sales properly, or he parted with the goods.

[De Villiers, C.J.: From the ruins could you judge whether there was a large stock at the time of the fire?]-Whatever stock there was was entirely destroyed.

Proceeding, the witness, in reply to Mr. Uppington, said the books had apparently not been kept up from day to day. They were all written up at the one time. According to the books the plaintiff was paying when he had no money to pay. From a set of admittedly new books, the loss was brought up to £955. Witness found it impossible to frame anything like an accurate account of the loss from the books supplied. Some of the entries he thought were not *bona fide*. The plaintiff claimed £60 as owing to him, but there was not a single entry of outstanding debts in the books. In one particular instance there were erasures which gave the entries the appearance of not being *bona fide*. The books were not properly written up.

Cross-examined by Dr. Greer: He did not in writing tell the plaintiff on the 12th October to send in his claim within fifteen days, although he told him verbally. Witness saw the books taken out of the safe, but thought the safe had been opened before that. He would qualify his statement by saying that the business did not increase in proportion to the increase of goods which the plaintiff bought.

John M. F. Leibbrandt, clerk in charge of the loss department of the Guardian Company, stated the construction of a building was most material in estimating the risk. There was about 30 per cent. difference in the case of Hammond and the plaintiff.

Cross-examined by Dr. Greer: He did not know what passed between the plaintiff and the company's agent. He was not aware that the agent said he would take the description of the building from the description already actually insured.

David S. Malan, the agent of the Guardian Company, denied that he met the plaintiff in a train and spoke of the advantages of insurance. Witness was told to see the plaintiff by a Mr. Solomon, a friend of the plaintiff. He did not say to the plaintiff that as long as the description was the same as that of Mr. Hammond the insurance would be all right. He did not know at the time whether Mr. Hammond insured the building or not.

Cross-examined by Dr. Greer: The plaintiff apparently knew the building was insured with the Guardian. The description of the building was filled in at the time witness filled in the proposal form.

Counsel having been heard for the plaintiff,

De Villiers, C.J.: It is not necessary to hear Mr. Upington for the defendant. The policy which was issued in favour of the plaintiff and on which he now sues, lays stress throughout upon the condition that the insured keep proper books and accounts. That appears in the body of the policy. Then there is the tenth condition, which prescribes what shall be done by the insured on the happening of loss or damage. And the condition provides that the insurer forthwith give notice in writing thereof to the company. Well, I take it he has done that. But it goes on: "He must, within 15 days after the loss or damage, or such further time as the company may, in writing, allow in that behalf, deliver to the company a claim in writing for the loss and damage." So far, if the books had been proper books, I should be inclined to think that the time within which the account was delivered was a reasonable one, and that there has been really no ground under all the circumstances of the case for forfeiting the right of the policy. But this condition goes on as follows: "He shall deliver to the company a claim in writing for the loss and damage, containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances, and must at all times at his own expense produce and give to the company all such books, vouchers, and other evidence as may be reasonably required by or on behalf of the company." Now, I take it that the company may reasonably require that the books which are produced in support of the claim shall be proper books, shall be such books that it is possible

for the company to ascertain from them what the actual amount of stock was in the shop at the time of the fire. In my opinion the books which he did produce were not of such a nature. It would be impossible for any accountant, however clever he may be, to frame a proper account, because there are grave inaccuracies in these books. They are kept in a slovenly manner. There are erasures which cannot be properly explained. Some of the entries cannot be explained, and although as far as the stock actually purchased is concerned there is not much discrepancy between the accounts furnished by the merchants and the books, yet that does not settle the matter, because if once it is clear that the books are untrustworthy in other respects, then it is impossible to know whether the daily sales have been properly entered, and that is of the utmost importance. It is not enough to prove that the goods were purchased from the merchants, because if goods were sold and delivered out of the shop, of which there are no entries, then there is no means of ascertaining what the stock was at the time the fire took place. And that is where the real difficulty comes in. Upon the books which were furnished to them it would have been impossible for them to accept the statement that the books are correct, and that all the sales have been properly entered. The books should clearly show what stock went out of the shop. In the present case I consider that the stock appearing in the books had entered the shop, but it is by no means clear that a very considerable quantity of stock had not gone out of the shop, which the books do not show. I think the company is acting quite within its rights under the policy to require that better books than these which were produced to the company should be forthcoming. It is said that this is a small country business, but even in a small country business the books may be properly kept. At all events the insured had full notice in the terms of the policy that he was to keep proper books. It was an essential portion of the contract in the body of the policy, and the tenth condition authorised the company to require among the proofs of the correctness proper books. For these reasons I consider it is not necessary to make further reference to the misrepresentations. I am inclined to think that the plaintiff himself did not misrepresent the nature of the building in which his business was carried on. The second ground, in my opinion, is clearly made out. The books are wholly improper books, and not such books as the company was bound to accept. The judgment of the Court must be for the defendant, with costs.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

LOUW V. ISMAIL. { 1907.  
Oct. 29th.

Principal and agent—Proofs of agency.

This was an action to recover the sum of £148 12s. 4d., being the purchase price of certain sheep.

The plaintiff's declaration was as follows:

1. The plaintiff, Jacob Petrus Louw, is a stock dealer, carrying on business at Mowbray.

2. The defendant, Mahomet Ismail, alias Hadje Camrodien, is a butcher, carrying on business at 118, Chiappini-street, Cape Town.

3. On divers dates during the months of February, March, and April, 1907, the said plaintiff sold to defendant, and defendant purchased from the plaintiff, a number of sheep at various prices, for the sum of £273 12s. 3d., particulars whereof will appear in a copy of the detailed account hereunto annexed, and to which the said plaintiff craves leave to refer.

4. On divers dates between the 5th day of March, 1907, and the 18th day of April, 1907, the said defendant reduced his liability by various cash payments, and the return of two goats by the sum of £124 19s. 10d., particulars of which will appear in a copy of the detailed account hereunto annexed, and to which the said plaintiff craves leave to refer, leaving a balance due from the said defendant to the said plaintiff of £148 12s. 4d.

5. Although repeatedly requested to pay the said sum of £148 12s. 4d., the said defendant neglects and refuses to do so.

Wherefore the plaintiff prays: (1) For judgment in the sum of £148 12s. 4d.; (2) interest a tempore morae; (3) costs of suit; (4) alternate relief.

The defendant's plea was as follows:

1. Paragraph 1 of the declaration is admitted.

2. As to paragraph 2, defendant admits that his name is Hadje Camrodien, but denies the remainder of the said paragraph. He says that he is not, and never has been known by the name of Mahomet Ismail, and that he has not carried on business at 118, Chiappini-street, save as hereinafter set forth.

3. Paragraphs 3, 4, and 5 of the declaration are denied as specifically as if every allegation in the said paragraphs was set out herein and defendant specially denies being indebted to the plaintiff in the sum of £148 12s. 4d. sterling, or any other sum.

4. In reference to the said paragraphs 3, 4, and 5, defendant says that during

the months of February, March, and April, 1907, and thereafter, he acted as manager of a butcher's business, carried on at 118, Chiappini-street, for and on behalf of one Mahomet Ismail. In his said capacity as agent for the said Ismail, defendant admits that he made certain purchases from the plaintiff and also made certain payments, as set forth in the declaration, save that he says that plaintiff ought to have given a further credit of £9 18s. 9d., and that the sum actually due by the said Ismail to plaintiff is £138 13s. 7d.

5. Defendant further states that at the time of the said transaction plaintiff was fully aware, and specially informed by the defendant, of the fact that defendant was acting merely as manager or agent for the said Ismail, and that Ismail was the principal and liable to plaintiff on the said transactions. In the premises defendant denies any liability to the plaintiff.

Wherefore the defendant prays that plaintiff's claim may be dismissed, with costs.

The plaintiff's replication was as follows:

1. The plaintiff joins issue with the defendant on paragraphs 2 and 3 of his plea herein, admissions excepted.

2. As to paragraph 4 of the plea herein the plaintiff denies that the said defendant acted as manager of the said butcher's business carried on at 118, Chiappini-street for and on behalf of one Mahomet Ismail, and says that he acted as principal and made the payments referred to in the declaration as such. He denies that the defendant did make a further payment of £9 18s. 9d., as alleged.

3. The plaintiff denies the allegations contained in paragraph 5 of the plea herein. The defendant did not inform the plaintiff that he was acting as manager or agent of one Ismail, and that Ismail was the principal, but held himself out to be the principal.

Wherefore the plaintiff prays for judgment as before.

The defendant's rejoinder was general.

Mr. Wallach was for the plaintiff; Mr. J. E. R. de Villiers was for the defendant.

Plaintiff gave evidence bearing out the allegations in the declaration and replication. He described in detail the nature of the transactions with defendant.

In cross-examination, the witness denied that he went to the defendant and asked for his custom, and that defendant said he was manager for Mahomet Ismail who was away from the country. He denied that defendant gave him any promissory notes.

Buchanan, J., pointed out that the witness had given defendant credit for two promissory notes in his account.



Witness repeated that so far as he could remember he had got no promissory notes from defendant. In further cross-examination the witness denied that he told defendant he had sufficient authority to sign promissory notes for his master.

[Buchanan, J.: There must be some mistake, Mr. Louw, or you would not have put down two promissory notes on your account.]

Plaintiff still said he had no promissory notes.

[Buchanan, J.: You have evidently forgotten something?]

Plaintiff: I expect it's that, my lord.

Further cross-examined, plaintiff said that defendant did not pay off two notes, and he (plaintiff) did not tell defendant when he paid one of these that he had forgotten to bring the note.

Re-examined: The accounts were written by his bookkeeper, Mr. Stevens, on witness's instructions.

Edward McGregor, speculator, said he had been dealing with defendant since February last, and had always known him as Mahomet Ismail. He owed witness about £27. Until certain Police Court proceedings (defendant was charged with theft and acquitted), he did not know that defendant was not Ismail. He had always looked upon defendant as a principal.

In cross-examination, witness admitted having received a promissory note signed "H. Camrodien, for Mohamed Ismail." Witness did not see this note. It was given to his brother. At the end of April, he signed a receipt in the following terms: "Received from H. Camrodien the sum of 5s. 3d., being trespass money on 125 sheep."

Harry Hogarth, clerk in the employ of the C.G.R., produced certain railway receipts signed by the defendant in February. One was signed "Mahomed Ismail," and another "for Mahomed Ismail."

A. F. du Toit, plaintiff's attorney, said that defendant had admitted the debt to him. Witness knew defendant as Camrodien.

The defendant was called. He said his name was Hadje Camrodien. Mahomet Ismail was in India. He left this country last February, previous to which witness was employed as his manager in a shop in Chiappini-street. Ismail left powers of attorney with two men. In February, Louw came to witness and asked him if he wanted sheep. Witness replied in the affirmative, but said he was not the master. He said that if Louw would trust him, he would take the sheep. Louw said he would trust witness, and that witness could sign. He told Louw his name. He gave Louw two promissory notes, and both of these he afterwards paid, but defendant brought him only one of these notes back, saying he had forgotten the other.

In cross-examination, the witness said he had no power of attorney from Ismail. He had no authority to sign for Ismail. As a manager, he had to do the master's work. The two men who had the powers of attorney were witness's "bosses."

Cross-examined: Witness had been losing a lot of money in the business. It was Ismail's money. He had not sent Ismail any remittances. He had no money belonging to Ismail. The latter left a little capital.

Charles Geddes, agent-at-law, said he had always known defendant as Camrodien. He witnessed a power of attorney signed by Ismail in favour of a man other than the present defendant.

This concluded the evidence, and counsel were then heard in argument on the facts.

Buchanan, J.: This is an action for the payment of money due upon the sale of certain sheep. The plaintiff, Mr. Louw, is a stock dealer, and the defendant is one Camrodien, to whom the summons and declaration give the alias of Mahomet Ismail. As far as the evidence goes the defendant has no alias of Mahomet Ismail, and is not Mahomet Ismail, but Hadje Camrodien. But the defendant Camrodien is the only person who dealt with Louw. Ismail has been known in Cape Town for a number of years and carried on business here. Camrodien has also been in Cape Town for a number of years, and has also carried on business here, but both were unknown to the plaintiff before the transactions in suit. Before the first meeting of the plaintiff and defendant it is said that Ismail had left for India. Camrodien, the present defendant, says that after Ismail left, he (Camrodien) carried on Ismail's business. The plaintiff, however, was altogether ignorant of the existence of Ismail. Camrodien was the only person who saw Louw, and who had any dealings with him, and the question is whether in these dealings which took place between Louw and Camrodien credit was given by Louw to Camrodien or whether it was given to the unknown Ismail. If I had solely to rely on the evidence of Louw I should have considerable difficulty in finding in his favour, because his evidence is not correct on one important matter. He says Camrodien came to him and represented himself as Ismail. On that day Camrodien gave Louw two promissory notes, each for half the purchase price of the first transaction between them. Louw denied altogether that he ever received any such promissory notes, but this denial cannot be sustained in face of his own documents and in face of the one promissory note produced. Now this statement of his—I won't say it was made falsely—is an incorrect statement,

and the fact that he denied having received these promissory notes throws discredit on the whole of his evidence. But when we come to look at the other circumstances proved, there is corroboration on the main issue in support of Louw's statement as to the person to whom he gave credit. It appears that when Ishmail left the country he gave his power of attorney to two other persons, not to Camrodien at all. After Ishmail left Camrodien carried on the butcher's business in the same premises which Ishmail previously occupied. He does not produce any books of that business, nor does he show that he accounted to Ishmail for any of the proceeds of that business, and the effect of his own evidence given to-day seems to me to imply—though he says he did mention Ishmail's name to the persons from whom he bought sheep—that he himself was the purchaser of the stock, and that the persons who sold the sheep to him were justified in considering that they were dealing with him and not with anyone else. He was asked if he would buy the sheep, and he said, "Yes, I will buy the sheep." Louw said if he would sign for them he would let him have the sheep. Now he did sign for them, and signed, it is true, in his own name for Mahomot Ishmail, but as he bought the sheep, as he carried on the business in the absence of the other man, as it does not appear that he in any way accounted for the business to the other man, whose power of attorney he does not hold, and as he from time to time paid amounts off this account to Louw, and especially as he answered Louw's telegram and settled with Louw thereon, I think Louw may be justified in saying he looked to Camrodien and Camrodien only, as the person responsible to him. I think justice would be done in this case by giving judgment for the plaintiff as prayed with costs.

[Plaintiff's Attorney: A. F. du Toit.  
Defendant's Attorneys: C. and A. Friedlander.]

#### WILKINSON V. ESTATE WILKINSON.

Will (holograph) — Privilege — Illegitimate issue.

*The privilege granted to a holograph will, whereby a father distributes the corpus of his estate among his children, is not to be extended to provisions in favour of natural children.*

The declaration set forth that the plaintiff was the natural son of the

late John George Wilkinson, of Pontefract, Yorkshire, England. In 1886 (or 1896) the late J. G. Wilkinson came to this Colony for the benefit of his health, but never abandoned his domicile of origin. On January 1, 1902, he executed a will in accordance with the laws of England, where the testator was domiciled at the time. Paragraph 6 read: "Should the Court hold that for any reason whatever, the said will cannot be upheld as a valid English will, but not otherwise, the plaintiff says that it is valid by the Common Law of this Colony as a privileged will so far as the bequests to the plaintiff are concerned," and paragraph 7 was to the effect that defendants (the Master of the High Court of Griqualand West and the executor dative in the estate of the late J. G. Wilkinson) wrongfully and unlawfully refused to accept the will, wherefore plaintiff claimed an order directing the Master of the High Court of Griqualand West to accept the will and the executor dative to administer the estate in terms of the will.

To this declaration, the defendant excepted on the ground that both claims were invalid and bad in law, and then pleaded over.

Mr. Howes appeared for the excipient (defendant in the action); Mr. Rowson for the respondent (plaintiff in the action).

Mr. Rowson applied for an amendment of the summons, which was granted by the Court, and the exceptions based on divergence between the summons and the declaration were abandoned by the exceptor.

Mr. Howse: Any will made in this country by a British subject must be executed in terms of Ordinance 16 of 1845. See *Dwyer v. Flynn's Executors* (3 Searle, 16), and *Re Lloyd's Estate* (12 S.C.R., 117).

[Buchanan, J.: The Ordinance referred only to wills which had previously been required to be witnessed by 7 witnesses.]

Dicey Conflict of Laws (p. 687, Edit. of 1896). The will must follow the law of the domicile. Even should the will be shown to be good as an English will, it must be proved in England; it cannot be proved here.

[Buchanan, J.: I think that English wills may *ex comitate* be admitted to proof in this Colony. We take cognisance of English law.]

Then see *Dwyer v. O'Flinn's Executor* (3 Searle, 16).

[Buchanan, J.: There the testator was domiciled in this Colony, and if the learned Judge went beyond deciding on the mere facts of the case, what he said were mere *obiter dicta*.]

See *In Re Robinson* (1 Rosc., 411). Van Leeuwen Roman Dutch Law (Kotzé's Translation), Vol. 1, p. 323. Voet (1-4-2, secs. 11, 13, 15, and

Schorer's note on Grotius (B. 2, C. 17). As to my second point (viz., that the declaration is bad, inasmuch as it alleges that an illegitimate child may take under a privileged will: See Maasdorp's Institutes of S. African Law, Vol. 1, p. 125. Voet (28-1-16). Burge's Colonial Law, Vol. 4, p. 398.

Counsel further cited *Re Pillans* (3 C.T.R., 278). The exception had to be raised otherwise the defendant would not have been entitled to his costs if successful in the action, vide *Alexander v. Armstrong* (Buch. 1879, p. 233), and on the ground of variance *Cabrita v. Du Preez* (10 C.T.R., 429).

Mr. Rowson argued that if the testator's domicile was English he not only might, but must make his will according to the provisions of English Law (Phillimore, Vol. 4, p. 628). As to the question of the rights of natural children under a privileged will he cited Van Leeuwen (*Cns. For.* (Book 3, part 1, ch. 2, par. 21, page 20, Schreiner's trans.). Christinaeus, Vol. 1, Decis 117, par. 7 to 10. Carpzovius, *Definitiones Forenses* (pars. 3. Constit. 4, Def. 24). Gronewegen's note on Grotius (Bk. 2, C. 17), Codex (5-29-4).

With respect to Voet (28-1-16) he admitted that that authority was against him, but denied that the authorities cited by the said author bore out his contention. To begin with, the Court had never bound itself to follow Voet, and had in many cases departed from his doctrine, and notably in this very section in which he upholds bequests to a wife or a stranger contained in a holograph will "if they be written in the handwriting of the testator and have been recited or named before two witnesses."

[Buchanan, J.: That means only that if in such case the will were attested by two witnesses, certain other formalities might be dispensed with.]

Voet admits that a holograph will made by a mother in favour of her illegitimate child is privileged, then why not that made by a father? The only difference is that the mother is easily ascertained, but supposing that the father can also be certainly ascertained, why should he not enjoy the same privilege?

Then to go into his authorities, he states that by the term "*liberi*" we must always understand legitimate children. The first authority he cites is Digest (27-1-2-3), which clearly refers only to a plea which might be urged against having a tutorship imposed upon a man. A man might be excused if he had already undertaken several tutorships, but that that plea might avail him all these tutorships must have been in respect of minors who were of legitimate birth.

His next authority is from Digest (1-6-6), in which it is said that he is

a son who is born of a husband and his wife." But what is the compiler talking about? He is speaking of the *patria potestas*, and unquestionably natural children did not fall under the *patria potestas*.

Then to take the general principle with which he begins: "*Privilegia strictam recipiunt interpretationem.*" That principle on which the whole of his doctrine is founded is diametrically opposed to Digest (50-17-20), (50-17-56), (50-17-183), and to Canon Law (Decret. Greg. 15, t39, Cap. 16), "*Beneficia principum sunt interpretanda largissime.*" A man who has injured a child by causing it to be brought into the world under the stigma of illegitimacy should be assisted as far as the law can possibly permit in his endeavours to make reparation to that child for the injury done.

Buchanan, J.: Exception is taken to the declaration filed by the plaintiff claiming that a certain will made by the late Mr. Wilkinson shall be held to be a valid will. This will was not executed in accordance with the requirements of the law of this country, but the first claim on the declaration is that Mr. Wilkinson, who was born in England, and had only come out to the Colony for the benefit of his health, had never abandoned his domicile of origin, and had executed this will with all the formalities necessary by the law of his domicile, namely, the English law. That is admitted on both sides, but it is contended that as the will was executed in this country, it must be executed according to the law of this country. The second claim is founded upon an allegation that even if the will cannot be upheld as valid under English law, it is valid by the common law of this colony, in that it is a privileged will. The will is not executed in compliance with the requirements of the Will Ordinance No. 15 of 1845, but it is a holograph will, that is, it is written by the testator himself, and signed by the testator in the presence of two witnesses, and it institutes the plaintiff, who is a natural son of the testator, as beneficiary under that will. On this part of the declaration learned counsel have quoted authorities so very fully that, although the question of privilege wills is not a matter which the Court is frequently called upon to decide, I have no hesitation in stating now my opinion that according to the law of this colony the privilege that is given to the testator by holograph will to institute his children as his heirs does not extend to illegitimate children. The older authorities, such as Carpzovius and Christinaeus, certainly are somewhat favourable to the plaintiff's contention, but Voet, who is a later authority, in Book 28, chapter 1, section 16, is clearly of opinion that this privilege

does not extend beyond legitimate children. In the several cases in which holograph wills have come before the Court, it has, as far as I can call to mind, always been clearly recognised that the institution of children as heirs by a holograph is a privilege, and in the language of Voet, this privilege is not to be extended, except to those to whom the law clearly gives it. Therefore, my opinion upon the second part of the declaration is that this will cannot be upheld as valid by the common law of this colony as being a privileged holographed will in favour of the plaintiff. To both causes of action set forth in the declaration, the exception is taken that the claims are invalid and bad in law. Now, in my opinion, the second claim is certainly not founded on a good cause of action, and is therefore invalid, and the plaintiff cannot, in my opinion, sustain any action on that ground. As to the other allegations in the declaration, they may or may not at the hearing be found to be sustained by evidence. But taking the allegations, for the purposes of the argument on exception, as correct, here we have a will of a person domiciled in England, and only temporarily resident in this colony, executed with all the formalities required by the home of the domicile. Such a will *prima facie* is a good will so far, at any rate, as the movable property is concerned, so that the exception to the first ground of action set forth in the declaration cannot now be sustained. The exception as to the claims being bad in law will not, therefore, be sustained as to the first claim, but it will be sustained as to the other claim, and consequently all the paragraphs of the declaration which do not set forth any cause of action must be struck out. The form of the order will be in favour of the exception for expunging clauses 2, 6, and 7 of the declaration. As to the questions of fact raised, the plaintiff may or may not have a good cause of action. That depends upon the evidence which may be led at the hearing. As this is a question of considerable importance, and as it arises out of the will of the testator, I think the question of costs should stand over until we can determine whether the will is valid or not, on the facts. Costs will therefore abide the result.

[Plaintiff's Attorney: J. H. Walker;  
Defendant's Attorneys: Van Zyl and Buissinné.]

#### RAUBENHEIMER V. RAUBENHEIMER AND ANOTHER.

Mr. Marais moved, on behalf of the plaintiff in the action, for an order authorising the Registrar of the Circuit Court, at Oudtshoorn, to accept notice of appeal.

The Court granted an order subject to the production, within four days, of the warrant of authority to act.

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1907.  
{ Oct. 29th.

Mr. Douglas Buchanan moved for the admission of Ockert Johannes Meintjes as a notary public.

Application granted, oath to be taken before the Resident Magistrate of Barkly East.

#### MILLS AND SONS V. ASKEW.

Mr. P. T. Lewis moved for the discharge of the provisional order of sequestration, a composition of 3s. 6d. in the £ having been accepted by the creditors.

Order granted.

#### MARAIS V. NIEUWOUDT.

Mr. Douglas Buchanan moved for provisional sentence on certain promissory notes for £47 3s. 1d. and £235 4s 3d., with interest and costs.

Order granted.

#### BOLTMAN V. NIEUWOUDT.

Mr. Douglas Buchanan moved for provisional sentence on certain promissory notes for £400 and £300.

Order granted.

#### PETERS V. QWESHA.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £250, with interest at 10 per cent. from the 1st July, bond due by reason of non-payment of interest, and for the property hypothecated to be declared executable. Counsel also moved for judgment, under Rul. 329d, for £85, cash lent and advanced, with interest, from the 1st July, 1906, and costs.

Order granted.

### MATRIMONIAL CASES.

#### HUMPHREYS V. HUMPHREYS.

This was an action brought by Harold Francis Humphreys, a farmer and dentist, in the division of Uitenhage, against his wife, Alice Jane Humphreys,



for restitution of conjugal rights, failing which a decree of divorce, with custody of the children and a declaration that defendant had forfeited the benefits of the marriage.

Mr. H. S. van Zyl was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Mr. Van Zyl produced an affidavit of service of citation upon defendant, who was stated to be residing in London, England.

Plaintiff said that he was married to defendant at Plaistow, Bromley, Kent, in 1890. At the beginning of 1900 witness came out to serve in the Imperial Yeomanry. In November of that year he settled down in Oudtshoorn to manage a dental practice. In January, 1901, he asked his wife to come out to join him, but she refused. There were three children of the marriage, aged 16, 14, and 13 years. His wife in her letter said she thought they were better apart, and that they had not been happy when they were living together. Witness was now carrying on a dental practice and farming in the division of Uitenhage. About 12 months ago he again wrote to his wife, asking her to come out, but she refused. He had tried other methods, but she would not join him. He did not ask for costs against defendant.

Decree of restitution granted, defendant to return to plaintiff on or before the 31st December, failing which, to show cause on the 12th January why an order should not be granted in terms of the declaration.

#### CARR V. CARR

This was an action brought by Sara Elizabeth Hendrick Carr, of the Paarl, against her husband, Carl Louis Carr, for restitution of conjugal rights, failing which a decree of divorce, with custody of the two children of the marriage.

Mr. Marais was for plaintiff; defendant did not appear.

W. T. Birch, of the Colonial Secretary's Office, gave formal proof of registration of the marriage.

Plaintiff said that after the marriage her husband treated her badly. In September, 1905, he deserted her, and had since contributed nothing towards the support of witness and the children. She did not know where her husband's present whereabouts were. She had been informed that he had gone to German South-west Africa.

Mr. Marais said that service had been made upon defendant by registered letter and publication in the "Cape Times" Weekly edition.

Ordered that defendant restore conjugal rights on or before the 18th December, failing which show cause on the 12th January why a decree of di-

voice should not be granted in terms of declaration, service as directed in regard to citation, and by registered letter to the address in German South-West Africa given by defendant in his letter.

#### HOFFMAN V. HOFFMAN.

This was an action brought by Johanna Maria Hoffman, of Cape Town, against her husband, Andrew Francois Hoffman, of the Paarl, for restitution of conjugal rights, failing which a decree of divorce, with custody of the child of the marriage.

Mr. Marais was for plaintiff; defendant did not appear.

Plaintiff said that while she was residing with her husband at the Paarl, he drove her out of the house on the 19th June, 1904. Defendant was addicted to drink. He tried to take her life with a razor while he was under the influence of liquor. Her brother interfered and took away the razor. Defendant had not since supported her. Witness had written to his father, but had received no reply. Defendant had refused to do anything towards providing her with a home or maintenance.

Ordered that defendant restore conjugal rights on or before the 27th November, failing which show cause on the 12th December why a decree of divorce should not be granted in terms of the declaration.

#### REHABILITATION.

{ 1907.  
Oct. 29th.

Mr. Toms applied for the release of the private estate of Joseph Powell Taylor from sequestration. It appeared that after the estate had been compulsorily sequestered, a second meeting of creditors was held, but no debts were proved, and no trustee was appointed.

Maasdorp, J., said that the applicant asked for rehabilitation in his application, and now counsel, finding that that could not be given, asked for a release. The matter must be brought before the Court in proper form. No order would be made upon the present application, but leave would be given to apply again.

At a later stage the matter was again mentioned, and Mr. Justice Maasdorp granted an order for the release of the estate from sequestration.

#### GENERAL MOTIONS.

##### *Ex parte* ESTATE VAN HEERDEN.

Mr. Payne moved for a rule nisi under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* SMIT.

Mr. De Waal moved for a certain rule to be made absolute calling upon respondent to show cause why a certain bond which had been mislaid should not be cancelled.

Rule absolute.

*Ex parte* ESTATE LATE FERREIRA.

Mr. Payne moved for leave to petitioner to raise a certain sum on mortgage of the estate property in order to pay certain debts, and pay off existing bonds.

Order granted as prayed.

*Ex parte* ESTATE CRANKO.

Mr. Marais moved, on the petition of the *curator bonis*, for leave to execute certain lease of premises at the corner of Adderley and Castle streets, Cape Town.

Order granted.

## BOTH A V. MILFORD AND ANOTHER.

Will—Adiation—Error—*Tempus deliberandi*.

This was an application brought by Christoffel Jacobus Botha, of Adelaide, for leave to make his election in reference to the mutual will executed by his late wife and himself, either to abide by the terms of the will or renounce the said will, leaving his half-share of the joint estate free and unencumbered, and leaving the other half to go to the legatees appointed by the will.

From the affidavits, it appeared that the will contained the following clause: "We give and bequeath to our said adopted children the remainder of our movable property belonging to our joint estate, which shall be left at the death of the survivor of us, such movable property to be divided between them equally, share and share alike."

Applicant's case was that he had been under a misapprehension as to the meaning of this clause, and he now desired a month's time within which to make his election.

Mr. McGregor, K.C., was for applicant; Mr. Close was for respondents.

Mr. McGregor cited *in re Gous* (23 S.C., 72), *Klipper v. Smit* (9 Juta, 167), *in re Jordaan* (24 S.C., 84), *Brown v. Rickard* (2 Juta, 314), *in re McIntjes*, and *Watson v. Burchell* (9 Juta, 2). He submitted that the applicant had put a wrong construction upon the will, in that he had thought he had the right to alienate the joint estate in his hands, and that the chil-

dren should only get the residue. Applicant should now be allowed to make his election either to adiate or take his own half of the estate, unaffected by the provisions of the will.

Mr. Close submitted that the applicant had not adopted the proper procedure to have the issues decided which were raised in this case.

Maasdorp, J.: In this case the applicant asks that time should be allowed him to make his election whether he will adiate under the joint will made by himself and his wife, or rather, to put it more correctly, whether he shall adiate under his wife's will or renounce his rights under that will, and merely take his share of the joint estate. Now, it appears that already in 1904 he actually did adiate under the joint will, and he has since then enjoyed the benefit of certain movable and immovable property. He now asks for relief, because he alleges that he adiated under the will under a wrong construction of its purport, and authority has been quoted which shows that the Court has given relief under similar circumstances. The misapprehension which he relies upon is the following: It appears that the will, after making certain other dispositions, proceeds to say: "We give and bequeath to our said adopted children the remainder of our movable property belonging to our joint estate, which shall be left at the death of the survivor of us, such movable property to be divided between them equally, share and share alike." The applicant states that the construction he had put upon this will was that he would have free disposal of the movable property during his lifetime, and that it was only such property as may be left at his death which should be divided amongst the children. In making out his account, he mentions the movable property, consisting of large sums of money, and states that he is to remain in undisturbed possession thereof till his death, when the residue thereof, in terms of the will, goes to the adopted children. Now, the terms used by him in that statement follow very nearly the terms of the will, and it is quite possible that the applicant may have been under the impression that he would have the free disposal of the property during his lifetime. Now, in the form in which this application comes before the Court, the Court cannot now go into the construction of the will. It is quite possible that the applicant may have been right in what he now considers a misapprehension, and in that case he would not ask for relief, or, on the other hand, he may have been wrong, and there may still be certain circumstances under which the Court may refuse to give him relief. It does not follow that, merely because he has adiated under a mistake, in all such cases the Court will grant relief. It is a matter which will have to be gone into

and the facts will have to be considered by the Court. These facts are to some extent in dispute. The respondent mentions certain circumstances which may go to prove that applicant never laboured under any wrong impression at all of the construction of the will, that whatever the construction may be, it is a construction of which he was fully aware, and that he acted with full knowledge of his rights. All these matters will have to be decided by the Court upon issues properly raised, and the authorities which have been cited are in respect of actions brought in the ordinary form for the purpose of having these matters determined. No order will be made, and the applicant can take such steps as he may be advised, the question of costs to stand over. If declaration be not served by the end of December, applicant will have to pay costs. Notice of motion will stand for summons.

MAGOR AND FOGARTY AND ANOTHER V. MULVIHAL AND SON AND OTHERS.

Magistrate's Court judgment —  
Supreme Court — Attachment.

*The Supreme Court has power to order the movable property of a debtor against whom judgment has been obtained in a Magistrate's Court to be attached when such property is in the hands of a third person.*

This was an application upon notice calling upon respondent to show cause why they should not be ordered to restore certain moneys to the second respondent (Mr. J. M. P. Muirhead), and why a certain order granted by Mr. Justice Hopley should not be set aside.

The notice of motion called upon respondents to restore forthwith to Mr. Muirhead a sum of £40 by reason of the wrongful payment thereof to Mr. A. J. MacCallum (respondents' attorney), and to show cause why an order granted by Mr. Justice Hopley should not be set aside.

The order made by Mr. Justice Hopley declared the sum of £40 in the hands of Mr. Muirhead, belonging to the firm of Magor and Fogarty, executable for the amount of the judgments and costs obtained by the petitioners (now respondents) against the firm of Magor and Fogarty in the Court of the R.M., Cape Town, on the 30th September, and authorised the Messenger of the said Court to attach the said money and pay over the same to petitioners in discharge of the judgment and costs, including costs of the present application.

Applicants now asked that this order be set aside on the following grounds: (1) That the judgment of the R.M. upon which the same was founded was never made a judgment of the Supreme Court; and (2) that the applicants (Magor and Fogarty) had since given notice of their intention to surrender their partnership estate as insolvent.

Mr. Bisset was for applicants; Mr. Benjamin, K.C. (with him Mr. Douglas Buchanan), was for respondents.

Affidavits were read.

Mr. Bisset quoted from Sir Henry Juta's "Magistrates' Courts" (p. 401), and cited *De Vos v. Voersce* (3 Juta, 79), *Deercourt and Faulds v. Urie* (14 E.D.C., 86), *Silberbauer v. Day* (2 C.T.R., 66), *Blake v. Rous* (3 C.T.R., 110), *Becker v. Duarte* (5 H.C., 192), *Ross v. Chetty* (11 C.T.R., 500), and *Law Society v. Donner* (22 S.C., 108).

Mr. Benjamin cited *Fassati v. Kleynhaus* (6 C.T.R., 140), and mentioned an application heard in Chambers in *Empire Steam Laundries v. Fowler*.

Maasdorp, J.: It would seem that the respondents in this case had obtained judgment against Magor and Fogarty, and it was found that Mr. Muirhead had in hand a sum of money belonging to the firm. Thereupon application was made on behalf of the judgment creditors to have this money declared executable in satisfaction of the judgment. By virtue of an order granted by the Court upon that application, the money came into the possession of the attorney for the judgment creditors. Application is now made to have the order for the attachment of the moneys set aside upon the ground that no judgment had been obtained in the Superior Court upon which execution could issue. Now, it would appear that orders are frequently given by the Supreme Court in aid of Magistrate Court judgments in order to obtain possession of movables which, being in possession of third parties, would not be available for execution, and these orders are given without requiring that any judgment should be taken out in the Supreme Court. Authorities have been cited from which it would appear that execution in respect of a Magistrate's Court judgment would not be issued by the Superior Court as against immovable property, but then the distinction made between movable and immovable property is quite obvious, because under the Rules of Court no immovable property is executable at all in respect of a Magistrate's Court judgment, and consequently it is necessary that there should be a judgment in respect of which it may be executable, but all movables are executable in satisfaction of a Magistrate's Court judgment, and it is only where there is some difficulty in the way of obtaining possession

of these movables that the aid of the Superior Court is called in. Under these circumstances, the order as granted by the Judge in Chambers must stand. If it appeared now that that order had been obtained in a manner injurious to other creditors through concealing of certain facts, there is no doubt that this Court would aid the other creditors, or the applicant in this case, who says he comes forward in order to safeguard the rights of the other creditors, but it would seem that, though, in the first instance, the money was held for the purpose of satisfying all the creditors *pro rata*, in case they should all consent to the assignment of the estate ultimately. But upon the assignment falling through the money was simply held by Muirhead for, and on behalf of, Fogarty himself, and it, therefore, became available in execution without any injury to the rights of any other creditors. Another ground advanced for setting aside this order is that if other proceedings had been taken then an opportunity would have been granted for the sequestration of the estate, and the money which is now taken for the benefit of one creditor would have been available for the benefit of all. But there is no principle or Rule of Court by which a judgment creditor should be kept out of his rights, because insolvency is contemplated by the judgment debtor. On both these grounds the application must be refused, with costs.

Mr. Bisset asked that costs should not be ordered against the second respondent (Muirhead), who, he said, was only joined formally.

Maasdorp, J.: Muirhead was a party to bringing the respondents into court, and putting them to these expenses. The application must be refused, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

MANQUINA V. JONAS. { 1907.  
Oct. 30th.

Native territories — Appeal to  
Superior Court—European—  
Act 26 of 1894.

*In an appeal in a civil case*

*from a Resident Magistrate of Tembuland, it appeared that one of the parties was a native and the other a coloured man.*

*Held, that under Sec. 2 of Act 26 of 1894, there was no appeal to the Supreme Court.*

This was an appeal from a judgment of the Resident Magistrate of Cala.

Mr. Roux was for the appellant: Mr. J. E. R. de Villiers was for the respondent.

Mr. De Villiers contended that the appellant had no right of appeal to the Supreme Court in terms of Act 26, of 1894, neither of the parties in the case being a European.

Mr. Roux submitted that it was clear from the record that the respondent was not a native. He was spoken of in the evidence as a coloured man. If it were found that both the parties were natives, of course he could not argue that an appeal lay to the Supreme Court.

De Villiers, C.J.: The 6th section of Act 3 of 1885 gives the right to appeal to the Supreme Court, whether the parties were natives, or whether they were Europeans. The first section of Act 26 of 1894 repeals the sixth section of the Act of 1885, so that after that repeal there would no longer be any appeal to the Supreme Court. But then came the second section of the Act of 1894, which enacts that: "An appeal shall lie from the judgment of any Court of Resident Magistrate in the territories set forth in the schedule attached to this Act either in the Supreme Court or the Court of the Eastern Districts, or to a Circuit Court held within the said Territories in any civil suit, action, or proceeding in which any one of the parties thereto is a European." Therefore, the only appeal that can by law be allowed to the Higher Courts is in a case in which one of the parties is a European. Now the question is: Is one of the parties here a European? Well, the evidence is that one is a coloured man and the other a native. Clearly, the native is not a European. Is the coloured man a European? In my opinion he is not. There are coloured men in regard to whom it may be found, by tracing back their origin, that one of their ancestors was a European, but if they are coloured they have never been classed among Europeans. It is not alleged in the present case that the coloured man had any European ancestor. Being a coloured man he is not European, and therefore there is no provision for an appeal in a suit to which he and a native were parties. The appeal must therefore be dismissed with costs.



COOKE V. VANGER.

This was an appeal from a judgment of the Resident Magistrate of Montagu.

In the court below, the plaintiff sued for the delivery of nine goats, or their value, £9. Plaintiff alleged that a contract of barter or exchange was entered into between plaintiff and defendant, the terms of which were that the plaintiff had to give a gelding, and to receive in exchange a mare and nine goats, and that the nine goats had to be selected from a certain flock of 25 running on a farm, and were to be of the value of £1 each. The gelding was delivered to the defendant, who duly delivered the mare to the plaintiff, but plaintiff said that when he selected nine goats from the flock, they were claimed and recovered by action in the Magistrate's Court by a third party, who alleged that he had the first choice of goats from the flock. Plaintiff said that of the other goats in the flock, none were of the value of £1, and he refused to take them. As a matter of fact, only two were goats, and the remainder lambs. He claimed delivery of the goats or their value, £1 each. Defendant admitted that the contract of exchange was entered into, and that nine goats had to be delivered, but he denied that any value was specified, or that they had to be selected from the flock. Most of the evidence in the case was taken by interrogatories. The Magistrate gave absolution from the instance, and the reasons for judgment given by him were as follows: "I am of opinion that the evidence for the plaintiff is not strong enough to justify judgment in his favour."

Mr. H. S. van Zyl was for appellant (plaintiff in the action); Mr. J. E. R. de Villiers was for respondent.

Mr. Van Zyl submitted that the evidence clearly supported the plaintiff's version of the contract, and that, even if the Magistrate was right in finding on the evidence that no value was specified or selection stipulated, he was wrong in giving absolution from the instance, inasmuch as the defendant tendered nine goats on payment of 1s. per month for the grazing of each goat for six months. Judgment should, he contended, in any case have been for the plaintiff to the extent of the tender on the pleadings.

[De Villiers, C.J.: Are you entitled to appeal on that ground? I suppose the goats are still there for you?]

Mr. Van Zyl: After the judgment in the case, there is nothing to compel the defendant to hold to the tender. He may claim a large sum for grazing.

Mr. De Villiers said there were reasons not on the record why the Magistrate did not give judgment in terms of the tender.

De Villiers, C.J., said he was anxious to put an end to further litigation at once. It was a petty little squabble be-

tween two neighbours. The only point of difference was between nine goats and nine selected goats.

Mr. De Villiers said the tender was at an abnormal rate of grazing, and it was of advantage to the plaintiff that the Magistrate gave absolution from the instance and did not give judgment in terms of the tender.

De Villiers, C.J.: Full particulars were given by the plaintiff as to his contract with the defendant, but it is quite clear that there was a definite denial by the defendant of the statements made by the plaintiff. Defendant's evidence was very brief, no doubt, but the denial was perfectly clear that the plaintiff had agreed to accept the remaining nine goats of the flock. Then another witness said that the plaintiff agreed to this. Well, the Magistrate must have been placed in a position of considerable doubt after hearing this definite evidence, and the conclusion he came to was that the plaintiff's evidence was not strong enough to meet the evidence given on behalf of the defendant. How is this Court now to judge as to the credibility of these witnesses? The Court is certainly not in so good a position as the Magistrate, who saw these witnesses for the defence, and who must have been considerably shaken as to the truth of the evidence taken on behalf of the plaintiff by interrogatories. Upon the merits, the Court cannot interfere with the decision of the Magistrate. But then a further question is raised as to the tender. If there had been an unconditional tender, then no doubt the Magistrate ought to have given judgment in terms of the tender, but unfortunately it was a conditional tender, namely, that the defendant was prepared to deliver nine goats on the condition that the plaintiff paid him a shilling a month for each goat. It does not appear that the plaintiff was prepared to accept this tender. Counsel is not now prepared to say the plaintiff will accept this tender. Then why should the Magistrate have given judgment in terms of the conditional tender? The plaintiff did not offer to take the nine goats at less than a shilling a month. If he had done so, then perhaps this Court might have interfered, but it is only as a second string to the bow that counsel now says, "At all events I ought to have judgment in terms of the tender." But counsel is not prepared to say that he will take judgment in terms of the tender. If he were to state now on behalf of his client that he would accept the tender, I could make an order that would put an end to the litigation, though that would probably not affect the question of costs. Therefore, I am afraid the only course open to me is to dismiss the appeal, with costs. But in dismissing the appeal with costs, I wish to say this, that, in order

to save any further litigation upon this paltry matter as to the difference between nine selected goats and nine goats, I consider that the defendant should not receive as much as a shilling a month, that the evidence seems to show that a penny per month would be enough, and therefore I would advise now that the matter be settled without any further litigation by the defendant delivering up nine goats, and the plaintiff paying at the rate of one penny per month per goat. However, that cannot form part of the judgment. It is only an expression of opinion to put an end to the litigation. As to the appeal itself, it must be dismissed, with costs.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

PAMPOEN V. OLIFANT. } 1907.  
Oct. 30th.

This was an appeal from a judgment of the Resident Magistrate of Jansenville, in an action brought against appellant by respondent to recover £20, one-third share of rent of farm, Paardenberg North, district of Jansenville, for the year ended May 31, 1907, in accordance with an agreement of lease entered into in or about the month of June, 1906.

Mr. Upington was for appellant, Charles Pampon, sen.; Mr. Howes was for respondent, Anna Olifant.

The Magistrate had given judgment for plaintiff for £7, with costs.

Mr. Upington said that the appeal was brought mainly on the ground that the Magistrate had given judgment upon a different agreement from that set out in the summons. Defendant (now appellant) admitted liability for £7, under an agreement entirely different and distinct from the contract sued upon. Counsel submitted that the Magistrate had erred, and that there was nothing in the evidence to support his conclusions, plaintiff having wholly failed to prove his contract. The proper judgment for the Magistrate to have given would have been one of absolution from the instance.

Mr. Howes submitted that plaintiff was entitled to succeed even if the amount of the defendant's liability was less than the amount sued for, so long as defendant had made no tender. The judgment of the Magistrate should be upheld. Counsel cited *Cwaba v. Kuhn* (16 S.C., 266) and *Basson v. Van Zyl* (14 S.C., 24).

Buchanan, J.: The plaintiff sued the defendant in the Magistrate's Court for the sum of £20, being one-third share of rent for one year, due in terms of an

agreement entered into in the month of June, 1906. When the summons was originally served at the residence of the defendant he was away from home, and judgment was given in default. The case was reopened by the Magistrate on proof of these facts, but unfortunately at the trial no plea was filed by the defendant. The plaintiff's son, who conducted plaintiff's business, in support of this claim for £20, produced a written memorandum of agreement of June, 1906, purporting to be signed by the marks of defendant and two other persons. Now, looking at the summons in this case, looking at the account annexed to the declaration, and looking at the agreement which the plaintiff's son produced in support of his claim, it is clear that the question in dispute before the Court was whether or not £20 was due upon the agreement produced. The question at issue was whether or not the defendant had signed this specific agreement. The Magistrate found that the defendant did not sign this agreement, that he was not present at the time it was signed, and that he did not give anybody else any authority to sign it. Under these circumstances the Magistrate should have given judgment for the defendant with costs. But in the course of his evidence the defendant said that he had had a previous verbal agreement of lease with the plaintiff, entered into three years ago, under which he was to pay £7 per year, and that was the only agreement on which he was liable. He admitted that he was liable, under that agreement, to pay £7. The Magistrate thereupon held that defendant should pay £7 under the other agreement, and costs of suit. The Magistrate justified his judgment by saying that the summons did not specify a written contract. But the evidence and documents produced at the trial show that it was the contract sued upon. The Magistrate gave judgment against defendant on a contract which was not before the Court. The question the Magistrate had to try was whether or not the defendant had signed the agreement under which £60 per year rent was payable to the plaintiff. It was proved to the satisfaction of the Magistrate that the defendant had not signed such agreement, and he ought to have given judgment for the defendant, or at least have granted absolution from the instance. The appeal will be allowed, with costs, and judgment in the Court below altered to one of absolution from the instance, with costs.

## WHITAKER V. JOHNSON.

This was an appeal from a judgment of the Resident Magistrate's Court, Indwe, in an action brought by appellant (Harry Whitaker) against respondent

(Samuel A. Johnson) to recover £1, balance of account for goods sold and delivered.

Appellant had sued defendant for a balance owing of £1 on an account for £19 18s. 6d. Defendant denied liability, on the ground that he should have been credited with a payment of £4 12s., which was not shown in plaintiff's account, and which was more than sufficient to extinguish any indebtedness by him to plaintiff.

Mr. Bisset was for appellant; Dr. Greer was for respondent.

Mr. Bisset having been heard in argument on the facts,

Buchanan, J.: The plaintiff in the Court below sued for the sum of £1, being the balance of an account for goods sold and delivered. The defendant, who is stated by the Magistrate to be a somewhat illiterate person, appeared in person, and denied the debt. He produced to the Magistrate a number of accounts and receipts, and it appeared from the plaintiff's own books that the transactions between the parties extended over a period of five years. In April, 1906, the books showed that the parties came to a full settlement, and the balance then found due was paid by the defendant, and a receipt in full was given by plaintiff. In July, 1906, defendant opened a fresh account, and on the 29th July, 1907, there was another settlement, and a receipt was granted by the plaintiff to the defendant to the effect that the account was settled up to that date. From the documents put in there seems to have been a number of other transactions between the parties which are not entered in plaintiff's books. Some of these were settled by contra account and some by cash. In one instance a cheque was given which is not entered in plaintiff's books, and the plaintiff says it must have been for a cash transaction. Plaintiff now says, though it was not clear when he first gave his evidence before the Magistrate, that he made a mistake in casting up some of the earlier accounts and in dividing a certain amount by half he charged defendant 10s. too little in each case. The Magistrate says that after going through the accounts the parties seemed to get somewhat mixed as to what had taken place, and consequently, when the plaintiff had given receipts for the accounts as settled up to certain dates, he held that the plaintiff was bound by his receipts.

There is a conflict of testimony on the point of the disputed item, and I think that the Magistrate's judgment was one that might reasonably be held to be supported by the documents. Under the circumstances, I think the plaintiff would have been much wiser to have gone no further, and not to have brought this appeal. The Magis-

trate gave absolution from the instance, and plaintiff could have brought a fresh action if he had been able to substantiate the case further, instead of going to the cost of an appeal. I think, with the facts before the Magistrate, he cannot be said to have erred in giving the judgment which he did. The appeal must be dismissed with costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

LEGAL AND GENERAL TRUST { 1907.  
AND INSURANCE CO., LTD., } Oct. 30th.  
LONDON V. LE SUEUR.

Mr. Toms moved for provisional sentence against the defendant on a judgment of the High Court of Justice, King's Bench Division, in the sum of £200 on a promissory note, and £10, the amount of a bill of exchange, with costs. Order granted.

### SUBERTSKY V. FRIEDGOOD.

Mr. Toms moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court in the sum of £20, with interest and costs.

In reply to His Lordship, counsel said he believed the defendant was at present in Kimberley. The defendant had offered £14 in full settlement, and later he made an offer of £2 10s. per month.

Maasdorp, J.: If you put him in prison you will get nothing. I think under the circumstances you should accept the offer. The decree will be granted, with costs, to be stayed while the defendant pays £2 10s. a month, the first payment to be made on November 15.

### BYRNE V. BILSON.

Mr. Pohl moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Wynberg, in the sum of £6 16s. 4d., for goods sold and delivered. There had been a return of *nulla bona* to the issue of a writ of attachment. Counsel now asked that the defendant's pension be attached from month to month.

Maasdorp, J., said he understood the papers were not quite in order. There was nothing to show that the judgment was served on the defendant. A similar order to that in the case of

*Toms v. Blackall* (*supra*) would be granted, the amount to be £3 monthly, the Sheriff allowed to attach it at the office of the Resident Magistrate, Wynberg.

#### LE ROUX AND GARLAKE V. BAILIE.

Mr. Watermeyer moved for an extension of the return day of the summons, as it was found there was not sufficient time to serve the defendant.

The return day was extended to the 14th November.

#### REHABILITATION. { 1907. Oct. 30th.

Mr. M. Bisset moved for the rehabilitation of Pierre Francois Haupt. Application granted.

#### *Ex parte* DIVISIONAL COUNCIL OF WORCESTER.

Mr. Philipson Stow moved to have a rule nisi under the Derelict Lands' Act made absolute.

Rule made absolute.

#### *Ex parte* ENGELBRECHT AND OTHERS.

Mr. McGregor, K.C., moved for leave to the petitioners to set down a special case, under Rule 322, to determine the construction of a joint and mutual will of the late Johannus Cornelius Martinus Engelbrecht, and Anna Jacomina Engelbrecht, of Cathcart.

Leave granted, the case to be set down for the 8th November, pending further inquiry.

#### BARTIE V. BARTIE.

Mr. Douglas Buchanan said that this matter had been before Mr. Justice Hopley, who, he had been informed, was likely to be away for a month, and who had ordered certain publications in granting leave to sue the defendant, John William Bartie, by edictal citation. The parties were married out of community of property, and had lived together at Kalk Bay for some nine years. There were five children of the marriage. On the 23rd April last the defendant left the plaintiff and returned about May 9. He then informed petitioner he was going to Cape Town to transact some business, but had not returned, and she had not heard of him since. The facts were not fully before his lordship, and since the granting of the order the defendant had made inquiries from friends of the plaintiff, and could not trace his whereabouts. There was an affidavit now as to the defendant's means. She was in poor

circumstances although not able to sue *in forma pauperis*. Nine publications had been ordered by Mr. Justice Hopley, and if these were all made the expense would amount to from £10 to £20, and when the rule was made absolute there would be similar publications.

[Maasdorp, J.: How would you prevent all that?]

Mr. Buchanan: I would suggest it has been customary in most of these cases to make one publication.

Maasdorp, J., said he would like to know the relations between the parties, which might throw some light on the plaintiff's disappearance. He had the same difficulty as the judge who first dealt with the matter. Some attempt should be made to throw some further light on the matter, which could be mentioned again.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. LE VILLIERS, P.C., K.C.M.G., LL.D.).]

#### CAPE TOWN TRAMWAY CO { 1907. V. MARKS. { Oct. 31st.

This was an action brought by the Cape Town Tramway Company against Samuel Herbert Marks, advertising agent, Cape Town, to recover certain sums of money due under an advertising contract and for labour performed and materials supplied.

Plaintiffs, in their declaration, said that by an agreement entered into between the parties on the 18th September, 1902, defendant was accorded sole right and monopoly of advertising in and upon the cars of the plaintiffs for a period of five years ending on the 30th September, 1907, on certain conditions, upon payment of £982 per annum in quarterly instalments, due and payable in advance, and a greater sum in proportion for an increased number of cars with advertising space available. One of the conditions was that, upon defendant failing to pay any instalment within one month after it had become due, the agreement should be cancelled forthwith at plaintiffs' option. Defendant from time to time paid off his indebted-



ness to plaintiffs, but in or about April, 1907, there was due by him a sum of £514 15s. for rent of space for the quarter ending June 30, 1907, and a further sum of £35 1s. 6d. for certain work done for, and goods supplied to, defendant in or about the painting of signs and other work connected with the agreement. On the 4th June he paid off £100, and on the 31st July, £50, and plaintiffs had moreover allowed him a credit of £9 15s. on the said sum of £35 1s. 6d. by reason of certain boards destroyed by fire. The agreement was terminated on the 31st July, 1907. Plaintiffs claimed £390 1s. 6d., less £9 18s. omitted to be claimed in the summons, with interest *a tempore morae* and costs. Alternatively, plaintiffs claimed £354 17s., balance of the sum of £514 15s. due for rent, £25 6s. 6d., balance of the sum of £35 16s. for work and materials, interest *a tempore morae* and costs.

Defendant, in his plea, admitted the terms of the contract and the payment of £100 and £50, but denied that in making such payments he admitted the correctness of plaintiffs' statement of account, and said that these payments were made without prejudice to his claim in reconvention. He admitted further that if plaintiffs had accorded him the exclusive right to which he was entitled, the amount of £514 15s. would have been due, less the two payments made on account. As to the claim for £35 1s. 6d., he said that after debate the plaintiffs agreed that he should be credited with £9 15s. and £6 18s. 11d., leaving a balance due of £18 7s. 7d. For a claim in reconvention, defendant said that the company wrongfully and unlawfully, and in breach of the agreement, let to the proprietors of the Mount Nelson Hotel, Cadarga, and the International Hotel, advertising spaces on nine passenger cars for a period of two years, during which time the advertisements of the said hotels appeared on the said nine cars. For these the plaintiffs were indebted to him in the sum of £648. Defendant said further that plaintiffs were indebted to him in respect of advertising space let by them to the organisers and proprietors of various undertakings, to wit, the Rosebank show, agricultural shows, football matches, dog and poultry shows, and the like in the sum of £150. He claimed judgment for £648 and £150, less £383 2s. 7d. credited in account, or, alternatively, for £798, damages for breach of contract.

Plaintiffs, in their plea to the claim in reconvention, denied that they let advertising spaces on nine cars to the parties mentioned, or to any parties other than defendant during the existence of the agreement. They said that from time to time they placed notices on different cars on their various systems indicating that the said cars respectively proceeded past or to some

particular place, show, or entertainment, and that such notices were so placed merely for the convenience of the public, to prevent confusion, or to induce the public to use the cars of the plaintiffs as a mode of conveyance, and were, if anything, merely adventitious advertisements of such places, shows, or entertainments, for which plaintiffs received no remuneration. They prayed that the claim in reconvention be dismissed with costs.

Mr. Struben appeared for plaintiffs; defendant appeared in person.

Defendant went into the box, and produced a copy of the original contract between plaintiffs and himself. The first clause, he said, gave him the sole right and monopoly of advertising for five years. He had not been allowed a sole monopoly. On nine of the cars the names of three hotels, viz., the Mount Nelson, the Cadarga, and the International, were displayed on boards, which had been on the cars for two years during the currency of the contract. He had protested to the manager, Mr. Giles, but without avail. Then when shows were being held, he had been deprived of earning money by advertisements because the company had put streamers at the front of the cars. Had it not been for this, he should have been able to obtain advertisements relative to the shows. He also protested to Mr. Giles with reference to this practice.

Cross-examined: If Mr. Giles said that witness had never protested in regard to the hotel boards on the cars, he was not speaking the truth. He did not know whether the company had received any remuneration for the hotel boards. He had objected to the manager every time he had seen the show notices on the cars. He had not written to the company raising a protest; all his protests had been made verbally. He would have commenced a lawsuit in regard to this practice had he had means wherewith to commence proceedings.

Alfred S. Giles, general manager of the plaintiff company, was called by Mr. Struben. He said that defendant complained that they were putting up hotel advertisements on certain cars. Witness thought he persuaded the defendant that the boards were not advertising boards, but destination boards to guide passengers to the principal hotels in the Gardens. As to show notices, the object of the company was not to advertise the shows, but to intimate that their cars passed the show ground, and thus obtain traffic. The company were not paid either by the hotels or the organisers of the shows.

By the Court: No destination boards were not upon cars that did not pass the hotels mentioned on the boards.

Arthur G. Syfret (attorney to the plaintiffs) said that after the summons

had been issued, defendant paid sums on account, but he never said that he had a counter-claim against the company, and the first witness heard of such a counter claim was when the plea was served.

Defendant addressed the Court, and said that his means of livelihood had for the present been taken away, the spaces having been let to the Tobacco Company, which was one of his customers formerly.

De Villiers, C.J.: It may be a hardship on defendant that he has lost this contract, but that is a matter that cannot enter into the consideration of the present case. What the Court has to decide now is whether or not the defendant has made out his counter-claim for damages against the company for their alleged breach of contract in advertising on the cars in breach of their contract, which gave the defendant sole and exclusive right and monopoly of advertising. The only thing that was done by the company seems to have been, in regard to shows, that there was some notice to the effect that these trams ran past the show grounds. Well, that seems a mode of advertising the Tramway Company. It calls the attention of the public to the fact that those cars will carry people to the show. The show people would advertise in the newspapers and elsewhere, but the tram-cars would advertise for themselves so as to attract as many customers as possible to utilise the cars, instead of utilising other means of conveyance to the show. I do not consider that that was advertising in breach of the contract. There was no payment made, and there was no intention to advertise on behalf of the show people. The same remark seems to me to apply to the case of the hotels. On one occasion, Mr. Giles admitted, a board had been left on the car by the negligence of one of the tramway men, but a single act of negligence like that cannot be regarded as such a breach of contract, as would entitle the defendant to damages for breach of contract. There was no deliberate advertising. There was a notice given on the cars that these cars pass certain hotels. That was the object, as far as I can see. There could have been no other object, as far as I can see, and it was of use to strangers that they should know that cars passed certain hotels, and the sole object, as it appears to me, of placing the names of the hotels on the cars was to show that these cars would pass the hotels mentioned. And here again it was all done with a view of benefiting the company, so as to enable strangers to know that by that particular car they could reach a particular hotel or hotels, but there was no intention to infringe the rights of the defendant. Then also no payment was made, and really I do

not consider that there was anything in the way of advertising of these hotels. For these reasons, I am of opinion that the defendant has not made out his case for the counter-claim, and the judgment of the Court must be for the plaintiffs as prayed, with costs, and judgment for plaintiffs on the defendant's claim in reconvention.

Defendant applied for a stay of execution for three months, and said that he had a claim against the estate of the late manager of the company (Mr. Lloyd) for £1,000, which he had been unable to get settled.

De Villiers, C.J.: I would suggest to the plaintiffs that they should not proceed to execution, because I do not think anything would be gained by it. I only throw this out as a wish that they should show consideration, but as a strict right they, of course, have the right to issue execution. I have no doubt that they will show you further consideration.

Mr. Struben said that the company had no desire to be hard upon defendant.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

SCHMIDT V SCHMIDT. { 1907.  
Oct. 31st.

This was an action brought by Wilhelm Schmidt, a farmer, of the Claremont Flats, to have the defendant, Paul Schmidt, his son, ordered to specifically perform an agreement, and to transfer to the plaintiff certain portion of land, the plaintiff tendering the cost of survey and transfer, payment of £100, and failing these orders, payment of £218 14s. 7d., with interest and costs.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer residing on the Claremont Flats, in the Cape division. The defendant is also a farmer, residing on the said Claremont Flats, and is a son of the plaintiff. He is the registered owner of certain land there situate, being lots 10 and 11, block A, Downs No. 1.

2. On or about the 16th April, 1901, the parties hereto entered into a certain agreement, copy whereof is hereunto annexed, marked "A," which the plaintiff prays may be considered as if inserted herein.

3. The plaintiff, in consideration of and relying upon the said agreement, incurred expense and disbursed moneys for and on behalf of the defendant, and at the special instance and request of the defendant, amounting in all to the sum of £218 14s. 7d., all of which the defendant is liable to repay to the

plaintiff in the event of the said agreement not being carried out by the defendant, account whereof is hereunto annexed, marked "B."

4. The defendant, after lawful demand duly made, has refused to carry out his part of the said agreement by transferring to the plaintiff the portion of the said lots 10 and 11, block A, Downs No. 1, as herein provided, and paying to the plaintiff the sum of £100 in terms of the said agreement.

Wherefore the plaintiff claims: (a) That the defendant be ordered to specifically perform the said agreement and to transfer to the plaintiff such portion of the said lots, the plaintiff tendering cost of survey and of transfer. (b) Payment of the sum of £100, with interest *a tempore morae*. (c) Failing compliance with prayers (a) and (b), payment of the said sum of £218 14s. 7d., with interest *a tempore morae*. (d) Alternative relief. (e) Costs of suit.

The defendant's plea was as follows:

1. Defendant admits paragraph 1 of plaintiff's declaration.

2. With regard to paragraph 2, defendant admits that he signed the said agreement, but says that he cannot read, and was ignorant of the full intent and meaning thereof when he signed it. He specially denies the allegation in the said agreement contained that lots 10 and 11, block A, Downs No. 1, were at the time when the agreement was signed, or at any time whatsoever, virtually the property of plaintiff.

3. On the 13th day of November, 1899, defendant, being then a person of full age and otherwise fully competent to receive a licence to occupy land by virtue of Act 37 of 1882, and having duly conformed with the provisions of the said Act, obtained a licence from the Colonial Government to occupy the aforesaid lots 10 and 11 upon the terms and conditions laid down in the said Act.

4. Thereafter, in accordance with the requirements of the said Act, defendant resided upon the aforesaid lots 10 and 11, and at the time when the said agreement was signed, was so resident thereon, and plaintiff had no interest in the same, nor could he (plaintiff) lawfully acquire any interest therein, except in the manner laid down in section 12 of the aforesaid Act, and defendant specially denies that plaintiff acquired any such interest in the said lots or in any portion thereof by virtue of the said agreement.

5. On the 17th August, 1905, defendant obtained title to the said lots 10 and 11 from the Government, in terms of section 18 of the aforesaid Act, and he has ever since remained the registered owner thereof.

6. Defendant admits that he refuses to transfer to plaintiff any portion of the said lots 10 and 11, and to pay

him the sum of £100, but denies that plaintiff is entitled to such transfer or to such payment. Save as above, defendant denies paragraphs 2 and 4.

7. With regard to paragraph 3, defendant admits that plaintiff paid licence fees on his behalf to the Government, but says that he advanced plaintiff the money to do so. He further admits that plaintiff supplied him with materials for building and wire for fencing to the value of £18 and £22 respectively, and that plaintiff on three occasions lent him horses to plough his ground, but he says plaintiff never sent him a proper account, nor ever made a demand upon him in respect thereof. He has always been ready and willing to pay the aforesaid £20, and herewith tenders the same.

8. He admits having bought a cart and harness from plaintiff, but says that he paid for the same. Save as above, he denies all and singular the allegations contained in paragraph 3.

Wherefore defendant prays that plaintiff's claim, subject to the tender made in respect of prayer (c), may be dismissed with costs.

For a claim in reconvention, the defendant (now plaintiff) says that on or about 30th January, 1906, plaintiff (now defendant) sold to him, as will appear more fully from an agreement of sale, copy whereof is hereunto annexed marked "A," to which he craves leave to refer when produced at the trial, all his goods, chattels, stock, furniture, and effects for the sum of £50, which sum was duly paid to plaintiff (now defendant).

The said goods, chattels, stock, furniture, and effects were delivered to defendant (now plaintiff), but subsequently restored by him to plaintiff (now defendant), the latter agreeing to repay him the said £50.

All things have happened, all times have elapsed, and all conditions have been fulfilled entitling defendant (now plaintiff) to payment of the said sum of £50, but plaintiff (now defendant) refuses to pay the same or any part thereof, although frequently requested so to do.

Wherefore defendant (now plaintiff) claims: (a) Payment of the sum of £50 with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

Mr. Upington for plaintiff: Mr. Van Zyl for defendant.

Evidence having been called and counsel heard in argument on the facts, Buchanan, J., gave judgment for the plaintiff for actual beneficial expenditure on the property which the defendant would now get in the sum of £139 4s. 10d., and £25 10s., debts due, making a total of £164 14s. 10d. The claim in reconvention would be deducted, leaving a balance of £114 14s. 10d. in favour of the plaintiff, with costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

#### PROVISIONAL ROLL.

COATON AND ANOTHER V. SPIRO AND COLL. { 1907.  
Oct. 31st.

Mr. M. Bisset moved for the final adjudication of defendants' estate as insolvent.

The defendant Spiro appeared in person.

Mr. Bisset said the other defendant had left the country, and there was a defect in the service. He therefore asked for an order in respect only of the estate of the defendant Spiro, and he asked that the return day of the summons against the other defendant should be extended.

Spiro, in reply to the Court, said he could not pay his debts.

The Court granted an order for the final adjudication of Spiro's estate, and extended the return day in the case of Coll to the last day of term.

#### HASKINS V. DE GOUVEA.

Mr. Douglas Buchanan moved for provisional sentence for £700 on a mortgage bond, with interest and costs, and for £1 10s. 6d., due for insurance, in terms of the bond. He applied also that the specially hypothecated property should be declared executable, and that the rents accruing therefrom should be attached.

Order granted as prayed.

#### BOALCH V. RIX.

Mr. Pohl moved for provisional sentence for £1,000 on a mortgage bond, with interest and costs, and for the hypothecated property to be declared executable.

Order granted as prayed.

#### RUDMAN V. KNOETZE AND OTHERS.

Mr. Douglas Buchanan moved for provisional sentence for £635 on a mortgage bond, with interest and costs, and for the specially hypothecated property to be declared executable.

Order granted as prayed.

#### ESTATE LAITE V. VAN SITTEBT AND ANOTHER.

Mr. Bisset moved for provisional sentence against the first defendant for £228 10s., rent due, on an agreement of letting and hire, for judgment under

Rule 320d, for £42 1s., for goods sold and delivered, and for an order for the delivery of certain articles as provided for in the agreement, and against the second defendant for provisional sentence for £309 11s. 4d., on an undertaking of suretyship, with costs.

Order granted as prayed.

### GENERAL MOTIONS.

*Ex parte* DIVISIONAL COUNCIL OF PORT ELIZABETH. { 1907.  
Oct. 31st.

Mr. Bisset moved to make absolute a rule nisi granted under the Derelict Lands Act. Counsel said that in regard to one of the pieces of land (No. 15), the owner had appeared, and the application with respect of that particular land was withdrawn. Counsel further stated that in connection with another of the lots of land, the name of the last transferee was omitted in the advertisements of the rule nisi. He asked also that the Divisional Council should be allowed certain special costs for advertising in other colonies, before the Court granted the rule nisi, and costs incurred in obtaining assistance in the search to identify the several properties. He quoted sections 21 and 20 of Act 28 of 1881.

Maasdorp, J., said that the cost of the advertisements before proceedings were commenced was not part of the costs of litigation.

The Court made the rule absolute, except as to the property No. 15 mentioned in the petition, with costs, including the expenses of the Secretary of the Council, necessitated by his coming to Cape Town to make search in the Deeds Office, and the costs of the conveyancer.

#### *Ex parte* HEUNIE.

Mr. Marais moved for leave to sue *in forma pauperis* for damages for breach of promise, and maintenance of child. Service of the order of Court on the respondent had been made, as directed, by registered letter, and the Post Office receipt was now filed.

The rule was made absolute, Messrs Michau and De Villiers being appointed attorneys and Mr. Marais counsel.

#### *Ex parte* ENDERS.

Mr. Inchbold moved for leave to sue *in forma pauperis* the executors of the estate of the late Thomas Norman, to compel them to file an account or to pay out an amount alleged to be due under Norman's will.



A rule nisi was granted, subject to counsel's certificate being lodged with the Registrar, the rule being made returnable on the 14th November.

*In re* PETRUSVILLE PROSPECTING SYNDICATE, LTD.

Mr. Wallach moved for an order confirming the official liquidator's report, and authorising the winding up of the company and the destruction of the books. The report showed that there was a balance of £91 17s. 8d., less the liquidator's commission, to be divided amongst the shareholders. The company was formed with a nominal capital of £14,560, but only 35 shares, each of the value of £20, were subscribed.

The report was confirmed, and commission of the liquidator allowed at 5 per cent. on the assets realised, the company dissolved, and leave granted to destroy the books after six months.

ESTATE BUSSE V. THOMPSON AND THE HIGH SHERIFF.

Mr. J. E. R. de Villiers moved, on notice calling on respondents to show cause why an interdict should not be granted restraining the Sheriff from proceeding with the sale of certain land at King William's Town, attached by order of Court, dated the 30th July, 1907. Costs were prayed for against the first respondent.

Mr. Swift appeared for the respondent.

Mr. De Villiers said that the property was attached by the creditors of the wife of the late Busse for unsatisfied debts, incurred by her after the death of her husband. The trustees of the estate of the late Carl Frederick Busse now asked that the attachment be set aside, and that the land be declared part of the insolvent estate of the late Busse. The property belonged to the joint estate. The debts of the joint estate had not yet been liquidated, and it had not been shown that there was anything to come from the estate to the wife. Counsel referred to Maasdorp's Institutes (Vol. 1, p. 92). The property was registered in the name of Carl Frederick Busse.

Mr. Swift said the question was one of fact as to whether the joint estate was sequestrated or whether only the estate of the husband was sequestrated. In the latter event, half of the joint property would pass into possession of the widow, and such half would become liable for debts which she incurred after the death of her husband. Counsel quoted the case of *Hiddingh* (Buchanan, 1878, p. 36), and said that while Busse died in 1902, his estate was only sequestrated about four months ago. He sub-

mitted that, as by the terms of the will the wife became entitled to half of the property on the death of her husband, as the creditors had allowed her to carry on the business, and to incur further debts, and as Thompson had proved a vigilant creditor, the Court would not now grant the extreme remedy of an interdict. Counsel pointed out that only half the joint estate had been attached.

Maasdorp, J.: It seems quite clear that when the application was made for the attachment of this property in execution, all the facts were not placed before the Court. This property seems to be registered in the name of Carl Frederick Busse, who was married in community of property with his wife, and it appears that after his death his estate was insolvent. The estate was consequently adjudged insolvent, and any property which belonged to him became vested in the trustee, and amongst other things, there was this land now in question, which stands registered in his name. It is now necessary for the trustee to liquidate the estate, and, amongst other things, to dispose of this property. If it would appear that after the liquidation and the payment of the debts of the joint estate, there is any balance over, which is to be divided between the estates of the husband and the wife, then the latter will become entitled to such property, but for the present the property is at the disposal of the trustee, who has to liquidate the estate, and the Court, if it had been aware of the circumstances of this case, would not have granted an order making the property executable in satisfaction of the debts of the widow, incurred after the death of her husband. The Sheriff will be interdicted from proceeding with the sale, and the interdict granted on the 30th July will be set aside. Respondent Thompson will be ordered to pay the costs.

MULLER V. COLONIAL GOVERNMENT.

Mr. Nightingale moved, on behalf of the Colonial Government, to have the award of the arbitrators in this matter made a Rule of Court. The arbitration was in connection with the expropriation of certain land. A consent paper was filed.

Order granted.

HARVEY V. HARVEY.

Divorce—English marriage settlement—Forfeiture of rights.

*H. and his wife were domiciled and married in this Colony. The wife brought certain movable property into the estate*

which, by a marriage settlement executed on the day of the marriage in the English form, was vested in certain English trustees for her separate use. H., however, was to enjoy a life interest in the property should he survive his wife. It was provided that the deed of settlement should be construed in accordance with English law. In any action brought by the wife for restitution of conjugal rights, &c., she prayed, inter alia, that H. be declared to have forfeited all benefits under the marriage settlement.

Held, that the said prayer be granted.

Mr. Inchbold asked leave to mention this matter. The case was one in which the petitioner claimed an order for restitution of conjugal rights. Mr. Justice Hopley had granted a rule nisi, but directed that on the return day a point should be argued relative to a claim that the respondent should be declared to have forfeited certain rights under a marriage settlement. Counsel said he understood that it was probable that Mr. Justice Hopley would be away for some time, and he asked leave to now argue the matter.

Maasdorp, J., said he would hear what counsel had to say on the point.

Mr. Inchbold said that the action was one in which the wife sued for restitution of conjugal rights, failing which, for divorce. There were prayers also for the custody of the children, and for a declaration that the defendant had forfeited certain rights given to him by a marriage settlement executed on the day of the marriage. The property dealt with under the marriage settlement was brought into the estate by the wife, and the settlement gave the defendant a life interest in the property if he should survive his wife. Mr. Justice Hopley granted a rule nisi returnable on the first day of the present term, but he directed that on the return day the point should be argued, whether this Court had jurisdiction to declare that the defendant had forfeited his rights in the peculiar circumstances under which this settlement was executed. It appeared that the settlement was executed in this country, but it was in English form, and the trustees were in England. The property was movable property, being certain shares vested in the trustees, and there was a clause which said that the interpretation of the document was to be by English law. The

question was whether this Court had the right to declare the defendant's rights forfeited under these conditions. Counsel quoted the cases of *Forbes v. Forbes* (2 Juta, p. 110), *Moore v. Moore or Bull* (1891, Probate, 279), *Numby v. Numby* (15 Probate Div., p. 186), *Forsyth v. Forsyth* (65 Law Times, p. 556), *Collis v. Hector* (32 Law Times, p. 223), and referred to 22 and 23 Vict., chapter 61, section 5, and to Nelson on International Law, page 124.

In reply to the Court, counsel said that the defendant left his wife in 1904. They lived apart in Cape Town, but subsequently defendant went to England, where he was residing at the time of the action. Defendant had not complied with the order to return to his wife.

The Court granted a decree of divorce, plaintiff to have custody of the child, the defendant being declared to have forfeited all benefits under the marriage settlement.

#### BARTIE V. BARTIE.

Mr. Douglas Buchanan mentioned this matter, which had been ordered to stand over for further information on the previous day. Counsel now read an affidavit by the petitioner, in which she said that the relations between her and her husband had always been of a friendly nature, although he always lost his temper when she asked him where he had been and what he had been doing. On the day he left, she missed £20 from a wardrobe, which she believed he had taken.

Maasdorp, J., said the order of Court would be varied by ordering one publication in the "Cape Times" and one in the "S.A. News," instead of the eight publications previously ordered.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### FIRST DIVISION.

MAJIET V. ZUCKERMAN AND ( 1907.  
CARROLL. ) Nov. 1st.

Messenger of Magistrate's Court  
—Writ of civil imprisonment  
—Illegal arrest.

*A writ of civil imprisonment  
having been obtained in a*

*Resident Magistrate's Court by the first defendant against the plaintiff upon an unsatisfied judgment against plaintiff's brother, whose name and occupation were identical with those of the plaintiff, the messenger (second defendant) arrested the plaintiff, but on being informed by the judgment creditor, to whom the plaintiff had been taken immediately on his arrest, that it was the wrong man, the messenger at once released the plaintiff.*

*Held, that as the writ had not been set aside, neither defendant was liable in damages for illegal arrest.*

This was an action brought by Abdulla alias Abdol Majid to recover damages estimated at £500 from Joseph Zuckerman, trading as the Colonial Cabinet Manufacturing Company, and Joseph Aloysius Carroll, messenger of the R.M.'s Court, Cape Town, for illegal arrest.

The plaintiff's declaration was as follows:

1. The plaintiff is a basket-maker, and at times carries on the trade of a fisherman as well, residing at No. 4, Cross-street, Cape Town. The first defendant carries on the business of a furniture dealer at Cape Town, under the style or firm of the Colonial Cabinet Manufacturing Co. The second defendant is the messenger of the Court of the Resident Magistrate for the district of the Cape.

2. On or about the 14th day of August, 1907, and in the vicinity of No. 4, Cross-street, the second defendant, acting with the authority, and at the request, of the first-named defendant, wrongfully and unlawfully seized and arrested the plaintiff in the presence and sight of a large number of friends and acquaintances of the latter, and falsely alleged in the hearing of the persons that the seizure and arrest was so effected.

3. The second defendant, in the course of such wrongful and unlawful seizure and arrest, violently grasped the plaintiff—who is 60 years of age—by the neck, and compelled him to enter the cart, for the purpose, as alleged, of proceeding to Roeland-street Gaol.

4. The second defendant, however, drove the cart to the store of the first defendant, where the plaintiff was released.

5. By reason of the premises the plaintiff has been injured in his bodily health, has suffered great public indignity, and has been injured in his credit and reputation, and has sustained damage in the sum of £500.

The plea of the first-named defendant (Joseph Zuckerman) was as follows:

1. The first-named defendant admits paragraph 1 of plaintiff's declaration.

2. With regard to paragraphs 2 and 3 thereof, he denies that he ever authorised or requested the second defendant to seize or arrest the plaintiff, and he says, further, that he has no knowledge of the details of the said seizure or arrest.

3. The first-named defendant admits that after duly obtaining a judgment in the Court of the Resident Magistrate of Cape Town against one Abdol Majid, he regularly and lawfully applied for and obtained a decree of civil imprisonment against the said Abdol Majid. The said Majid is not the plaintiff.

4. The first-named defendant admits paragraph 4, and says that immediately upon the plaintiff being shown to him, he informed the second defendant that the plaintiff was not the defendant in the Court below, against whom the decree had been obtained.

5. With regard to paragraph 5, the first defendant denies that plaintiff has suffered any damage at all, or any damage for which the first defendant is in law responsible.

Therefore the first defendant prays that plaintiff's claim may be dismissed, with costs.

The plea of the defendant, Joseph Aloysius Carroll, was as follows:

1. The defendant, Joseph Aloysius Carroll, admits paragraph 1 of the plaintiff's declaration, but says that on or about the time when the writ was issued the plaintiff resided at 16, Horsburg-lane, off Hanover-street, Cape Town.

2. On the 14th August, 1907, the said defendant, pursuant to and in the discharge of his duty as messenger, by means of a certain writ of civil imprisonment, arrested the plaintiff in the vicinity of No. 4, Cross-street, Cape Town, using in such arrest no unnecessary violence.

3. The writ says that the plaintiff is the person referred to therein as "Abdol Majid, basket-maker, 16, Horsburg-lane, off Hanover-street, and that the plaintiff on the 14th August, 1907, before the arrest was effected, admitted to him that he (the plaintiff) had formerly resided at 16, Horsburg-lane, and had there received notice of the proceedings taken by the first defendant for the writ of civil imprisonment.

4. After the arrest of the plaintiff, and when he was in the cart of the defendant, the plaintiff denied that he was the man who owed the money to the first defendant, who trades as the Colonial Cabinet Manufacturing Company, whereupon the defendant forthwith drove with the plaintiff to the store of the first defendant, who then said that the plaintiff was not the man

who owed him the money for which he had obtained judgment.

5. Thereupon the defendant forthwith released the plaintiff from arrest, under which he had been for less than half-an-hour, and offered him a sovereign, and to send him home in a cab, which offer the plaintiff refused, saying that he wanted nothing.

6. The defendant admits that there were various persons present when the arrest of plaintiff was effected, but says that the attention of such persons to the arrest was not drawn by any act on his part, but by the excitement of the plaintiff and noise made by him.

7. The defendant specially contends that he did no more than his duty in the premises in obedience to the writ addressed to him wherein the plaintiff was in fact the person described and referred to.

8. Save as aforesaid, the defendant denies all the allegations in paragraphs 2, 3, 4, and 5 of the plaintiff's declaration, specially denying that the plaintiff has sustained any damages for which he is responsible.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Mr. Upington (with him Mr. J. E. R. de Villiers) appeared for the plaintiff; Mr. Alexander appeared for the first defendant (Zuckerman); Mr. Pohl appeared for the second defendant (Carroll).

The plaintiff gave evidence, and said he was born in 1848, and he was a Gatiep or official of his church. He had never bought furniture from Zuckerman, and he was never civilly summoned, but at Christmas, 1905, he received a civil imprisonment order, but he declined to accept service, and the document was thrown into his shop. He went to Zuckerman's shop, and saw a young woman, and repudiated liability, saying that he was not the man referred to in the document. Then he went to Silberbauer, Wahl and Fuller, Zuckerman's attorneys, and made a similar denial. He heard no more of the matter until August 14, this year, when he was suddenly arrested in the street as described. He alleged that he was induced to speak to his captor by the latter saying that he wanted to give him an order for baskets. Plaintiff wondered if he had been arrested for stealing, and the man replied, "Yes, you have been arrested for stealing Zuckerman's furniture." He was forced into a cart, protesting that he did not like to go to prison in the clothes he was wearing, but he was informed, "If you go in your Sunday clothes Zuckerman won't know you." They arrived at Zuckerman's shop, when Zuckerman remarked, "No, this isn't the man." The person who arrested proposed to compensate him by giving him 7s. 6d., and Zuckerman

thought a couple of chairs or a toilet set would mollify him, but he refused to take anything, and was then liberated from arrest. The arrest was witnessed by about twenty people, and it greatly upset him mentally and physically. From the very first he denied that he was the man wanted, and he even explained that an almost similar mistake had been made in 1905.

Cross-examined: He regarded it as a sufficient repudiation of the 1905 incident to have told the girl in Zuckerman's shop, and to have seen Zuckerman's attorneys. There was another Abdol Majiet, a basket-maker, who was his brother. Witness was not supporting the children of his brother's two wives. 16, Horsburg-lane was witness's correct address at the present time. Witness denied that he had mentioned in Messrs. Silberbauer, Wahl, and Fuller's office, the fact that he received things intended for his brother, and that his brother received message for him.

You want to charge the defendant £500 for your free drive of half-an-hour's duration up Plein-street? How do you make that up?—I am a coloured man.

Witness denied that he obtained the services of a doctor.

Did you get any medicine?—Yes.

Of what value?—Say, 9d.

De Villiers, C.J., said that if the Court found that there had been an illegal arrest, the damages could not be assessed on the quantity of medicine consumed. There was the question of the indignity to be considered.

When witness got to the shop he indignantly refused to take anything they offered him.

In cross-examination by Mr. Pohl, witness said that he was a Gatiep.

Is that not the person who waits on the priest?—No, he is another man.

[De Villiers, C.J.: The Gatiep is a kind of deacon.]

Witness said he was still a Gatiep, so the arrest had not injured his position. He had no turban on then.

In reply to the Chief Justice, Mr. Pohl explained that the original summons was not served on the witness, but on the right man.

The witness stated that although Mr. Carroll said nothing about taking him to Roeland-street, everybody knew that when they got into Mr. Carroll's cart, there were only two places they would be taken to, and they were the Magistrate's Court and Roeland-street. Witness denied that Mr. Carroll suggested to him that he should pretend to measure a basket, and thus go away quietly. Witness denied that he shouted. He said in a low voice: "I am not a thief."

Carroll offered to pay for a cab to take him home or to employ his own cart, but he refused the offer. He was



under arrest between five and ten minutes.

[De Villiers, C.J.: Did your brother ever tell you an action had been brought against him?]

Plaintiff: No; not that Zuckerman had summoned him.

[De Villiers, C.J.: Did you say, "The summons is for my brother?"]

I said it might be. That was in December, 1905.

Abdol Ganie, general dealer, Cross-street, son-in-law of plaintiff, gave evidence that plaintiff was much respected, and suffered a shock by the arrest.

Evidence of a corroborative nature with regard to the arrest was given.

The defendant Carroll described the affair, and said that when Zuckerman said the plaintiff was not the man, he (witness) remarked that he would hold Zuckerman responsible. Witness had done his duty by arresting the person described on the writ at the address named. Witness offered plaintiff £1 compensation, and offered to drive him back home, so that the people might see that the arrest was a genuine error. The plaintiff repeatedly, to witness and Zuckerman, said: "I want nothing." If he had to take the word of every debtor there would be no arrests made.

Mr. Pohl: You have arrested many people in your time?

Witness: Probably over 5,000. As many as 660 in a single year.

Have you ever had an action for illegal arrest or assault?—Never. I have never assaulted anyone.

Cross-examined: Plaintiff was evidently surprised when he was arrested.

Mr. Upington: Why couldn't you have let the man go into his house until you had made inquiries?

Witness: Why. I should never have been able to get him out again. I cannot arrest a man in his house. At the present time I have a writ for a man who is not a hundred yards from this court. He sits in his shop all day, and watches through a window myself and my deputies pass daily, but I can never catch him outside. I have had that writ, waiting to serve it, for two years, and haven't been able to serve it yet.

You had to adopt a little strategy by pretending you wanted a basket made?—Yes.

You were doubtful of your man?—I was never doubtful. I knew he was the man described on my warrant.

You see Zuckerman says he is not the man, and you say he is?—I say he is the man I had to arrest.

Mr. Pohl (re-examining): You do not regard a writ as stale when it is a year and a half old?

Witness: No; I have arrested a man on a writ 11 years old. I had another after seven years. He had been away seven years, and he was taken the first week of his return.

What would have happened if you had let plaintiff go into his house?—There would have been trouble, undoubtedly. We never allow a man to go back to his house.

Can you arrest a man in his house?—Certainly not; I would never attempt it.

[De Villiers, C.J. (to Mr. Upington): I don't see what case there is against Carroll.]

Mr. Upington: The plaintiff had to join him as co-defendant. Carroll made a tender, but I admit I cannot press the case against him.

Michael Bolton (deputy messenger) corroborated the evidence given by Mr. Carroll, and added that when he served the summons the plaintiff denied that he was the person concerned, and he advised him, if so, to appear at the Court.

Other witnesses gave corroborative evidence.

An articled clerk, in the employ of Wahl, Fuller and De Klerk, who conducted the case on behalf of Zuckerman, said that when application was made to Majid, at the top of Caledon-street, for the amount due, a person went into the office and said that the person concerned lived at 16, Horsford-lane.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: This is an action for wrongful and unlawful arrest, and consequently the plaintiff can only succeed against either defendant by showing that the arrest was wrongful and unlawful. The arrest was effected by the second defendant as messenger of the Resident Magistrate's Court of Cape Town under a writ of civil imprisonment, signed by the Magistrate, which commands the messenger to take Abdol Majiet, basket-maker, 16, Horsburg-lane, off Hanover-street, and place him in gaol until the claim of the first defendant is satisfied. The date of the writ is 20th December, 1905, at which time the plaintiff, who was and is a basket-maker, was the only person of the name of Abdol Majiet whose address was 16, Horsburg-lane, off Hanover-street. He therefore was the man specifically indicated by the writ as the person to be arrested, and consequently, whatever else was illegal, the arrest itself was not illegal. Up to the present time the writ has not been set aside, and so long as the writ stands it is impossible to hold that the arrest effected thereunder was either wrongful or unlawful.

In justice to the messenger, I am bound to say that the allegations of the use of unnecessary violence in effecting the arrest are not supported by the evidence, and that even if the arrest had been proved to be technically illegal, this would not have been a case for heavy damages or for awarding of more

than Magistrate's Court costs. The detention of the plaintiff was very brief, and as soon as it was discovered that the writ had been issued against the wrong man the plaintiff was released from custody.

As to the first defendant, it is unnecessary to say what the decision of the Court would have been if the writ of arrest had been set aside before the present action was brought. In assessing damages for an arrest authorised by a writ which had been improperly obtained and afterwards set aside, the result would greatly depend upon the degree of impropriety on the part of those who induced the magistrate to issue the writ against the wrong person. The nature of the evidence required in such a case would differ from the evidence required in a case where the illegality of the arrest itself is relied upon. In the present case it would appear that the first defendant's attorneys are responsible for the obtaining of the writ, but the plaintiff himself is not free from blame, because after he had been served with a notice that a writ would be applied for against himself, he did not take the trouble to appear and oppose the application. He had been led to believe by a clerk in the attorneys' office that the matter would be set right, but on the other hand he had been warned by the messenger's officer who served the notice of application on him that he should appear personally to support his objection. The attorneys' clerk seems to have forgotten all about the matter, but it is quite possible that the attorneys might have produced further evidence on the point if their negligent conduct in obtaining the writ, after they knew that the plaintiff was not Abdol Majiet against whom judgment was given in the original action, had been stated as the ground of the present action. As it is, the only ground relied upon is the illegality of the arrest, but as the arrest was authorised by a writ, which is in due form and has never been set aside as having been improperly obtained, the Court can only grant absolution from the instance with costs.

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

ESTATE BATE V. WHEELER. { 1907.  
Nov. 1st.

Mr. P. T. Lewis moved for provisional sentence on two mortgage bonds for

£450 each, with interest from the 1st July, 1906, bonds due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ESTATE YOUNG V. HUDSON.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £750, with interest from the 1st July, 1905, and for £12 2s. 6d., insurance premiums, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

### ILLIQUID ROLL.

TOWNSHEND, TAYLOR AND SNASHALL  
V. COLONIAL INVESTMENT CORPORATION, LTD.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £30 17s. 3d., less £10 paid on account since issue of summons, with interest *a tempore morae* and costs.

Order granted.

### GENERAL MOTIONS.

*Ex parte* CHRISTIANIE. { 1907.  
Nov. 1st.

Mr. Watermeyer moved for a certain *rule nisi* to be made absolute, admitting petitioner to sue her husband *in forma pauperis* for divorce.

Rule absolute, Mr. Watermeyer appointed counsel, and Messrs. Van Zyl and Buissinne attorneys, to the petitioner.

*Ex parte* KNOX.

Commissioner — Attestation of powers.

*Any foreign Commissioner for Oaths, unless he be appointed by the Supreme Court, must have his powers attested by some person in authority, in order that depositions sworn before him may be accepted by the Court.*

Mr. Douglas Buchanan moved for a certain *rule nisi* to be made absolute, authorising petitioner to sue her husband John James Barry Knox *in forma pauperis* for restitution of conjugal

rights. Counsel produced an affidavit of service upon respondent at H.M. Dockyard, Devonport, England, sworn by a solicitor's clerk before a Commissioner of Oaths in England.

Maasdorp, J., said that there was a very serious defect of service in this matter. The affidavit was sworn before a man named Jackson, who called himself a Commissioner of Oaths, but the Rule of Court was very strict that any Commissioner in a foreign country, or any person exercising powers in a foreign country, must have his powers attested by someone in authority. In this case there was no attestation of the Commissioner by a person recognised by this Court. There were Commissioners of this Court in England, and if the document had been taken before a Commissioner of this Court, it would have been sufficient attestation.

Mr. Buchanan asked for the indulgence of the Court, seeing that this was a pauper suit, and applied for the rule to be made, subject to due proof of service.

The matter was ordered to stand over, pending inquiries as to whether the firm of solicitors mentioned appeared in the English Law List.

Later on, Mr. Buchanan stated that he found that to be the case.

Rule absolute, Mr. Douglas Buchanan appointed counsel and Mr. Bernard attorney to the petitioner.

*Ex parte FERREIRA.*

Mr. Toms said that this was the return day of a rule nisi calling upon respondent to show cause why petitioner should not sue him in *forma pauperis* for restitution of conjugal rights. Counsel produced an affidavit showing that the rule had been served upon respondent's father at Knysna, but the latter had taken up a hostile attitude towards the applicant, and declined to disclose the whereabouts of respondent, with the result that it had been impossible to ascertain whether, in compliance with the directions of the Court, the rule had been brought to his notice. Counsel now applied for an extension of the return day, and leave to effect substituted service.

The return day was extended until the 14th November, and leave given to effect substituted service by one publication in the "Knysna Herald."

TRUTER V. TRUTER.

Mr. Swift moved upon notice to respondent to show cause why the petitioner (his wife) should not be appointed as *curator bonis* to administer his property and estate, and why costs of this application should not be paid out of his estate. Counsel read affidavits

by the petitioner and respondent, the latter of whom consented to the application. It was explained that the reason of the present proceedings was that respondent was of intemperate habits. Counsel cited *in re Chisholm* (9 Juta, 61).

The matter was ordered to stand over for further affidavits in proof of the *bona fides* of the application.

Maasdorp, J., suggested that an affidavit either by the minister before whom the declaration had been made or by a medical man should be produced in reference to the state of respondent.

*Ex parte DE VILLIERS AND ANOTHER.*

Mr. Watermeyer moved on behalf of petitioners, husband and wife, for leave to register an ante-nuptial contract excluding community of property. The parties, who had been married in Edinburgh, Scotland, stated that they were advised before the ceremony that it would not be necessary at that time to enter into a contract in order to exclude community of property, and that it would be sufficient if they executed a contract upon their arrival in this country. Mr. De Villiers was domiciled in this country, having been a member of the South African Rugby team which toured Great Britain and Ireland in the season 1906-7. The petitioners said it had been their intention from the beginning to be married without community.

Maasdorp, J.: As it appears that there was an intention before the marriage of these parties to enter into this contract, but that they were advised in Scotland that this contract could be entered into after their arrival in this country, it seems to me that they were *bona fide* under a wrong impression, and the Court will now assist them to carry out the intention that they had formed before the marriage. It is wrong to call it a "post-nuptial" contract, because, after marriage, it is impossible in this country for the parties to enter into such a contract. What the Court now allows is that the contract, which they contemplated making before marriage and which would consequently have been an ante-nuptial contract, be made and registered as an ante-nuptial contract, saving the rights of creditors previous to the date of registration.

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### APPEALS.

LOUW V. HOOGENDYK. ( 1907.  
( Nov. 4th.

#### Exception to summons—Vague and embarrassing.

*In a summons for money due to a boardinghouse-keeper in lieu of notice, it is not sufficient to allege that the defendant was bound to give such notice; the grounds of such obligation must be fully set forth.*

This was an appeal from a decision of the Resident Magistrate at Caledon overruling an exception taken on a summons brought by plaintiff, who was now appellant, against the respondent.

The applicant agreed to supply respondent's wife and family with board and lodging for £16 a month. On August 31 respondent vacated the applicant's premises, having failed to give notice, for which the applicant claimed £16. An exception was raised to the summons that while the cause of action purported to be for damages, neither the requisite or any other essentials were clearly set forth; therefore the defendant was hampered in his defence.

The Magistrate upheld the exception, and in his judgment said that he was obliged to hold that the summons showed no cause of action. Plaintiff sued defendant because he had wrongfully and unlawfully left the premises without giving notice. The plaintiff might have meant to sue for a month's board and lodgings, but although that might be the inference, it was not stated. Therefore he upheld the exception.

Dr. Greer for applicant, Mr. Close for respondent.

Dr. Greer contended that the matter should be sent back to the Magistrate. The summons was particularly clear in showing why defendant was brought into Court. It was clear that he was sued for a month's money in lieu of notice, and the exception was taken on a technicality. Counsel quoted in support of his argument the case of *Thompson v. Barkly East Municipality, Rinderpest Committee* (4 Supreme Court Report, p. 193).

[Maasdorp, J.: Where does the contract say that notice was required.]

Dr. Greer: It is not given, but it is a usual custom.

Maasdorp, J.: In this case the plaintiff in the Court below complained that he entered into an agreement by which he was to supply the family of defendant with monthly board and lodging. The board and lodging was supplied in terms of that contract until August 31, 1907, and thereafter the plaintiff removed his family without giving a month's notice. Now, it is quite clear that the parties understood what the suit was about. The plaintiff complained that the month's notice should have been given, and that the defendant failed to give it. But then the question arises whether there is anything in the summons given as ground for saying that such monthly notice was required. The notice may be required on different grounds. It may be because it is one of the terms of the contract. It may be, as is suggested by counsel for the defendant, that it is a universal custom that such notice must be given. Or it may be that the mere fact of a monthly contract having been entered into, requires in law a month's notice. These different alternatives go to show that the summons is in its character embarrassing, and that the defendant is prejudiced in his defence. It is impossible for the defendant to say which of these grounds of action he is to meet, and the very suggestions of counsel for the appellant that he might take one or the other shows that it is necessary specifically to state that a month's notice became necessary before an end could be put to the contract. The Magistrate upon this exception has held that there was no cause of action. The exception taken was not on that ground. The exception was that the nature of the summons was such as to prejudice the defendant, and I think the defendant is prejudiced in his defence until he knows exactly what the ground of action is. The Magistrate said that if an application had been made for an amendment, it would have been allowed, and it now appears that if an opportunity had been given to amend that summons, the plaintiff would have had some difficulty in setting out his exact ground of action. There seem to be several grounds which might be set up in the proposed amendment of the summons, and the plaintiff is not now prepared to state what amendment he desires to make.

The appeal was dismissed, with costs.

#### BUILDERS' SUPPLY CO., LTD. V. FAULDS.

This was an appeal from a decision of the Resident Magistrate of East London.

The respondent (Faulds) had sued the applicant company for £19 15s. 4d.,



which he said the company owed him, as the balance of wages due by one John James Lacey, a contractor, formerly of Adelaide, to the plaintiff for work and labour performed by the plaintiff, which sum the defendant company had guaranteed and undertaken to pay. The defendant had denied the claim, and pleaded the general issue. The Magistrate, after hearing the evidence, gave judgment for the plaintiff for the amount claimed, with costs, finding that Watson (the company's manager) had given plaintiff to understand that he would see that plaintiff was paid. He (the Magistrate) considered that privity of contract was established between Watson and the men. On May 6, Lacey was ejected from his contract, and on the same date the company received £208 from the Public Works Department by virtue of the assignment it held from Lacey. The contract was subsequently carried out by the company as Lacey's surety.

Mr. Benjamin, K.C., for the appellant, and Mr. W. Porter Buchanan K.C., for the respondent.

Counsel were heard in argument on the facts.

Maasdorp, J.: "It appears that Lacey entered into an agreement with the Government, undertaking to construct certain buildings at Adelaide, and the Builders' Supply Company (defendant in the Court below) became guarantors that all the duties undertaken by Lacey would be performed. In the beginning of April, 1907, Lacey seems to have got into difficulties. He then owed the company about £275 for goods supplied, and he was also indebted to certain workmen for wages. The company wanted to secure themselves, and got an assignment from Lacey of the £275, which had accrued due to him on the certificates. Later in the month Lacey seemed to have thought that there had been some misunderstanding, and he inquired of the company how matters stood, pointing out that if the company drew all the money there would be nothing with which to pay the workmen. Lacey asked the company if they were prepared to pay the workmen, without whose services he could not proceed with the building, and in reply Mr. Watson (defendant's manager) wrote: "With reference to your favour of the 19th inst., regarding the order which you gave us to receive certain payments from the Public Works Department in connection with your contract at the Adelaide Gaol, we would advise, as we explained to you when the order was given, that sufficient moneys to cover your wages on the gaol would be paid from the further progress payments the Public Works Department would make, wages in the meantime would be advanced by us out of the

progress payments as made." Here, therefore, there is a clear undertaking that the company will pay the workmen. Thereupon, at a later stage, the workmen approached Lacey, and he informed them of this undertaking. Here, then, there is an intimation by one of the parties that the workmen could expect their wages from the company, but still there is no privity of contract between the workmen and the company. Later on, when things became more pressing, the workmen, who were still engaged on their duties, began to press Watson (the company's manager) as to what their rights were. Watson then made statements which the Magistrate had found established the privity of contract. The most important statement was that of Blacker, who said that the result of the interview was that when the men asked for payment, past payment was made, and that Watson then told the men that he had not the money to pay them in full. Blacker said that he distinctly understood that the company was liable for the wages. So also in the evidence of Mr. Luckhurst. There was thus at that time a distinct promise on the part of Watson that he would pay the men, and the contract between them and the company was completed. There was an assignment and undertaking that the company would pay the men. It was quite clear that they gave up the indebtedness of Lacey, which was the consideration for the contract with Watson. The appeal will be dismissed with costs.

1907.  
REX V. DE VILLIERS. { Nov. 4th.  
" 15th.

Butcher's licence—Selling from cart—Act 13 of 1870, Sec. 6.

*A butcher who, having obtained a licence in respect of a certain shop, sends out a cart with instructions to sell meat therefrom is guilty of contravening Sec. 6 of Act 13 of 1870.*

This was an appeal from the decision of the Resident Magistrate, at Somerset Strand, fining the appellant (defendant in the Court below) 10s., for contravening section 6 of Act 13 of 1870.

It appeared that the appellant was a butcher, at Somerset West, and held a licence for the district. He sent meat in a butcher's cart to Gordon's Bay, where it was sold haphazard to whoever purchased it. The Magistrate, in his reasons, said the appellant had

a licence for the sale of meat at Somerset West, and in going to Gordon's Bay, went outside the area, through which action he contravened the Act.

Dr. Greer for applicant, Mr. Nightingale for respondent.

Dr. Greer said that this case was really brought as a test case. His point was that when stock was slaughtered on licensed premises, the mere carrying round of it on a cart for sale was but an extension of his business.

Mr. Nightingale contended that a great hardship was inflicted on the other butchers in Gordon's Bay, who paid a licence there, by this man being allowed to vend meat in this way. He considered it was an illegal action on his part.

*Cur. Adr. Vult.*

*Postea* (November 15th).

Maasdorp, J.: In this case it appears that the defendant, who held a licence to carry on the trade of a butcher at Stellenbosch, obtained a new licence in terms of section 9 of Act 13 of 1870, on the 19th March, 1907, to carry on such trade at lot 1, block L, Main-road, at Somerset Strand. At his butcher's shop in Somerset Strand he cut meat into pieces which were labelled with the weight of each piece, and this meat he sent off in a cart to Gordon's Bay, with instructions to the driver to deliver to customers all that had been ordered from the shop, and to sell the rest there to anyone willing to buy. Meat was accordingly sold not only to customers upon their orders, but also to other persons. For selling to such other persons the defendant is now charged with carrying on the trade of a butcher at Gordon's Bay without a licence, in contravention of section 6, Act 13, 1870. Some authorities were cited at the bar, in which the question was raised as to the nature of the dealings in meat which would constitute the exercise of the trade of a butcher. But it seems to me these cases do not bear upon the present case. It is quite clear that the defendant is a butcher, and holds a licence authorising him to exercise his trade at lot 1, block L, Main-road, at Somerset Strand, and nowhere else. There he carried on his trade by dressing and selling meat, and he delivered the meat there sold to his customers at their residences wherever they might be, as he was justified in doing. But when he actually carried on, through his agent, the driver, this business of selling meat at Gordon's Bay, to persons who came to his cart to buy the meat there, he must be taken to have exercised the trade of a butcher at Gordon's Bay. He was therefore rightly convicted of contravening section 6, Act 13 of 1870, and the appeal must be dismissed.

#### SCHOEMAN V. NOURSE.

In this case the executors testamentary of the estate of the late Stephanus Job Schoeman, of Kombuis, district Oudtshoorn, claimed payment of £2,736 13s. 9d., balance of the purchase price of the farm Bultfontein, district Colesburg, and an amendment of a certain memorandum. To this declaration defendant excepted.

From the declaration it appeared that on June 7, 1904, the late S. J. Schoeman sold to defendant the remaining extent of the farm Bultfontein for £6,300, payable as £2,000 in cash, and the balance in 9 or 12 months. Thereafter defendant desired the contract to be reduced to writing, and signed a memorandum drawn up by the defendant or at his direction. The memorandum was accepted generally by the late Mr. Schoeman save as to (a) the terms directing payment of part of the purchase price to be made at the office of W. E. Gordon Davis, at Colesberg, and (b) the terms directing that transfer should be effected by Attorney W. E. Gordon Davis. As to these terms, defendant repudiated them as forming part of the contract. Plaintiff prayed that the terms might be considered as not inserted in the memo. There remains a balance of £2,736 13s. 9d. due on the contract, and defendant has had possession of the farm, but refused to pay the balance. The exception was that the alleged contract set out in the declaration was a material variance from the written contract set out in the summons. (2) That the allegations in paragraph 4 of the declaration were inconsistent with and contradictory to the allegations in the summons, inasmuch as it was alleged that the late S. J. Schoeman repudiated portions of the written contract, whereas on the summons it was alleged that the written contract was signed by the defendant and entered into by the late S. J. Schoeman.

Mr. Upington for the plaintiff, and Mr. Close (with him Mr. Louwrens) for the respondent.

Counsel having been heard in argument,

Mr. Justice Maasdorp suggested that the case should be allowed to stand over pending the parties interested being able to come to some agreement, and thus saving further costs.

Leave was given to mention the case again.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

REX V. NOVEMBER AND { 1907.  
ANOTHER. { Nov. 11th.

### Evidence of accomplice—Corroboration.

This was an appeal from a judgment of the Resident Magistrate of Graaff-Reinet, who had convicted appellant (Jakie November), of stock theft, in contravention of Act 35, 1893, as amended by Act 7, 1905.

From the record, it appeared that the appellant and one Piet Jantjes, farm labourers, were charged with the theft of two goats, the property of their master, Jacobus Johannes du Toit. Jantjes pleaded guilty to stealing one goat, while November pleaded not guilty. Evidence was led in support of the Crown case, and Jantjes was convicted of the theft of one goat, and sentenced to a term of imprisonment and lashes, and to pay compensation or undergo a further term of imprisonment. Jantjes then went into the box, and gave evidence against November, who was convicted of the theft of one goat and similarly dealt with.

Mr. P. S. T. Jones was for appellant; Mr. Nightingale was for the Crown.

Mr. Jones submitted that the evidence of Jantjes was irregularly admitted against the appellant, seeing that the Crown case had to all intents and purposes been closed. When the verdict had been found against Jantjes there was really no evidence against either of the accused, had it not been for the admission of Jantjes that he was guilty of stealing one goat. He cited *Regina v. Du Preez and Badenhorst* (11, S.C., 274). In the event of this objection not being upheld, counsel argued that the evidence of Jantjes, being that of an accomplice, ought to be carefully scrutinised, and that it was far from conclusive against November.

Buchanan, J.: Two farm servants were charged with stealing two goats, the property of Mr. Du Toit. The prisoner, Piet Jantjes, pleaded guilty to stealing one goat. The prisoner November pleaded not guilty. The case was heard in the usual way. Mr. Du Toit gave evidence to prove that his goats had been stolen, and he and a constable gave evidence as to spoors. Thereupon the Magistrate convicted Jantjes, who had admitted the theft of one goat, and sentenced him, and, after he had been so convicted and sentenced, Piet Jantjes was called at a witness for the Crown against November. The first objection taken is that the evidence of Jantjes was improperly admitted, on

the ground that the case for the Crown was closed. Now it is not an unusual practice for Magistrates, whenever they have two or more prisoners before them, and the evidence clearly shows that one of the prisoners is guilty of the crime, to convict and sentence him, and then allow him to give evidence. This has been done at the Criminal Sessions also. A case has been quoted in which, after the Crown case had been and after the defendant's case had been closed, and the Court had adjourned, the Crown then wished to call one of the prisoners who had been convicted to give evidence against the other, and the Court of Appeal, although there was some difference of opinion, said that, with such an irregularity, the prisoner would be prejudiced, and refused to support the conviction which had been so obtained. That was not the course adopted in this case. I do not think this was an irregular procedure. The conviction of Jantjes was proper and in order. I do not think an irregularity was committed, in that, before any evidence whatever was led for the defence, the evidence of Jantjes against his fellow-prisoner was taken. I fully agree with Mr. Jones that Jantjes must be looked upon as an accomplice, and that the evidence of an accomplice must be most carefully scrutinised, but our law says, provided a crime is proved *aliunde* the evidence of an accomplice may be sufficient to satisfy the Court of the guilt of anybody charged with a crime which is otherwise proved to have been committed. It has been very clearly laid down that it is not necessary to have corroboration of the fact of the guilt of the prisoner against whom the accomplice gives evidence, but it is always admitted that the crime of an accomplice must be looked at critically, and must be most carefully scrutinised. In this case we find very strong and distinct corroboration, especially in the evidence of Mr. Du Toit and of the constable as to the spoors found at the slaughtering place. Under the circumstances, I cannot find any fault with the Magistrate's decision in convicting November. The conviction will be confirmed, and the appeal dismissed.

### REX V. GIBISELA.

This was an appeal from a judgment of the Resident Magistrate of Elliotdale.

Buchanan, J., said that the record had been received, together with the reasons, but a letter had come to hand from the appellant, who said that he was too poor to engage counsel to argue the case for him, and that he was undergoing a term of imprisonment. Under the circumstances, he proposed

to assign counsel, and to appoint Mr. Swift to argue the case for the appellant.

Mr. Swift accepted the appointment, and an order was made accordingly.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

SMART V. ESTATE SIMEY. { 1907.  
Nov. 5th.

#### Will—Interpretation.

*The will of the late Mrs. S. gives and bequeathes to "my son T. J. S., my daughter M. J. W. and my youngest daughter C. S. equal shares in the estate, house and garden known as G. V....., also the piece of ground opposite the gates of G. V., belonging to me as per transfer. Each one of my children named herein to have equal shares in this property for their lives, and after their decease it shall descend to their lawful issue." The three children of C. S. (the plaintiffs) contended that under the terms of the will, T. J. S., M. J. W., and C. S. inherited only a life usufruct in the whole of the property named. The executors of the will (defendants) contended that on the death of Mrs. S. the said three heirs were each entitled to a third share of G. V., free and unencumbered, and that the restriction as to life usufruct applied only to the land opposite to G. V.*

*Held in terms of plaintiffs' contention.*

This was a special case for the construction of certain clause in the will of the late Matilda Simey, of Cape Town.

The special case was set out in the following terms:

1. The plaintiffs are Arthur Samuel Smart and Winifred Mary Smart, the children of Caroline Smart, hereinafter mentioned. The defendants are William Edward Moore and Thomas James Simey, in their capacity as the executors testamentary of the estate of the late Matilda Simey.

2. On or about the 12th day of June, 1882, the said Matilda Simey, then resident in Cape Town, duly executed her last will.

3. By her said will the said Matilda Simey appointed William Edward Moore and Thomas James Simey to be the executors of the said will and administrators of her estate and the said William Edward Moore and Thomas James Simey duly took up the appointment pursuant thereto.

4. By a clause of the said will the testator made the following bequest: I give, devise, and bequeath to my son, named Thomas James Simey, and to my daughter, Matilda Jane Wright; also to my youngest daughter, Caroline Smart, equal shares in the estate of house and garden known as Greenwood Villa, situated between Caledon and Hanover streets. Also the piece of ground opposite the gates of Greenwood Villa belonging to me, as seen pr. transfer, each one of my three children named herein to have equal shares in this property, for their lives, and after their decease, it shall descend to their lawful issue.

5. By a further clause of the said will after making further bequests the testator appointed her said daughters to be joint heirs of the residue of her estate.

6. The said Matilda Simey died on the 2nd day of December, 1884, without having executed any further testamentary disposition in regard to her estate, and leaving surviving her three children, Thomas James Simey, Matilda Jane Wright, and Caroline Smart, and three grandchildren, the plaintiffs above mentioned, and James Greenwood Simey, child of the said Thomas James Simey.

7. At the date of the execution of the said will the said estate of house and garden known as Greenwood Villa was valued for Municipal purposes at £580, whilst the said piece of ground opposite the gates of Greenwood Villa, which was then vacant land, was valued at £20.

8. On or about the 2nd day of December, 1886, application was made by the executors to the Supreme Court for authority to sell the said piece of ground opposite the gates of Greenwood Villa. The said Court authorised the said land to be sold and the proceeds of the sale, amounting to £88 ls., were deposited with the Master of the Supreme Court to the credit of the lawful issue of Thomas James Simey, Matilda Jane Wright, and Caroline Smart, in terms of the order of the said Court.



9. On or about the 27th day of April, 1904, the said executors obtained an order from the Supreme Court authorising them to sell the house and premises known as Greenwood Villa, subject to the condition that the amount realised be paid in to the Guardians' Fund to the credit of lawful issue of the children of the said Matilda Simey. The said sale has not been proceeded with.

10. The said Matilda Jane Wright, who is 61 years of age, is a widow and has no issue. The said Caroline Smart, who is 59 years of age, has two children, the plaintiffs above mentioned, both majors. The said Thomas James Simey has one surviving child, the said James Greenwood Simey, a major.

11. The parties annex hereto a copy of the said will, and beg leave to refer this Honourable Court to the original of the said will when the same is produced from the custody of the Master at the hearing of this suit.

12. The plaintiffs contend: That the estate of house and garden known as Greenwood Villa and the piece of ground opposite the gates of Greenwood Villa were bequeathed to Thomas James Simey, Matilda Jane Wright, and Caroline Smart in equal shares for their lives, and that after the decease of the said Caroline Smart they, the said plaintiffs, are entitled to succeed to the said Caroline Smart's share of the said bequest.

13. The plaintiffs further contend: That on the death of the said Matilda Jane Wright without issue, her said share of the aforesaid bequest accrues in equal shares to the said Caroline Smart and Thomas James Simey for their lives should they be alive, and that thereafter on the decease of the said Caroline Smart, they, the said plaintiffs, are entitled to the said share thus accruing to her, and in the event of one or other or both the said Caroline Smart and Thomas James Simey predeceasing the said Matilda Jane Wright that the said plaintiffs are entitled to the share which would have accrued to the said Caroline Smart had she been alive.

14. The defendants contend: (a) That each of the said three children of the testatrix became entitled on the death of the testatrix to one-third undivided share of the said estate of house and garden known as Greenwood Villa, free and unencumbered. (b) That each of the said three children of the testatrix was appointed fiduciary heir of one-third undivided share of the said piece of ground opposite the gates of Greenwood Villa, and that upon the death of any one of them the said share of such deceased one must go to his or her lawful issue; but if any one of them should happen to die without issue, then the said share of such deceased one shall form part of his or her estate absolutely for the benefit of his or her heirs

testamentary or *ab intestato*. (c) That on the death of any of the said three children of the testatrix there is no accrual of his or her share to the others of them, or to any of their issue.

Wherefore the parties pray for judgment on their respective contentions, and that this Honourable Court may be pleased to direct that the costs in this suit may come out of the said estate.

Mr. Sutton, for plaintiffs; Mr. Louwrens for defendants.

Mr. Sutton submitted that the clause in question should be read as one clause and as conveying one bequest. He cited *Strydom v. Strydom's Trustee* (11 S.C., 425).

Mr. Louwrens submitted that there were two different and distinct bequests in the paragraph in question, and that the restriction applied merely to the ground opposite the gates of Greenwood Villa. He quoted *In re Simey's Estate* (13 C.T.R., 262, and 14 C.T.R., 301). If one bequest had been intended it was strange that the terms "in equal shares" should be used twice, and that there should be a separate description of the property in each sentence.

Buchanan, J.: The question before the Court is the construction of a clause in the will of the late Mrs. Simey. The will seems to have been written by Mrs. Simey herself, and signed by her and duly executed before witnesses. In this will a clause appears giving and bequeathing to "my son named Thomas James Simey, my daughter Matilda Jane Wright, and my youngest daughter Caroline Smart, equal shares in the estate, house and garden known as Greenwood Villa, situate between Oaledon and Hanover streets, also the piece of ground opposite the gates of Greenwood Villa belonging to me, as per transfer." It is sought by the defendants in this case to separate Greenwood Villa from the piece of land outside, opposite the gates, and a declaration is asked that by the will Greenwood Villa was bequeathed to the children named absolutely, and that it is only the piece of ground opposite the gates that is bound by the provisions in the next sentence of the will. After mentioning these two properties, the will goes on: "Each one of my children named herein to have equal shares in this property for their lives, and, after their decease, it shall descend to their lawful issue." Now, reading this, I think the intention of Mrs. Simey was to place both these properties on the same footing. Looking at the subsequent clause, it will be seen that she refers to "each of my children named herein." The "three children named herein" are named specially with reference to Greenwood Villa. There is no gift of the ground outside the gates to anybody, unless it go with the previous bequest. It gives

Greenwood Villa to these people named, and then says, "also the piece of ground opposite the gates of Greenwood Villa, as seen per transfer." If that be the reading of the will and the intention of the testator, then the property must all be included, and "each of the three children named herein" had only a life interest in this property. In all these cases it is the intention of the testator which determines what shall be the construction of the will, and looking at the clauses containing bequests to the same children, it will be seen that the other bequests are also burdened with a usufruct, and it is only a life interest to the children that is disposed of. I think, looking at the will, and reading this clause critically, there can be very little doubt, that the piece of land, which is not disposed of separately from the other must go, as Greenwood Villa is acknowledged to go by the will, and that the last clause of the paragraph of the will refers to the whole of the property and not to the ground only. Judgment will be in favour of the plaintiffs' contention, as contained in paragraph 12 of the special case. There is another contention in this case, and that has reference as to how, at the death of Matilda Jane Wright, her share of the estate is to go. Now, Mrs. Wright is only one of the three children; it is true she is the eldest of the three, but she is only two years older than her sister, and to ask the Court now to make such a declaration is rather, I won't say invidious, but rather premature, because, supposing that the brother and sister died before Mrs. Wright, such a declaration would have no effect whatever, and it would be providing for a case which has not yet arisen, and giving a declaration upon what are at present only possibilities. Under these circumstances, I think it would be highly improper for the Court to give any further order at the present moment. The costs of this case will come out of the estate. I may add that this order does not interfere with any previous order of the Court authorising sale of the property.

[Plaintiffs' Attorneys: Findlay and Tait. Defendant's Attorneys: Moore and Son.]

ESTATE TUDHOPE V. SAND. { 1907.  
Nov. 5th.

**Bond — Co-principal debtors —  
Release by creditor of part  
of the security.**

*Three trustees of certain  
Church property (F., R. and  
S.) borrowed £500 on mort-*

*gage for Church purposes  
from one T., specially hypothe-  
cating certain Church land  
registered in their names as  
trustees. They all bound them-  
selves as co-principal debtors,  
renouncing the benefits of  
excussion and division: and  
also bound their individual  
property as security. R. also  
specially hypothecated certain  
land of his own as additional  
security, which was afterwards  
released by T. After T.'s  
death, his executors obtained  
provisional sentence on the  
bond, and execution was levied  
on the Church property, which  
realized about £150. S. now  
denied that his estate was  
liable.*

*Held, that the fact of T.  
having released a portion of  
the security did not relieve the  
sureties from their liability,  
each in solidum for the balance  
due under the bond.*

This was an action brought by the executors testamentary of the late Francis Tudhope against Friedrich Sand, of East London, to recover judgment upon a certain mortgage bond, upon which defendant was sued as surety and joint principal debtor.

Plaintiffs, in their declaration, said that on the 29th November, 1899, Joseph Fink, Carl Richter, and defendant, in their capacity as trustees for the time being of the Apostolische Kirche, East London, entered into a mortgage bond in favour of the late Mr. Tudhope, for £500 for money lent, under which certain immovable property was hypothecated. They bound themselves in their individual capacities as sureties *in solidum* and joint principal debtors, for the payment of the said sum of £500, together with interest thereon, and insurance premiums, and renounced the exceptions of excussion and division. Interest became due and payable on the 31st December, 1905, but the said interest had not been paid. On the 17th April, 1906, plaintiffs obtained provisional sentence on the bond against Richter, Fink, and defendant in their capacities as trustees, and also as personal sureties. The property hypothecated under the bond had been sold, and a liquidation account had been framed. Plaintiffs prayed for judgment for £427 12s. 1d., with interest from the 1st May, 1907, plaintiffs tendering cession of action against the other sureties.

Defendant, in his plea, said that by the terms of the bond there was bound specially certain piece of land, with the buildings and erections thereon, being remaining portion of lot 2, block F, near East London, the value of which property had at all times material been far in excess of the amounts claimable under the bond. Thereafter, and prior to the 31st December, 1905, the plaintiff, without the knowledge or consent, and to the prejudice of defendant, released the said property from the operation of the said mortgage, and by reason thereof defendant was not liable to plaintiffs in any sum whatever.

Plaintiffs, in their replication, said that at the time of entering into the said mortgage bond, Richter, together with the defendant, and Joseph Fink, became sureties *in solidum* and joint principal debtors, renouncing the benefits of the exceptions, and generally binding their persons and property, movable and immovable, for the repayment of the said sum. Richter, further, in his capacity as surety, as part of his surety obligation, and not otherwise, and for the security of the late Francis Tudhope in case either of the said other sureties, or the said Carl Richter, should at any time be unable to discharge their liabilities, specially hypothecated the remaining portion of lot 2, block F, in the division of East London, belonging to him. Thereafter, prior to the 31st December, 1905, with the knowledge and consent of the defendant, the said remaining portion was released from the operation of the said suretyship in so far as it had been specially hypothecated for the security of the said surety obligation, but Richter, Fink, and defendant were not in any way released from their surety obligations, nor had they been in any way prejudiced.

Mr. Sutton for plaintiffs. Mr. Upington for defendant.

Evidence was given by a clerk in the Master's Office, after which counsel read the record of evidence taken on commission at East London.

Mr. Sutton, in argument, said that his clients were suing Sand as one of three sureties and co-principal debtors, who had renounced the benefits of excussion and division. These three parties had placed themselves except as to the benefit of cession of action in the same position as the principal debtor. This was not a suretyship of indemnity and only in that case would a release or pledge release the surety. He cited Maasdorp's Inst., vol. III., pp. 368 and 373, *Van der Vyver v. De Waver and Others* (4 Searle, 27), *Priest v. Stegmann and Others* (15 C.T.R., 407), *Serrurier v. Langeveld* (1 Menzies, 317), Voet, 46, l. 29 (Swift and Payne's Trans.), and Burge on Suretyship, p. 163.

Mr. Upington said that the defence taken was that there had been a material variance in the contract without

the defendant's consent, and there was clear authority for the proposition that where the contract was varied without the surety's consent he ceased to be bound. The creditor had wilfully prejudiced the defendant. He cited Maasdorp's Inst., vol. III., pp. 376 and 377, and *Van Oosterzee v. McRae* (1 Menzies, 305).

Mr. Sutton having replied,

Buchanan, J.: The executors of Tudhope sue upon a mortgage bond executed in favour of the late Mr. Tudhope for the sum of £500. There were three parties to this mortgage bond. In the first place, Messrs. Fink, Richter and Sand, acting in their capacity as trustees of the Apostolische Kirche, at East London, borrowed £500 for the purpose of building a church on land donated to them for that purpose. The money was borrowed first on the security of the Church property, which was registered in the names of the trustees. Then one of the trustees, Richter, agreed to bind himself as a surety and co-principal debtor, also interposed a piece of land of his own, which was included in the mortgage. Then the three trustees, in their individual capacity, agreed to be security for the due payment of the capital sum. They bound themselves not only as sureties, but as joint principal debtors, and they renounced the benefits of the exceptions of excussion and division, and they bound not only themselves but their property for the due payment of this bond. The executors of Tudhope sued upon this bond, and obtained provisional sentence, and thereafter a writ of execution was taken out against the church property, and the three defendants as trustees, and also against the defendants personally. Under this writ the church property was attached and realised, and about £150 in round figures was realised therefrom. But nothing has been realised from either of the three trustees in their individual capacity. The two trustees, Fink and Richter, abide by the provisional sentence, which was given against them, and, in fact, Richter is said to have tendered to pay his third of the liability to the plaintiffs. But that tender was not accepted, as they were entitled to demand from each defendant payment in full of the amount due. The defendant Sand entered appearance, and the Court allowed him to go into the principal case. The defence set up by him in the principle case is this, that as Richter interposed his own personal property as part security for this debt, and as Tudhope in his lifetime released the landed property so interposed by Richter, therefore Sand (the defendant) is not now liable to pay anything whatever in his personal capacity as a surety. The line of argument, as I

understand it, is this, that if Sand paid as surety he would be entitled to demand from plaintiffs cession of the action against all three defendants, and also with that cession of action plaintiffs would be obliged to deliver all of the sureties held when the bond was executed, and that by releasing part of the securities the mortgagor prejudiced the right of defendant to recover the amount due by the other sureties. It must be borne in mind in this case, that the original obligation was one of liability for the Church, which was the original principal debtor, and that the three defendants bound themselves as sureties. Being sureties, they would be entitled to have the exoneration of the principal debtor, but they specially renounced that right. But, though they specially renounced the right of exoneration, still, as sureties, they are entitled to demand from the debtor to have a cession of action. Now, the question, I think, narrows itself down to this, are the plaintiffs, the creditors, able to give a cession of action to one surety against his co-sureties? And it is clear as the case stands they are so able to give this cession of action. But the further question is whether the fact that the creditor has released certain property which he obtained from one of the sureties is a good ground for holding that the creditor has thereby released the other two sureties from their liability under the bond. I am of opinion it is not. There has been no release of the surety himself, and the creditor can still give cession of action against him. All the sureties remain liable under the bond. There was no warranty of solvency of any one of the sureties given by the creditor. On this simple ground, I think, provisional sentence ought to be confirmed in the principal action, and the judgment against the defendant must be sustained. The balance which is due after the church property has been realised, is £427 12s. 1d., and judgment will be given against the defendant for this amount, with interest *a tempore morae*, and costs.

SCHWARTZ V. BURGER.

1907.  
Nov. 5th.  
" 6th.  
" 7th.  
" 8th.  
" 25th.

This was an action for an interdict and damages. There was a claim in reconvention for damages and for specific performance of contract.

The plaintiff's declaration was as follows:

1. The plaintiff, Schalk Gerhardus Burger, is a farmer, residing in the dis-

trict of Worcester, and is and was at all times material the registered owner of a portion of a farm called De Doorns, by deed of transfer, dated August 14, 1902, and diagram thereto attached, to which plaintiff craves leave to refer when produced at the trial.

2. The defendant, Johan George Bosch Schwartz, is a farmer, also in the said district, and is the owner of a part deducted from the said portion of the farm De Doorns, sold by plaintiff to defendant on July 12, 1902, which said part was transferred to defendant on November 25, 1902, and is marked AXWO on the said diagram.

3. In or about February and March, 1907, defendant wrongfully, unlawfully, and maliciously entered upon and trespassed on plaintiff's said property, and did commit certain unlawful acts of trespass thereon, and otherwise caused damage to plaintiff, by digging or causing to be dug through plaintiff's orchard and cultivated ground a certain trench, about 4 feet deep and some 200 yards in length, commencing at or about the point "1" on the said plan, and running thence to the point "2" on the line "XB" on plaintiff's boundary, as shown on the said plan.

4. Defendant has laid certain pipes in the said trench and on plaintiff's said property, in the left bank of the Hex River, which skirts plaintiff's said boundary.

5. Defendant has further erected an iron post on plaintiff's ground, on or near the said left bank of the river.

6. By reason of the said acts of trespass, plaintiff has suffered damage in the sum of £100.

7. Defendant threatens to continue and persist in the said acts.

8. By reason of the premises, plaintiff claims: (a) An order calling upon defendant (1) to remove the said pipes wrongfully and unlawfully laid upon and across plaintiff's said land; (2) to reinstate the said trench or excavation so wrongfully and unlawfully made; (3) to remove the said iron post erected by defendant on plaintiff's property; (b) an interdict restraining defendant from continuing and repeating the said acts of trespass; (c) the sum of £100, as and for damages; (d) alternative relief; (e) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 4, and 5 of the plaintiff's declaration.

2. He also admits paragraph 2 thereof, and says that he purchased the said property from the plaintiff, in terms of and subject to the conditions of a certain contract of sale, dated the 12th of July, 1902, which is annexed to and forms part of the defendant's deed of transfer, and to which he craves leave to refer at the trial.

3. By the said contract, it was provided, *inter alia*, that the defendant, as purchaser, should have the right to



make a dam upon a site to be pointed out to him on the plaintiff's ground, and the plaintiff bound himself to supply the defendant with a 2½-inch (pipe of) water, which was to be brought into the said dam from a certain agreed point on the plaintiff's ground, the defendant to have the right of making a cutting or cuttings on the plaintiff's ground from the said dam to his own ground.

4. At the time the said contract was entered into, it was contemplated by the parties that the supply of water for the said dam would be obtained from the neighbouring land of one Wolsaardt, but it was subsequently found that the said water could not be obtained therefrom, and an arrangement was thereupon made between the parties whereby the plaintiff was to supply the said stipulated quantity of water from certain points on the side of the railway on the plaintiff's land, this water to be conveyed to a dam on the defendant's land, the latter to get certain monetary compensation for the abandonment of his right to the dam referred to in paragraph 3 hereof, and to cover the cost of constructing the proposed dam on his own ground.

5. In pursuance of the above arrangement, water was obtained from the locality referred to, and taken in pipes from these sources to a dam constructed by the defendant on his own ground, but the supply so obtained, though it has been used for a considerable period, proved insufficient to fill a 2½-inch pipe, and thereafter, as the plaintiff had moreover failed to pay the compensation agreed upon as aforesaid, it was agreed that he should, in lieu of such compensation, allow the defendant to make certain two furrows across the plaintiff's land from the Hex River side, for the purpose of conveying water to the said dam on the defendant's land.

6. The arrangement last referred to was however also found unsatisfactory in practice, and eventually on or about 22nd January, 1907, it was agreed between the parties that the plaintiff should allow the defendant to dig a trench across the plaintiff's land from a point on the bank of the Hex River to lay pipes in the said trench, and by this means to convey a supply of water from that quarter on to his own land. A portion of the said trench extending for a distance of about 200 feet had to be covered in by the defendant. The said trench was constructed in accordance with the above arrangement, and after the pipes had been laid therein, it was duly covered in. The said trench and pipes are those which the plaintiff now seeks to have removed.

7. The erection of the iron post mentioned in paragraph 5 of the declaration, as well as the construction of all the works complained of by the plaintiff as acts of trespass, took place with the

plaintiff's consent and in pursuance of the said last mentioned arrangement.

8. The parties never intended by any of the aforesaid arrangements to release the plaintiff, nor was he thereby released, from his obligation to supply the defendant with the full quantity of water stipulated for in the said contract of sale, nor did the defendant at any time waive his right to such full supply; on the contrary, he has throughout and repeatedly claimed the same from the plaintiff, but as yet without success.

9. Subject to the above, the defendant denies paragraph 3 of the declaration and also paragraph 6 thereof.

10. He admits paragraph 7, and says that he is lawfully entitled to the free and undisturbed use of the said trench and pipes.

Wherefore the defendant prays that the plaintiff's claims may be dismissed with costs.

For a claim in reconvention, the defendant said:

11. The defendant (now plaintiff) craves leave to refer to the pleadings in convention.

12. Through the failure of the plaintiff (now defendant) as aforesaid to deliver to the defendant the full and proper supply of water stipulated for in the said contract of sale, to wit, a full 2½ inch pipe of water, the defendant has already sustained damage to the extent of £500.

Wherefore the defendant (now plaintiff) claims: (a) An order compelling the plaintiff to deliver to him the said full 2½ inch supply of water, or, in the alternative, payment of the sum of £2,000 as damages for breach of contract. (b) The sum of £500 as damages for the plaintiff's failure in the past to deliver the said full and proper supply of water. (c) Alternative relief. (d) Costs of suit.

The plaintiff's replication and plea to claim in reconvention was as follows:

For a replication to defendant's plea, plaintiff says:

1. With regard to paragraphs 2 and 3, he admits that the said purchase was subject to the said conditions of sale, and for greater certainty craves leave to refer thereto for the full terms and true intent thereof, and he annexes hereto a true copy of the original, which is in Dutch, and also a true translation thereof.

As to paragraphs 4 and 5, plaintiff says that, in accordance with the said conditions, the stipulated quantity of water was brought from certain points situated on plaintiff's land in certain 3-inch and 2-inch galvanised pipes supplied with defendant's consent by plaintiff in or about February, 1904, in lieu of the iron pipes mentioned in the said conditions, and laid by defendant in accordance with clause 2 of the said conditions; and, further, that the said points were "the certain place" on the plaintiff's ground agreed upon be-

tween and in the contemplation of the parties as therein stated.

3. Defendant constructed the said dam in or about November, 1902, to February, 1904, and thereafter fenced the boundary between plaintiff and himself, when it appeared that the said dam, instead of being wholly on plaintiff's ground in terms of the said conditions, was partly upon plaintiff's ground, but for the most part on the ground purchased by defendant, and plaintiff thereupon measured off portion of his (plaintiff's) land adjoining the said dam of the size stipulated for the said dam in the conditions of sale, and gave possession of the same to defendant, who did not thereon construct the dam agreed, but with plaintiff's acquiescence used and still uses and enjoys the said portion for purposes of cultivation.

4. The said pipes were, and are, adequate and sufficient to carry the stipulated quantity of water, of which there is ample supply, to the said dam, and plaintiff says that if they do not at present do so it is owing to the bad workmanship and neglect of the defendant in and about the laying of the said pipes and the cleansing of the said pipes and the intakes thereto from time to time.

5. With further reference to paragraphs 4 and 5, and with reference to paragraphs 6 and 7, plaintiff specially denies that any agreement has at any time been made between him and defendant entitling the latter to make the trenches, lay the pipes, or erect the post complained of upon his land, and says that he has in all respects performed his obligations under the conditions of sale.

6. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the plea, he denies the allegations of fact and conclusions of law therein contained, joins issue thereon with the defendant, and again as before prays for judgment with costs.

As a plea to the claim in reconvention, plaintiff (now defendant) craves leave to refer to the several paragraphs of the replication, and denies that he has failed to deliver the full and proper supply of water stipulated for in the said contract, and that defendant (now plaintiff) has suffered the alleged or any damage. Wherefore plaintiff (defendant in reconvention) prays that defendant's (now plaintiff's) claim in reconvention be dismissed with costs.

The plaintiff had withdrawn his claim, and the case had been set down by the defendant on his claim in reconvention.

Mr. Schreiner, K.C. (with him Mr. Struben), for plaintiff. Mr. Burton, K.C. (with him Mr. Pohl), for defendant.

Mr. Burton, in reply to the Court, said that the whole claim in reconvention was for the 2½ inches pipe supply

of water, and for £500 damages for past failure to supply this. Defendant (plaintiff in reconvention) claimed specific performance of contract, and there was an alternative claim for damages.

Johan G. B. Schwartz, the defendant in the case and plaintiff in reconvention, gave evidence as to the arrangement entered into in 1902 with Burger, and in regard to the disposal of the water. He described the subsequent efforts made to obtain further water. In March, 1903, witness agreed with Burger that the latter should pay him £150, and that in consideration of that witness should give up the right to have the dam on Burger's ground. It was much more difficult to make a dam on witness's property than to make one on Burger's ground, and Burger agreed to give him £36 on account of the extra expense. After the completion of the dam, Burger did not pay the £36, and witness, instead of that, claimed the piece of ground belonging to Burger, upon which he trespassed in the making of the dam. Burger never admitted this claim. Witness had neither got the £36 nor the £150. The witness gave evidence in detail relative to subsequent work and agreements, and specified the damage which he had suffered on account of not having sufficient water.

Willem Hamilton, farmer, of Worcester, said that in 1903 and 1904 he resided on Burger's farm. On the piece of ground he leased there was a small spring of water which he used for his gardens. He gave up the spring to Mr. Burger in February, 1904. Mr. Burger then told him that he had sold land to Mr. Schwartz with the right to 2½-inch pipe of water. Burger was under the impression that he could get the water from Wolfardt's. The witness indicated the position of the spring on a plan. Burger employed witness to open up the spring, but they got very little more water thereby. Witness tested the flow by means of a hole in a plank. The hole was made by his son-in-law. The water filled about three-quarters of the hole. It was sometimes less, but never more.

In cross-examination, the witness said he was not told to measure the water. He did not know how much water was there. He told his son-in-law to make a 2½-inch hole in the plank. Mr. Burger had asked him whether he would be able to find a 2½-inch pipe of water. He told Burger it was a 2½-inch hole. The hole was a round one.

Further evidence was called for the defendant (plaintiff in reconvention), in the course of which it was stated that Burger had given instructions to measure a 2½ inch pipe of water. In order to ascertain the yield of a certain spring on Burger's property, a plank was used in which a circular hole 2½ inches in diameter was used. A neighbour of the parties named Wolfardt said that

at the time of the sale by Burger to Schwartz, Burger approached him with a view to buying a certain spring. Burger said he would measure the water by putting a plank in the furrow and cutting a hole in the plank of  $2\frac{1}{2}$  inch breadth.

Evidence was given by Dirk Meiring, farmer, of Worcester, and member of the Worcester Water Board; George Wm. Gie, farmer, and member of the Water Board, and others, on the point of the loss caused through the lack of water and the depreciation of the property thereby, and also with regard to the customary meaning of a  $2\frac{1}{2}$  inch supply. It was stated that it was an accepted custom that  $2\frac{1}{2}$  inches of water meant a  $2\frac{1}{2}$  inch pipe—a pipe with a diameter of  $2\frac{1}{2}$  inches.

In cross-examination, Mr. Meiring said that he did not know of any cases in which water was measured by a rectangular-shaped measure. When water was sold, the idea of the parties was to have a pipe measurement. He had seen divisions made through round holes. Mr. Wright, engineer, said that in his experiences in connection with irrigation works, he had found that it was understood that  $2\frac{1}{2}$  inches of water meant a supply through a pipe with a diameter of  $2\frac{1}{2}$  inches.

For the plaintiff (defendant in reconvention), a former tenant of Schwartz, named Van der Merwe, was called. He said that on one occasion, after the visit of an engineer, Schwartz said to him, "I have enough water, but I want to see what I can get." Mrs. Van der Merwe gave corroborative evidence.

John Brown Ellis, an engineer, residing at Worcester, stated he was instructed by Mr. Burger to go to De Doorns and go over the property of plaintiff and take particular note of the water he was supplying to Mr. Schwartz. He returned and made a survey of the place, and put in plans of some. He accurately surveyed the fountains and the pipe lines. There was no construction to prevent waste. The water was not properly kept nor saved. He found about 8 gallons of water per minute at the outflow. There was a continuous flow of water.

Stephanus Klopper, a retired farmer, who had farmed for many years in the Over Hex, said: By  $2\frac{1}{2}$  inches of water, farmers understood that it meant the quantity of water that would pass through two single inch pipes and a half-inch pipe, and not through a pipe of  $2\frac{1}{2}$  inches' diameter, as that would mean nearly five inches of water. He measured the water in dispute on November 1, and found about three inches of water.

Witness, in cross-examination, thought Schwartz had paid a good price for the farm, with a five inches supply of water, as he measured it. He always

measured the water with round inch holes.

In reply to the Court, the witness said many farmers in the district had more than five inches of water. Two-and-a-half inches of water would not be of much use to a farmer.

Schalk Johannes Rabie gave corroborative evidence.

An appraiser named Lindenberg gave evidence in support of Burger, to the effect that he presumed the parties themselves would understand what was meant by  $2\frac{1}{2}$  inches. They would have a definite understanding on it.

In cross-examination, the witness said he never knew farmers to sell water by the inch for irrigation purposes.

In re-examination, he said farmers usually sold by time.

Schalk G. Burger, the defendant in reconvention, said he had lived for 22 years at the place in question. He became owner of the farm in 1901, shortly before he sold the piece to Mr. Schwartz. Vermullen was negotiating to hire the portion of the farm purchased by Schwartz from witness, before it was sold. There was a man named Smitten farming there, before witness became owner. He wanted to hire the ground in question. Witness tried to get water from Wolfaard, but was unsuccessful. Mr. Wolfaard was mistaken when he said witness said he wanted the water for Schwartz. Witness showed Schwartz where the water was to come from. He did so before the contract was signed. The contract was drawn up on the authorisation of witness and Schwartz by Mr. Bland. Witness showed Schwartz where the dam was to be constructed. Witness never agreed that the dam should be erected where Schwartz said it was. Witness denied that he promised Schwartz £150 to change the site of the dam. Witness used to allow Schwartz to draw water from his dam for almost a year, until his own was completed. When Schwartz erected his dam, the ground was not fenced. Witness denied that he agreed to pay Schwartz £36 in consideration of his having built the dam on his own ground. He gave him a piece of ground equivalent in extent to the piece used for the dam. Witness had no idea that the water should pass between a  $2\frac{1}{2}$ -inch pipe, he thought it should pass between two single-inch pipes and a half-inch pipe.

In the course of cross-examination, Mr. Burger said he did not know what Schwartz thought of the means of measuring. Witness had often seen water measured in the way he suggested. He saw it at Robertson on his father's farm. Witness could not say what the dispute was on that occasion, but he saw the water measured by a rectangular hole. He did not remember any other cases. In witness's part of the country they conveyed water by pipes. The water was measured in a square hole.

Witness denied that the arrangement was for water coming through a 2½-inch diameter pipe. The stream of water through a 2½-inch rectangular hole would be very small. The ground Schwartz purchased would require a lot of irrigation. Witness could not say how much of the ground Schwartz had irrigated. Witness denied having asked Hamilton to give up the spring. He did not ask either of them to open up the spring, to see if they could get enough water to fill a 2½-inch hole. He just asked them to open up the fountain. He could not say how it was that the water was measured through a 2½-inch hole. He did not place the board in the furrow. Hamilton took him the plank, and he threw it away. The evidence that he went to see the water running through the plank was incorrect. Witness and a young man named De Vos, now resident in the Transvaal, measured the water with a plank he made himself. It was measured at the intake, and the two supplies together were measured. Witness could not say if Hamilton knew about this. Soon after the pipes were laid, Schwartz began to complain that he was not getting the proper quantity of water. It would be about a year. Witness did not remember having told Schwartz that he had measured the water. Schwartz had a zinc plate, with a 2½-inch hole in it, across the furrow. Witness did not speak about it when he saw it. Witness took an engineer out to measure the water. The engineer was now in America. Schwartz made his dam about the beginning of 1904. Witness agreed to have the intake cemented, but not on the understanding that he would get a supply from Wolfaardt. Up to the time the springs were opened, Schwartz got water from witness's dam. He gave it whenever Schwartz asked for it. He did not do it only when he could spare it. Witness had not a large supply of water, but he did not irrigate very much land. The water given to Schwartz was led through a 5-inch pipe. That was in 1904, but since then he had cultivated largely, and could not spare any water now. Witness contended that he had fulfilled the terms of the contract.

In re-examination, witness said he made the agreement with Smeeten, and not with Hamilton. He never agreed with Schwartz that the water was to be through a 2½-inch pipe. When the engineer went to the farm it was shortly after witness heard that Schwartz was claiming the 2½-inch pipe supply. Witness took up the position that he had done all he should do, after he received the report from Lewis. Witness never refused water when it was required. The bond passed by Schwartz in favour of witness for £1,900 had the condition that the capital should not be called up

before 1905; £1,100 was written off in September. Witness could not say how it was that Schwartz paid before the money was due.

Further cross-examined by Mr. Burton, witness said he did not ask Schwartz to advance him money.

*Postea* (November 25th).

Maasdorp, J.: The plaintiff sold to the defendant on the 12th day of July, 1902, the lower portion of his farm, De Doorns, and further agreed that the buyer should have the right to construct a dam in the seller's ground and in a spot indicated by him within a superficial area of 22,500 square feet. The next clause I shall give in the original Dutch, because some question might be raised as to its exact equivalent in English: "De verkooper verbindt zich hierbij den koper te verschaffen met een twee en een half duim water." The translation of this annexed to the plea is: "The seller binds himself to provide the buyer with two and a half inches of water." If this were the true translation there might be little difficulty in construing its meaning, but it seems to me to be a rendering somewhat too free. Mr. Lindenberg, one of the witnesses, who is a sworn translator, gave it as "a two and a half-inch water," and "a two and a half-inch supply of water." This appears to be more accurate. The first rendering would bear the meaning that the quantity of water supplied should be measured by a flow through three orifices, two of an inch diameter, or an inch square, and one of half an inch diameter, or half an inch square; these orifices forming cross sections perpendicular to the level flow of the water. The latter rendering creates the difficulty of construction in this case, upon which the main issue between the parties rests. The defendant states in his plea that under the above stipulation the plaintiff bound himself to supply the defendant with a two and a half-inch (pipe of) water, but the supply furnished, though it has been used for a considerable period, proved insufficient to fill a two and a half-inch pipe. The defendant, upon the ground that the words in the contract are uncertain in their meaning, and require explanation from extrinsic evidence, tendered in the first place evidence to prove that by custom and usage the words in the contract had acquired amongst farmers a special and peculiar meaning, and that the contract was to be construed by the light of such usage. This evidence was objected to on behalf of the plaintiff, but upon my suggestion, when it appeared that both parties were prepared with evidence upon the point, the evidence was admitted. Strictly taken, it seems to me, where a party intends to raise such a contention as the defendant relies upon, the existence of the alleged usage or custom



should be pleaded. Whether the words in a contract are ambiguous or not, it is open to a party to show that in a certain business, trade, or locality they have acquired in dealings a special or peculiar meaning different from their ordinary or popular signification. Now, upon the evidence there appears to me to be little difficulty in disposing of this part of the case. The variety of opinion expressed by the witnesses goes to prove that no general or universal custom or usage exists in the district in question, or anywhere, which has given a definite and peculiar meaning to the words in question. The evidence of the engineer is of the most meagre character, consisting of casual conversations with farmers. The evidence of the farmers only proves that in disputes between farmers certain means are employed in measuring the water, and no particular words or terms of agreement have come up constantly in dispute for decision so as to have given by usage a peculiar or local signification to those words. And the mode of measurement spoken to by the witnesses vary greatly. Under the circumstances the words in question, if capable of construction, must be construed irrespective of any custom or usage. There is no proof that “a two and a half inch supply of water” has come by usage to mean a supply of water that will flow through a perpendicular circular orifice of two and a half inches diameter, with a sufficient head of water to give a full flow through the orifice. But then the defendant tendered evidence of another character to prove that the parties actually intended that the supply of water should be measured in that manner. This evidence consisted of conversations, declarations, and acts of the parties at the time of the agreement and thereafter. Objection was also raised to the admissibility of this evidence, and here again upon my suggestion the legal point was reserved and the evidence admitted. The evidence upon this point is mainly the statement of defendant that at the time of the agreement it was arranged that he was to get a two and a half inch pipe of water; that of Wolfardt, who says the plaintiff told him in conversation that the water was to be measured through a two and a half inch pipe; and the evidence of Hamilton, that at the request of the plaintiff he had a round hole of two and a half inches diameter made in a plank to measure the flow of the water. It was contended that this evidence was admissible under the principle of law that parol evidence may, in all cases of doubt, be adduced, explain the written instrument, or, in other words, to enable the Court to discover the meaning of the terms employed, and to apply them to the facts; as it is expressed in Taylor on Evidence, section 1,158. Now, assuming that this

is a case in which extrinsic evidence is admissible to explain the document, then it remains to consider what kind of evidence is admissible for this purpose. Powell, in his work on Evidence, 8th edition, page 383, says: “In almost all cases where extrinsic evidence has been received to explain written evidence, it will appear that it had been received, not in form of declarations of intention by the parties, but in the form of collateral and surrounding facts, which, like every other species of presumptive evidence, may reasonably be connected with the substantial issue, and so form data to aid the Court or jury. They must be related to the written evidence, and yet independent of it. They must not be personal declarations of a party, but distinct incidents, which may be presumed to have been present to the mind of the party, without wearing the suspicious form of oral statements.” We find the following passage in Taylor, section 1,193: “It, further, almost seems that when a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses present at the time of its being made, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms. Even conversations between the parties when the contract was being made, have, on one or two occasions, been received, in proof of the sense which they attached to the ambiguous expressions. The principle of these cases is, however, not very clear, and no great weight should be attached to them.” The cases here referred to by Taylor are chiefly American cases, and we have the view of an American writer upon this point, written after the cases were decided. Parsons, in his work on Contracts, in section 564, says: “If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by ‘extrinsic testimony.’ Then he adds in a note upon the passage: “This intention, of course, is to be ascertained, in all cases, except that of latent ambiguity proper, by a development of the circumstances under which the instrument was made. It cannot be ascertained by bringing forward proof of declarations or conversations which took place at the time the instrument was made, or before, or afterwards. After considerable confusion caused by some anomalous early cases, the law upon this point, especially in reference to wills, is clearly settled in England.” It is quite clear from these authorities that evidence of statements made by the plaintiff at the time of making the contract or thereafter is not admissible to explain the meaning of words used in the written agreement, or the intention of the parties. But it may be said in this case we have

more than mere declarations, we have the conduct of the parties in the employment by them subsequently of boards with round holes of  $2\frac{1}{2}$  inches in diameter to measure the water. But the incidents and circumstances of which proof is admitted according to the authorities are such as existed at the time the agreement was made, and thus influenced the parties, not matters which occurred after the contract was concluded. The Court must therefore construe this contract without the aid of custom or usage, or the declarations of parties. Now, although the words used in the contract give rise to some difficulty of construction, it cannot be said that they are incapable of having a distinct and definite meaning annexed to them. The document speaks of water as being measured by inches. In estimating the volume of water passing in a stream, when not possessed of the means of ascertaining the quantity produced in any given time, one would naturally think of the dimensions of the stream and the rate at which it is flowing. The dimensions would naturally be taken as the depth and breadth of the stream, and as from time to time this primitive way is employed to measure streams of no large volume, but varying in size, some unit of measurement would suggest itself. Considering the usual size of the streams in this country, this unit would not be a large one, and accordingly the unit of one inch would be taken, as it actually has been taken. Now, to my mind, the Court is entitled to look to such extrinsic circumstances as these to aid it in ascertaining the intention of the parties. Having once adopted the unit of one inch, it would follow that in speaking of a number of inches in a contract the parties must be taken to intend a multiple of this unit. The language cannot be construed in the sense contended for by the defendant; that is, to take the number of inches mentioned as signifying the diameter of a pipe carrying the water. We must bear in mind that the inch unit of measurement was in use long before pipes came into common use. I take the words, "The seller binds himself to provide the buyer with a two and a half-inch supply of water" to mean the quantity of water which will flow through three orifices, two of an inch diameter or square, and one of half an inch diameter or square. These orifices being taken separately and in one, and sufficient head being allowed to give a free flow. The parties seem themselves to understand clearly the operation of this necessary head of water. It might have been a question whether square or round orifices should be used, but the plaintiff being willing to give the defendant the benefit of a single rectangular orifice one inch in height and  $2\frac{1}{2}$  inches in length, it is

not now necessary to discuss that point. That quantity of water has in the past been supplied by the plaintiff to the defendant, and no breach of contract has been proved. Judgment must be given for the defendant in reconvention upon the claim in reconvention, with costs.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Bisset and Hofmeyr.]

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

ADMISSION. 1907.  
(Nov. 5th.)

Mr. Roux moved for the admission of Rubin Hermann Brande as an attorney and notary. Counsel explained that the applicant was articulated as Hermann Brande, but his real name was Rubin Herman Brande.

The application was granted.

### MALONY V. MALONY.

In this action the plaintiff, Ann Elizabeth Malony, of Wynberg, sought an order for the restitution of conjugal rights against her husband, failing which a decree of divorce.

The plaintiff's declaration stated she was married in Bradford in 1901, after which she came to South Africa. In 1904, respondent deserted her, and had failed to provide for her.

Mr. W. Douglas Buchanan appeared for applicant.

The plaintiff, Ann Elizabeth Malony, stated she was married to defendant at St. Clement's Church, Bradford, England, in July, 1901. She produced a copy of her marriage certificate. The original had been mislaid. Witness's husband came to South Africa in May, 1902, to work with her brothers, who were in business in Cape Town. Witness followed him in the following September. She resided in Cape Town for a time, and then went to reside at Wynberg, where there was a branch business. She came back to reside in Cape Town, but subsequently returned to Wynberg. Her husband was unsatisfactory at his work, and her brother could not keep him.

[De Villiers, C.J.: Did he drink?]

Witness: Not much.

Mr. Buchanan: No, my lord, they complained of the way he carried out

the duties entrusted to him in a laundry business.

Witness, continuing, said her husband went to England in September, 1904, and she had only heard from him three times since.

In reply to the Court, the witness stated that she had not written to her husband, asking him to return to her. There was one child of the marriage, of which she asked charge. There was no property in the estate.

[De Villiers, C.J.: Have you written to him?]

Witness: I wrote in reply to all his letters.

[De Villiers, C.J.: I see he complains in one letter here that you have not written for over a month.]

An order for the restitution of conjugal rights on or before January 12, was granted. The return day was fixed for February 1, when proper proof will have to be given of service of the summons, and the original marriage certificate produced.

#### HILL V. HILL.

In this action Lucy Hill sought a decree of divorce against her husband, James Hill, on the grounds of adultery.

The plaintiff's declaration stated she was married to defendant on June 29, 1898, in community of property, at St. Oswald's, Cornwall. There was no issue of the marriage. Defendant had committed adultery in 1905, 1906, and 1907 with one Annie Lambe.

Mr. Toms appeared for applicant.

The applicant stated that two days after her marriage, her husband left her to come to South Africa. For some time he allowed her £2 a month, but when this stopped she wrote out to his employer, and found that he was living with a woman by whom there was one child.

[De Villiers, C.J.: Did you know when he married you that he was going to leave you in two days?—Yes.

[Why did you not come with him?—I had no money.

[Did you know he had no money when you married him?—Yes.

Doctor Wood stated he attended the reputed wife of James Hill during her confinement.

James Christie, an attorney, stated he served the declaration on defendant, who admitted that applicant was his wife, and that he had committed adultery with Annie Lambe, and that he had been living with her as Mrs. Hill.

The order was granted, with costs, the defendant to supply the plaintiff with £3 per month, the first payment to be made on December 1.

#### GENERAL MOTIONS.

*Ex parte* VAN DE VENTER. { 1907.  
Nov. 5th.

Mr. Payne moved for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

*Ex parte* SWART.

Mr. J. E. R. de Villiers appeared for applicant, and Mr. Alexander appeared for respondent.

Mr. De Villiers explained that a rule nisi had been granted, calling on the respondent to show cause why the executor of the estate of Daniel Swart should not be interdicted from paying over any portion of the inheritance to the respondent, and why Abelkop and Bailomitz should not be restrained from paying over to the respondent any money due by them.

There was no proof that the rule had been served on the executor and on Abelkop and Bailowitz.

Counsel read further affidavits made by applicant against respondent, alleging adultery and prodigality, and alleging that if this money was placed in his hands he would spend it all. She was bringing an action against him for judicial separation.

In replying affidavits, the respondent denied the allegations of adultery and prodigality, and stated he had asked the applicant to return to him, and he would maintain her.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: I understand applicant, in an action, claims not only the division of the joint estate, but also the maintenance of herself and children, and it is quite clear, therefore, that full justice might not be done if the Court merely prohibited payment of the half of the proceeds of the sale. It may be that the applicant may show in the action she is instituting that she is entitled to more than one-half. Moreover, if the respondent did sell this property at a gross undervalue, it may be a question whether that would not be sufficient ground for her claiming more than half the price realised. The respondents Abelkop and Bailowitz have received notice of this application, and have not appeared, and therefore do not seem interested in the passing of the transfer. My own view is that at the trial we may learn all the circumstances of that sale, and I do not see that any injustice will be done if the transfer is delayed until the action is decided. The Court will therefore make the rule absolute, and the interdict to continue pending the result of an action by applicant against respondent for a judicial separation, the costs to go by result.

KRAITZICK V. ARLOSOROFF.

Partners—Good faith—Interdict.

*It is not the practice of the Court to interfere between partners by interdict, unless it is proved that there has been want of good faith, or conduct contrary to agreement between the partners.*

This was the return day of a rule nisi interdicting one Arthur Ettlinger from parting with certain funds in his possession, pending an action to be brought. The present application was to make the rule nisi absolute.

The applicant's declaration set forth that he had advanced the respondent £20 to purchase a certain quantity of iron. The iron was purchased by Ettlinger for £26 15s., and applicant applied for the return of his £20 and half-share of the profits, and statement of accounts, which he had not received. Therefore this application was made to restrain Ettlinger from parting with certain moneys in his possession, pending an action. It was further alleged that the respondent intended leaving the Colony, and that he was not solvent.

The respondent's plea stated that he did not intend to leave the Colony, and he was perfectly solvent, and that he intended defending the action that might be brought.

Mr. Howse appeared for applicant, and Mr. Toms for the respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: I had considerable doubts whether this order should be granted, but there was a statement on the original affidavit that the £20 had not been returned to the applicant. There was a statement that the applicant asked repeatedly for a statement of account, and that the respondent had failed to render it. There was a definite statement that as soon as he had received payment from Ettlinger he was going to Johannesburg, or about to leave the country; and, further, there was the definite statement that Ettlinger had bought the iron from the respondent. The affidavits now put in place an entirely different complexion on the matter. There is no proof that he is going to hurry away out of the country. In the first transaction it was agreed that there should be further transactions. It also appears that Ettlinger has not bought this iron, as there is a dispute about the purchase, and if that is so, I am not prepared to make the rule absolute. It is not the practice of the Court to interfere by interdict between part-

ners, unless the Court is satisfied that the partner against whom the interdict is sought has acted in a manner contrary to good faith or to the agreement between the partners.

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*Ex parte* RUDMAN.

Mr. Lewis moved for an order authorising the transfer of certain property in which minors were interested. The Master's report was favourable.

Order granted in terms of Master's report.

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*Ex parte* INSOLVENT ESTATE BASSON.

Mr. Douglas Buchanan moved for the appointment of a commission in insolvency.

Order granted, the Resident Magistrate of the Paarl to be commissioner.

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*Ex parte* ESTATE BOYES.

Mr. Douglas Buchanan moved for leave, on behalf of the executors of the estate of the late Cornelius Boyes, to mortgage certain property.

Order granted in terms of Master's report.

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*Ex parte* BEHR.

Mr. De Waal moved, on behalf of Johannes Behr, to assume the death of Amos Behr, his father, 27 years ago.

Counsel read affidavits, stating that Amos Behr left Bredasdorp in 1880 to work on the railway between Worcester and Beaufort West, and was reported by a friend to have died of hemorrhage.

Order granted.

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DE CLERK V. DU TOIT.

Dr. Greer appeared for applicant, and Mr. Stowe watched the case.

Dr. Greer moved to have an arbitration award made a rule of Court. Granted.



# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

*Ex parte* INSOLVENT ESTATE (1907.  
DU PLESSIS. (Nov. 6th.

Mr. Roux moved as a matter of urgency on behalf of certain creditors in the insolvent estate of David Johannes du Plessis for the appointment of a provisional trustee. The crops in the estate were ripening, and if they were not gathered without delay the creditors would suffer great loss. It was suggested that Jacob Isaac de Villiers, A.P. son, of Paarl, should be appointed as provisional trustee, with power, if necessary, to engage labourers to gather the crops.

Order granted.

THOMSON V. ZUID AFRIKAANSCH RIJ-  
TUIGEN BOUW MAATSCHAPPIJ, LTD.

This was an action brought by Wm. Charles Thomson, an importer and manufacturers' representative of Cape Town, to recover from the defendants £92 13s. 11d., £10, £1 16s., and 18s., in respect of certain goods supplied.

The plaintiff's declaration was as follows:

1. Plaintiff is William Charles Thomson, an importer and manufacturers' representative carrying on business at Cape Town; defendant is a company with limited liability duly registered under the Company's Act (25 of 1892), and carrying on business at Huguenot, in the division of Paarl.

2. Plaintiff is the representative within this colony of several English firms, for manufacture builders' requisites, and samples of whose wares he keeps in stock.

3. During and between the months of January and July, 1907, plaintiff supplied to the defendant company on the order of their duly authorised agent, one Laurysen, goods to the value of £394 10s. 3d. sterling, in respect of which the defendant company has paid £271 17s. 8d. sterling, and received various allowances and discounts amounting in all to £29 18s. 8d. sterling, leaving a balance of £92 13s. 11d., due and payable by defendant company to plaintiff.

4. Certain locks supplied by plaintiff to defendant company among the aforesaid goods proved not to be in accordance with the order, and plaintiff undertook to replace the said locks by others of the required type, and did actually so replace them. Prior, however, to the arrival of the locks of the required type, the defendant company without the

knowledge or permission of the plaintiff placed the locks first supplied temporarily in a building which they were constructing; there the said locks remained until replaced by the new locks. The locks first supplied were returned to plaintiff by defendant company in such a condition owing to incompetent handling, bad treatment, and improper packing by the defendant company, that plaintiff has suffered loss and damage thereby in the sum of £10 sterling, for which he says that the defendant company is liable.

5. Certain two of the locks replaced as aforesaid were not returned by defendant company to plaintiff, and plaintiff claims in respect thereof the sum of £1 16s. sterling.

6. Plaintiff also, at the request of the defendant company, sent certain fanlight cords to replace cords that had been originally sent, and defendant company has failed to return twelve of the fanlight cords so replaced, the value whereof plaintiff says is 18s., for which plaintiff says that defendant company are liable.

7. Plaintiff says that the defendant company has refused or neglected, and still refuses or neglects, to pay the aforesaid sums of £92 13s. 11d. sterling, £10 sterling, £1 16s. sterling, and 18s., though frequently requested so to do.

Wherefore plaintiff claims: (a) Judgment against defendant company in the sums of £92 13s. 11d. sterling, £10 sterling, £1 16s. sterling, and 18s. (b) Interest a tempore morae. (c) Alternative relief. (d) Costs of suit.

The defendants' plea was as follows: (1) The defendants admit paragraphs 1 and 2 of the plaintiff's declaration. (2) As to paragraph 3 thereof, they say that between the said months the plaintiff sold and supplied to the defendants goods amounting to the total price of £304 10s. 3d. and no more. The plaintiff also forwarded to the defendants certain coat and hat hooks priced at £90 in the plaintiff's accounts but the defendants not having ordered or purchased the same, returned the same to the plaintiff. Defendants deny that the said Laurysen has ever ordered or ever had authority to order any goods on defendants' behalf. (3) The defendants say further that the item of £4 15s. in the account annexed to the declaration is incorrect, and should be £7, and that the plaintiff has omitted to credit the defendants with an item of 8s. 9d., being an allowance of 10 per cent. on £4 7s., the difference in price of 116 fanlight cords, by reason whereof it will appear that there is no balance due to the plaintiff in respect of the transactions referred to in paragraph 3 of the declaration. (4) As to paragraph 4, defendants say that the locks as supplied were placed in the said building with the knowledge and consent of the plaintiff, and by the instructions of the ar-

chitect Hesse, who had authority to give such instructions on behalf of the plaintiff and binding on the plaintiff. The defendants deny the allegations of incompetent handling, bad treatment, and improper packing, and deny plaintiff's alleged damages. (5) Defendants admit paragraph 5, and say that before the declaration was filed they tendered the said sum of £1 16s., with costs, and hereby repeat the said tender, with costs to date hereof. (6) As to paragraph 6, they say they returned all the said fan-light cords, but nevertheless hereby tender the said sum of 18s., with costs. (7) The defendants admit paragraph 7, save as to the tenders hereinbefore pleaded. Wherefore, subject to the said tenders, the defendants pray that the plaintiff's claims be dismissed with costs.

Dr. Greer was for the plaintiff, and Mr. Upington (with him Mr. J. E. R. de Villiers) was for the defendants.

Wm. Chas. Thomson, the plaintiff, stated that he kept a certain amount of goods in stock, and a number of samples from which he took orders. He remembered on December 31 having had a transaction with Mr. Laurysen, on behalf of the defendant company, for locks and hat and coat hooks. Witness produced a copy of the order which Laurysen gave for the defendant company. The articles had been approved of by Mr. Hesse. Laurysen knew that the articles were not in stock. Some time after the 31st December a letter was received from the defendant company referring to the price as a quotation, although witness was positive it was a definite order. At the same time Mr. Laurysen ordered other goods for the defendant company, which were accepted. The locks had been left in heaps of dirt and dust by the defendants, and some of them would not answer to the key. They could only be disposed of as scrap iron. He thought the defendants, having had permission to put on these locks, extra care should have been taken with them. If they had been put on by an ordinary tradesman and taken off by an ordinary tradesman there would have been no marks of damage.

Cross-examined by Mr. Upington: He was the agent for the persons who supplied the coat and hat hooks. He considered he received an out-and-out order from Laurysen. When he received the letter from the manager of the defendant company he did not take any steps to cancel the order by cable, which he could have done. Witness took up the position that the locks originally supplied by him were according to order, and in supplying locks with rollers instead of springs he was doing an act of grace. His explanation of paragraph 4 of the declaration was that there was nothing special said when this order was given whether the locks were to be spring bolts or roller bolts. In another

building at Stellenbosch there were roller bolts supplied previously, and Mr. Hesse said he would like to have them all the same, but in giving the order Mr. Laurysen said nothing about the kind of locks, and witness took it ordinary spring bolts were required. Mr. Roux did not previously explain to witness the class of locks required.

Dr. Greer closed his case.

Francois Gerhardus Roux, manager of the defendant company, stated the company contracted for the erection of the Bloemhof Girls' School at Stellenbosch. They disputed the claim for £90 for certain coat and hat hooks. Mr. Hesse had in his office samples of the coat and hat hooks required. In December witness gave no one instructions to order coat and hat hooks. Witness saw the plaintiffs' manager in December at Stellenbosch. On 20th December witness wrote to the plaintiff whether he could not submit a cheaper set of locks. Witness, with Mr. Heddle, went to Mr. Hesse's office to see samples of the locks. It was suggested by Mr. Hesse that Heddle should proceed to Stellenbosch and interview the foreman carpenter to get all the particulars in regard to the right and left locks and the different sizes of the keys. The letter of 31st December reached witness on 14th January, after his usual holiday. Then he came to see Mr. Hesse for the purpose of making inquiries with regard to the hat and coat hooks. On reading the letter of 31st December, he did not consider an absolute order had been given for hat and coat hooks. The only order he had given was with regard to locks. As soon as he saw the locks, he repudiated them as not being according to contract. The course of dealing between witness and the plaintiff would be that witness would give verbal orders, and these would be confirmed in writing by the plaintiff. The foreman carpenter had no right to order material without special authority.

Cross-examined by Dr. Greer: It was necessary for Heddle to go to Stellenbosch to get particulars from the foreman carpenter as to the locks. The flush-bolts were ordered, together with the locks, in the office of Mr. Hesse. When witness was away, his bookkeeper did not deal any letters with penny stamps on them. He took the letter of the 31st December of the plaintiff to be a quotation. Thomson might have regarded the letter as an order, but witness looked upon it as a quotation. The locks were not put in before they were actually required. If the locks were only packed in shavings and paper, he could not explain how they became clogged with dirt.

Lambertus Laurysen, foreman carpenter at the Girls' School, Stellenbosch, last December, stated that he was not at present in the employment of the

defendant. Mr. Roux gave him instructions to get the sizes of the locks for the building, and gave particulars to the plaintiff Thomson. He had no instructions at all to order coat and hat hooks on behalf of the company. Witness simply handed in the particulars to Mr. Thomson. Witness never at any time even discussed the subject of coat and hat hooks at all. The first set of locks upon arrival were not to Mr. Hesse's satisfaction. The manager later on told witness to put the locks in. Twelve working days were occupied in removing the old locks and putting in the new ones. Proper care was taken in the packing of the locks.

The witness Lauryssen, under cross-examination by Dr. Greer, said he left the defendant company about ten weeks ago. When he saw the plaintiff on December 31, he mentioned only the locks. Mr. Heddle came down to Stellenbosch to get particulars of the locks, which witness was not able to supply. Witness never spoke a word about the 600 hat hooks. On the day when he visited Mr. Hesse's office, he could not say whether he went there for the purpose of looking at the plans, to find out which were right-hand and which were left-hand locks. Witness superintended the whole of the work of replacing the locks, and he saw that three men did an honest day's work during the time they were there. He did not believe the statement that some of the locks had been taken to pieces to make them work.

Re-examined by Mr. Upington: He tried every lock before packing. He never gave any order for flush bolts, cords for fanlight openers, or hat and coat hooks.

Walter Hesse, who was architect for both the Boys and Girls' High Schools at Stellenbosch, said that the original specifications provided for 480 coat and hat pegs of one sort, and 120 hat pegs of a different pattern. Some time after the job was started, there was an alteration to 600 of the same pattern. Prior to December he had in his office a sample of the coat and hat pegs which would be required, and this was furnished to him by another firm. On the occasion when Messrs. Roux and Heddle came to witness's office, witness said he wanted the same locks as those at the Boys' School, and as to particulars, witness referred Mr. Heddle to the foreman carpenter. Mr. Heddle was well aware that the class of lock was a roller bolt, and not a spring bolt. When witness saw the locks at Stellenbosch, he disapproved of them.

Cross-examined by Dr. Greer: He could not fix the date when Mr. Roux and Mr. Heddle came to his office. No order was given by Mr. Roux to Mr. Heddle in witness's office. He thought that 2s. 6d. a lock would well repay these people for the refitting.

Alfred John Wall, clerk of works at the Girls' High School, Stellenbosch, stated the foreman carpenter was a highly efficient man. The temporary locks were put on carefully, and they were replaced under witness's supervision. The foreman carpenter packed the old locks, and in witness's opinion, they were carefully packed. Mr. Heddle used to visit the works to get information with a view to orders.

Cross-examined by Dr. Greer: The dirt was not in the box when the locks were packed at Stellenbosch.

Counsel having been heard in argument on the facts,

Buchanan, J.: This action is brought by an importer and manufacturers' representative, carrying on business in Cape Town. As such agent, he enters into contracts on his own behalf to supply goods to those who give him orders. The defendants are a building company, carrying on business at the Paarl, and at the beginning of this year a number of orders were given by the defendants to the plaintiff for goods to be imported from abroad. The declaration alleges that these orders were given by one Lauryssen. Lauryssen was the foreman carpenter of the defendant company. Mr. Hesse was engaged as the architect to supervise a building which was being erected at Stellenbosch by the defendants, and for which building the plaintiff was to supply the goods. Prior to December 31, Mr. Roux, manager for the defendant company, had discussed with plaintiff what goods would be required for the building then in progress. The samples of the different articles had been approved by the architect, and after considerable negotiations the architect seems to have approved of the quality and quantity of the different articles which the plaintiff could supply. Mr. Roux says that he gave the plaintiff an order for a number of things including certain locks, but said he would send definite information by his foreman, Mr. Lauryssen. A considerable conflict of evidence as to what took place appears from the verbal evidence. Fortunately, in this case we have written documents, and these documents written at the time show what actually did occur. I accept the plaintiff's statement, and that of his manager, that prior to the placing of any order there was a discussion between Mr. Roux and the architect, Mr. Hesse, and the plaintiff, and that the plaintiff was anxious to obtain the order, and Mr. Roux gave him to understand that he gave him the order, but would send his foreman to him to give details. On the 31st December the foreman came and placed the order with the plaintiff, and gave details. In accordance with the practice which had grown up between the parties where an order was given verbally, the plaintiff had to con-

firm it in writing. The plaintiff on the same day wrote to the defendants: "I beg to confirm the order given by your foreman of works, Mr. Laurysen, for locks and fittings for the school as per enclosed list." I must hold that this order was closed on that day by Laurysen. The defendants say that Laurysen had no authority to settle only for the locks, but he also ordered the other articles mentioned in the list sent to defendant's manager. He ordered the locks. These further articles were approved of by Mr. Hesse, and the fact that they had been ordered was communicated to the defendant at once. The defendants did not at any time repudiate the correctness of the statements of this letter. When the other goods so ordered arrived, they did not dispute their liability for them, but objected only to the coat and hat hooks. It is true the letter confirming Laurysen's order was sent to defendants on the 31st December, and holidays intervened. Mr. Roux says that he did not receive the letter until about the 14th January, and on the 18th January he wrote: "Please note we can purchase hat and coat-hooks approved by the architect for 2½d. less than your quotation." Now, why should he write "your quotation" in this letter, which says it was "an order given by your foreman of works as per list annexed"? There is no quotation given in this letter of any kind. What seems to be the case is that Mr. Roux, after receiving the letter of 31st December, came to Cape Town. He did not see the plaintiff or repudiate Laurysen's authority, but he then for the first time found that another firm was able to supply the 600 coat and hat hooks at 2½d. each lower than the price at which it had been ordered by Laurysen from the plaintiff. If Mr. Roux had not discovered this 2½d., I have not the slightest doubt there never would have been any question about this order which had been placed by his foreman. He gave the most lame excuse in the box for not writing to the plaintiff or going to see the plaintiff, and saying, "What business have you to send an indent to me for these goods? Laurysen had no right to order them." On the contrary, he said something about not liking to go to see the plaintiff because the plaintiff might take advantage of his visit. He did not while in Cape Town at any time repudiate the action of his foreman. I think the plaintiff had a perfect right to insist upon the contract which had been entered into, and which I think was previously authorised, or at least ratified, by the defendants when they received the intimation of December 31st, which they did not at once repudiate. I think the plaintiff is entitled to say: "Here are the goods which you ordered. They have now arrived, and now you must

take them." I think the defendants cannot now say they never ordered these goods. There are several other small amounts in the account, but they have been agreed to between the parties, and if the defendant is obliged to take these hat and coat hooks, the amount due to plaintiff is the sum of £94 19s. There are two other items in dispute, and both arise out of the locks which were ordered. It appears that locks of a particular kind—locks with roller bolts instead of ordinary spring bolts, were required for these school buildings. The locks sent out had spring bolts, and when they arrived they were not approved of by the architect, as they were not what he wanted for the building. There was some correspondence about these things, and there is no doubt that the plaintiff afterwards authorised the architect to use these spring-bolt locks on the building temporarily, until he obtained locks with roller bolts. The locks were so used, and, unfortunately, the foreman carpenter was not told they were only there for a temporary purpose, and in some instances he seems to have filed a part of the striking plate, and fitted them to the doors in a way in which he would not have done had he known that the locks were to be used only temporarily. When the proper locks came out, the old locks were removed from the doors, and sent back to the plaintiff. There is no doubt that the locks have depreciated in value by their use, but this was a use permitted by the plaintiff, and probably with the express purpose of keeping on good terms with the defendants. I think the plaintiff, having permitted such use, unless there was a gross depreciation or wilful destruction, is not entitled to damages. One of the witnesses for the defendants said he could restore these locks to a saleable condition at a trifling cost. There is another question which arises out of the locks, and that is the expense incurred in taking off the one set of locks and putting on the new locks. The defendants say that this alteration of the locks cost them £7. Well, one might argue that as the defendants had been given the benefit of the use of these locks, they should set the use against the cost of changing the locks, but the plaintiff says he is quite willing to allow a reasonable sum for replacing the locks, and he allows 2s. 6d. each lock. After hearing Mr. Howard, the contractor, I must say that the tender of 2s. 6d. per lock is a very fair amount to allow in this case. Mr. Howard says it was not necessary to make any alteration in the woodwork of most of the doors, and he thinks 2s. to 2s. 6d. per lock a very fair charge. The defendant will be allowed £2 5s., and this will leave the amount still due to the plaintiff £94 19s., for which judgment will be given with costs.



THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL ROLL.

PRIEST V. NESER. } 1907.  
Nov. 6th.

Mr. Swift moved for provisional sentence on a promissory note for £500, with interest from the 6th November, 1906, and costs.

Order granted.

SCHULTZE V. THE MASTER } 1907.  
AND ANOTHER. } Nov. 6th.  
" 29th.

Claim to inheritance—*Prima facie* evidence of parentage—Proof of marriage—Register of marriage—British Kaffraria—Rule nisi.

On an application for an order directing the Master of the Supreme Court to pay to the executor of Martins certain sums in the Guardians' Fund, and for a further order directing the executor to pay the sums to the applicant as being the sole surviving child of Martins, it appeared that there was no register of the marriage of Martins to the applicant's mother and no register of the applicant's baptism, but there was evidence that the registers of births and marriages in British Kaffraria, where the parties resided, were very defective, more especially the registers kept by the minister who was alleged to have performed the marriage ceremony. Witnesses deposed to the minister arriving to perform the ceremony, to the friends of the parties meeting at the residence of the bride, to the bride who was a widow, telling her children that they should in future call Martins "father," to Martins and applicant's mother living together as husband and wife, and to the

applicant being afterwards born of the union.

Held, that there was *prima facie* evidence that the applicant was the lawful child of Martins, but, in order to give any other possible claimants to the money an opportunity of asserting their claims, a rule returnable at a long date, to be extensively advertised, was granted, calling on all persons claiming to be heirs of Martins, to shew cause why the orders should not be made.

This was an application upon notice calling upon the first-named respondent to shew cause why he should not be authorised to pay over to the second-named respondent, as executor of the estate of the late Leopold Martins (or Martens) two sums, amounting to £2,974, paid into the Guardians' Fund on the 28th October, 1887, and the 7th June, 1903, to the credit of the said Martins, and why Charlotte P. Schultz (wife of the applicant) should not be declared to be the sole heir of the said Martins.

The affidavits showed that applicant resides at Potsdam, in the district of East London. His wife was the daughter of the late Leopold Martins, and as such entitled to payment of the money standing in the name of Leopold Martins. It transpired that Martins came out to this colony as a member of the German Legion in 1857, and that the chief part of the funds had been derived from the sale, under the Derelict Lands Act, of a piece of ground in the "village of East London," which Martins had been granted a considerable number of years ago, and in which no one appeared to have taken any particular interest for some time. Martins was believed to have died in 1878 at King William's Town.

The Master had declined to pay over the money, in consequence of the evidence as to the identity of Mrs. Schultz being unsatisfactory. She had not produced either her own birth or baptismal certificate, or a marriage certificate of Leopold Martins.

Mr. McGregor, K.C., was for applicant. The Master was present. The second respondent did not appear.

Mr. McGregor read a number of affidavits and correspondence which had passed between the Master and the applicant's agent. This showed that there had been a good deal of confusion owing to the variety of names by which Martins had been known, and also owing to the fact that the death

notice described Leopold Martins as unmarried.

[De Villiers, C.J.: The great difficulty seems to be that there is no certificate of the marriage of Martins.]

Mr. McGregor said that that was so.

De Villiers, C.J., raised the question of presumption of marriage where parties had lived together for some years.

Mr. McGregor cited *Potter v. Potter* (7 E.D.C., 143), *Hoffman v. Hoffman* (1 Menzies, 281), and *Kemball v. Kembell* (1 Menzies, 281). Counsel said that there did not appear to have been any registration laws in force in Kaffraria at the birth of applicant's wife. The only Ordinance he had been able to procure began in 1862, and this lady was born in 1860.

The Master (in answer to the Court) said that there were no other claimants to this money. The principal evidence was wanting in this case, seeing that there was no proof of marriage and no baptismal certificate of applicant's wife.

De Villiers, C.J., asked if counsel had authority with regard to the rights of an illegitimate child where there was a failure of claim by legitimate issue.

Mr. McGregor quoted Tennant, but said that there did not appear to be any authority for the propositions which Tennant laid down.

[De Villiers, C.J.: I am not sure that the old Roman law was not more just than our law. If there is an illegitimate child and there is no claim by legitimate issue, I should think sooner than the Crown should take the money the illegitimate child should have it.]

Having heard counsel further,

*Cur. Adv. Vult.*

*Postea* (November 29).

De Villiers, C.J.: This is an application for an order authorising and directing the Master of the Supreme Court to pay over to the executor dative of the late Leopold Martins certain sums in the Guardians' Fund and, in effect, for a further order directing the executor to pay the money over to the applicant's wife as being the sole surviving child of the late Leopold Martins. The application was necessary owing to the Master having very properly refused to recognise the applicant's wife as the child of Martins upon such evidence as was submitted to him. That evidence has subsequently been supplemented by further evidence in support of the applicant's claim and, after carefully considering the matter, I am satisfied that there is *prima facie* evidence that Mrs. Schultz, the applicant's wife, was the only lawful child of the late Leopold Martins. The alleged marriage of Martins to the widow of one Liecsenberg took place about the year 1860, at Hanover, in the district of King William's Town. At that time British Kaffraria had not yet

been annexed to the Colony, and the registers of births and marriages seem to have been very faulty indeed. The marriage is said to have been solemnised by the Rev. Mr. Opperman, who appears to have been particularly careless in the preparation of his registers of marriage and baptism. Several witnesses depose to such a marriage having taken place, and I attach some weight to the affidavit of Liecsenberg's son August, who at the time of Martins's alleged marriage to his (August's) mother, was about 9 years of age. He remembers a number of people assembling at the house of Martins, and his mother, after that, telling him to call Martins "father." Subsequently his mother gave birth to a female child, and died a few days after. A Mrs. Richter took charge of the child, and there can be no doubt that the child thus taken charge of by Mrs. Richter married the applicant in the present case. There is no register of the baptism of the child, but the child may never have been baptised, and even if she was baptised, the register may have shared the same fate as that of the marriage of the parents. Martins appears to have taken no notice of the child after he had entrusted her to the charge of Mrs. Richter, and at the time of his death in 1877, he and his daughter had been completely estranged. After his death, some property, at East London, registered in his name, was sold in order to pay the rates thereon, and realised about £3,000, which was paid into the Guardians' Fund. An executor had been appointed before this payment in to the Guardians' Fund, and the executor now consents to the application being granted. The applicant has a large family by his wife, and is anxious that the money should be paid over at once for their support, but as the case made out by him is, as I have said, only *prima facie*, some time must elapse before such payment can be made. Every opportunity must be given to any other next-of-kin of Martins to become acquainted with the applicant's claim, and, if need be, resist the same. The Court will therefore grant a *rule nisi* calling upon all persons claiming to be the heirs *ab intestato* of the late Leopold Martins or Martens, who died on the 29th of March, 1877, to show cause on the 14th of May, 1908, why the sums of £21 1s. 11d. and £2,952 19s. 2d., standing to the credit of the said estate in the Guardians' Fund, with the interest due thereon shall not be paid to the executor dative James Wellbeloved, and by him paid to the wife of the applicant, as being the only surviving child of the said Leopold Martins or Martens. This rule to be published once every month in English and in German in an English East London newspaper and an English King William's Town news-

paper, as well as in a German newspaper, if any, circulating in King William's Town or in East London, and in such other manner as may be directed by the Master of the Supreme Court. The expenses of such publications to be paid by the Master out of the assets of the estate in the Guardians' Fund.

*Ex parte* ESTATE WATSON.

Mr. P. T. Lewis moved, on behalf of the widow of Francis Harold Watson, in whose estate she is one of the executors, for leave to cancel certain mortgage bond for £2,000 by paying the balance due thereunder, and to pass a fresh bond of £1,500.

Order granted as prayed.

*Ex parte* INSOLVENT ESTATE DE WET.

Mr. W. Porter Buchanan, K.C., moved on the petition of the trustees in the insolvent estate of P. J. de Wet, a speculator, of Dordrecht, for the appointment of a commissioner to examine certain witnesses as to their dealings with insolvent.

Order granted appointing the R. V. of Dordrecht, or the officer acting as such, to be commissioner to examine the persons named in the petition, and such other witnesses as the applicants may think desirable.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

SCHOEMAN V. OLIVIER. { 1907.  
Nov. 7th.

This was an action in which the plaintiff complained that the defendant constructed certain "schanzes," more especially "schanze" No. 6, in the bed of the Grobbelaars River, Oudtshoorn. The effect of these "schanzes" was to divert the flow of the river on to the plaintiff's property, which lay below that of the defendant. The plaintiff further complained that alongside the "schanze" No. 6 certain excavations had been made, which further tended to divert the flow of the river in the direction

of the plaintiff's property, and plaintiff complained that these works had already done damage to his property, and as long as they continued to remain, they would threaten his property with further damage. He prayed for an order compelling the defendant to remove the obstruction and other works, and for an interdict restraining the defendant from continuing to make further obstructions of this sort, and for £1,000 damages.

Mr. Van Zyl (with him Mr. Louwrens) was for the plaintiff, and Mr. M. Bisset (with him Mr. Howes) was for the defendant.

The evidence had been heard at the Oudtshoorn Circuit Court.

Mr. Van Zyl, in the course of his argument for the plaintiff, cited *McGregor v. Clanwilliam Divisional Council* (15 S.C., 350), *Kohne v. Harris* (16 S.C., 144), *Dickens v. Lake* (Juta's Water Rights, p. 176), *Jansen v. Van der Merwe* (17 C.T.R., 449), *Angell on Watercourses* (p. 334), *Menzies v. Breadalbane* (3 Bligh's New Reports, 414), *Rex v. Trafford* (1 B. and Ad., 874), *Fairham* (Vol. 2), *Brickett v. Morris* (14 L.T., No. 835), *Ewing v. Colquhoun* (L.R., 2, Ap. Cases, 839), *Withers v. Purchase* (60 L.T.N.S., 819), *Voet* (1, 8, 9, 43, 15), and sec. 14, Act 32 of 1906.

Counsel having been heard further in argument,

Buchanan, J.: The Grobbelaars River takes its course through Oudtshoorn. The *locus in quo* of the present dispute is on the banks of the river between one of the streets called Bridge-street and a street lower down called Albert-street. The defendant has property on the west bank from Bridge-street to Albert-street, and the plaintiff has property from Bloem-street to Albert-street on the east bank. So the defendant's property is partly above and partly opposite the plaintiff's. The old course of the Grobbelaars River was to the west of its present flow. The diagrams and surveys on the east side show that what is the present flow is what was called by Ford in his diagram the branch of the Grobbelaars River. In 1847 there was apparently water flowing down this branch which passed outside or on the east of plaintiff's property, and crossed Bloem-street near the corner of Lot J. Ford's diagram pointed out the course and showed that the water entered exactly as indicated on Morkel's diagram. On the plaintiff's lots 293 and 294 there was some high ground, and Ford's old diagram showed water on both sides of this, but to the east of the old course. In 1869 there was a flood, and after that the old course was abandoned, and the water took the course of the branch. Morkel in 1874 surveyed the land between the then course of the old course, and cut it up

into lots G, H, I, and J, extending from the bridge to Bloem-street, and all of it above the plaintiff's ground became the property of the defendant. Before 1905 the river entered the plaintiff's land across Bloem-street, where it enters it now, but perhaps a little to the east, and evidence has been given that at that time there was no flow to the west of the high ground on the plaintiff's land. The evidence also shows that the tendency of the flow was to cut into the land on the east. Before 1905 the plaintiff's father attempted to divert the stream to cause the water to flow to the west, so as to pass on the west instead of on the east of his high ground. In 1905 a flood took place, and the river took the new course intended by Schoeman, but after the flood subsided, the water again flowed to the east of the high ground. The effect of this was to change the course of the river a little above Bloem-street and to make it encroach on the defendant's land. The flood also washed away the high land on the island. The defendant has now put a number of "schanzes" on his own ground, numbered on the plan 5, 6, and 7. The declaration makes particular mention of 5, but it has been amended to apply to 6; 5 does not affect the defendant, and during the trial it was admitted that 7 did not either. Number 6 was made the boundary of the defendant's land; before it was placed there, J was high ground, higher than the "schanz" is at present, so the ordinary flow of the river was to the east of 6 before 1905. The plaintiffs contend that as the flood washed away the high ground of J, the defendant was not entitled to put up a "schanz" to reclaim that ground, and on that the argument was built up that as lot J was now the bed of the river the defendant had no right to erect anything there. Now, the Court is not prepared to hold that because the high ground was washed away the defendant could not go there and erect a "schanz"; the Court cannot hold that J is now the channel of the river. It is said that the river when in flood flowed over J, but in order to do that it would have had to rise much higher than to go over the "schanz." The river, as is common on the Karoo, has a very wide channel, and the water flowing in it is but a trickle. A freshet came down while the Court was at Oudtshoorn, and even then the whole channel was not covered with water, and it was only in cases of extraordinary floods that the water went beyond the ordinary channel. The only legal point in the case is, if the effect of the flood is to wash away, has the defendant any right to protect it by erecting a "schanz"? In this case the extension of the channel at high water does not prevent the defendant from protecting his bank. The "schanz" is not more than half the

height of the old ground, and it cannot, therefore, deflect the water more than the old high ground did. The defendant has not followed the line of his diagram, but has built the "schanz" altogether on his own land, and has not infringed any right of the plaintiff's. The doctrine relied on by the plaintiff has been *sic utere tuo ut alienum non laedas*, which means: Use your own property so as not to infringe any other person's rights, and in this case none of the plaintiff's rights have been infringed. It is more the action of nature which has caused the river to gradually eat away more and more of the east bank than any act of the defendant's. Since 1874 it is doubtful if any water flowed to the west of the high ground, and the Court does not think that the action of the defendant caused any injury which would not have been caused if the "schanz" had not been built. The present flow of the river is not caused by the "schanz," and there has been no acquiescence by the defendant in the flow of the river created by the flood. Judgment will accordingly be for the defendant, with costs, including the costs of both the plans.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

DOUGLAS V. GIBBONS. } 1907.  
Nov. 7th.

Mr. Roux moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court, execution to be suspended upon payment of certain instalments in terms of consent.

Order granted in terms of consent.

### MOSTERT V. TRUTER.

Mr. Sutton moved for provisional sentence upon two mortgage bonds for £85 and £200 respectively, with interest from the 7th April, 1906, and the 6th July, 1906, bonds due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ILLIQUID ROLL.

PURCELL, YALLOP AND EVERETT V.  
CROOKE AND ASHBY.

Mr. Philipson Stow moved for judgment, under Rule 329d, for £120 2s. 3d.,



balance of account, due by defendants for goods sold and delivered, with interest a tempore morae and costs.

Order granted.

LINDSAY V. LINDSAY.

This was an action brought by Anne Elizabeth Lindsay (born Wessels), of Ceres, against her husband, Harmon Wm. Lindsay, late of Boston, U.S.A., for restitution of conjugal rights, failing which a decree of divorce.

Mr. Marais was for plaintiff; Mr. Howes was for defendant.

It appeared that Mrs. Lindsay instituted an action against her husband for restitution of conjugal rights on the ground of alleged desertion. In her declaration, she said that defendant, in 1905, went to America, and had made no provision for her and the family.

Defendant filed a plea in which he denied that he had deserted the plaintiff, and said that he went away with her knowledge and consent. He further said that he had returned to this country, and had offered to live with the plaintiff as her husband, but that she declined to return to or receive him. He tendered to make irrevocable certain power of attorney granted by him to Mr. Muirhead in regard to property of his wife registered in his name, and to have at any time any person nominated by the plaintiff substituted instead of Mr. Muirhead. In reconvention, he claimed a decree of restitution against the plaintiff (now defendant), failing which a decree of divorce. He tendered custody of the children to his wife, subject to access being given to him at all reasonable times and places, and to leave being given to him to apply further hereunder should defendant's circumstances or condition be materially altered.

Plaintiff, in her plea to the claim in reconvention, denied the allegations of desertion, and prayed that her husband's claim may be dismissed, save in so far as it referred to custody of the children.

Mr. Marais for plaintiff. Mr. Howes for defendant.

Mr. Marais (in answer to the Court) said that he did not propose to call any evidence, the claim in convention by Mrs. Lindsay having been abandoned.

Mr. Howes said that the claim in reconvention was practically undefended.

Harman Wm. Lindsay (plaintiff in reconvention) was called. He said that he was married to the defendant at Kenilworth, in November, 1893, without community of property. They subsequently lived together at Claremont and Ceres. While they were living at a farm in the district of Ceres, owned by Mrs. Lindsay, witness's goods were put out of his room, and he was practically ejected. Mrs. Lindsay then went

to reside at a boarding-house in Ceres. In 1905, witness left for America. When he heard that the action was being brought against him by Mrs. Lindsay, he at once came back to this colony. He had seen Mrs. Lindsay, and had endeavoured to effect a reconciliation, but she refused to live with him. There were four children of the marriage, all girls, their ages being 13, 11, 9, and 7 years. He was willing that the children should remain in the custody of his wife, provided that right of access was reserved to him. He had been employed as a teacher in America during the last two years, and had had to resign his appointment in order to come to the colony.

By the Court: The only cause of disagreement, as far as he was aware, was that Mrs. Lindsay did not care to live with him.

Decree of restitution granted, defendant in reconvention to return to or receive the plaintiff in reconvention on or before the 8th November, failing which rule to issue calling upon defendant in reconvention to show cause on the 19th November why a decree of divorce should not be granted, and why plaintiff in reconvention should not have reasonable access to the children at all reasonable times and places, with leave reserved to him to apply to the Court for custody of the children. By consent, the Court also directed that an irrevocable power of attorney be granted by the defendant in convention, in terms of the 8th paragraph of his plea.

STELLENBOSCH UNDENOMINATIONAL COLLEGE AND PUBLIC SCHOOLS V. HOWARD.

This was an application upon notice to Thomas Howard, builder, Cape Town, to show cause why he should not be ordered to forthwith deliver up to applicants the Boys High School, Stellenbosch, erected by him in pursuance of a contract, upon payment of £2,994 7s. 1d. by applicants, in accordance with the architect's certificate, and why he should not pay costs of this application.

Applicants said that under the contract respondent bound himself, under penalties at the discretion of the architect, to complete and hand over the premises on or before the 1st March, 1907, that he had not yet given applicants possession of the premises, that they had tendered to him the sum of £2,994 7s. 1d. in accordance with the final certificate of the architect (Mr. Hesse), and that, in consequence of the delay of respondent in giving delivery to applicants, were suffering loss and damage in the hire of other premises, and so forth.

From the respondent's affidavits, it appeared that his attorney had made a

proposal with a view to the abandonment of the present proceedings, respondent to deliver up the keys on payment of the amount certified by the architect, without prejudice to respondent's right to recover a further sum under the contract. The negotiations, however, broke down on the question as to who should pay the costs of the proceedings on motion, respondent refusing to make himself responsible for such costs. In his affidavit, respondent said he had good grounds for assailing the architect's certificate as invalid and not binding upon him, and that the defence must needs involve serious imputations against the architect, which it would be impossible to go into on affidavit. He said he was entitled to £1,250 over and above the figure certified by the architect.

Mr. McGregor, K.C., was for applicants; Mr. Watermeyer was for respondent.

Having heard Mr. Watermeyer,

De Villiers, C.J.: *Prima facie* the applicants are entitled to possession of the keys. The terms of contract state that payments are to be made on the architect's certificate, and the architect has certified that a certain sum of money, and that sum only, is due. The applicants have tendered that amount. The respondent refuses to accept it and hand over the key, because he has a claim of more than is certified by the architect, and he alleges practically that there was a want of *bona fides* on the part of the architect in not awarding to him the sums due. But at this stage the Court can only deal with the contract as it stands, and I consider that the respondent ought to hand over the keys upon payment of the amount, less the sum of £25, to meet the applicants' costs of this motion, in case they should be awarded in applicants' favour. The Court will, therefore, order that the respondent deliver to the applicants the keys of the building upon payment by the applicants to respondent of the sum of £2,994 7s. 1d., less £25 to meet the applicants' costs of this motion, in case they should be awarded in their favour, payment of the same not to prejudice the respondent in any action he may institute against applicants for further payments, costs of this application to be costs in such an action.

#### GENERAL MOTIONS.

LIVERPOOL AND LONDON  
AND GLOBE INSURANCE ) 1907.  
CO. V. TRUSTEES OF IN- ) Nov. 7th.  
SOLVENT ESTATES CASE- )  
RON AND ANOTHER.

Mr. Alexander moved for a certain award of an arbitrator to be made a Rule of Court. The arbitrator (Mr.

Benjamin, K.C.) reported that he found that the applicants were not liable to pay to respondents any sum whatsoever.

Award made a Rule of Court.

#### *Ex parte* HILLSDON AND HILLSDON.

Mr. Alexander moved, on the petition of William Ewan and Frederick Bethel D. Smith, carrying on business in Cape Town, as Hillsdon and Hillsdon, gun and ammunition makers and dealers, for leave to sue one Herbert William Hillsdon, believed to be residing in Birmingham, England, by edictal citation, and to attach *ad fundandam jurisdictionem* a certain sum of £12 10s. in petitioners' hands, instalment due by them to the respondent, under an agreement. Petitioners allege that they acquired the business of Hillsdon and Hillsdon, in Cape Town, and that respondent had undertaken in terms of an agreement not to trade in South Africa in gun and ammunition making and dealing. In breach of the agreement, they said, respondent had, under the style of Hillsdon and Hillsdon, Ltd., of Birmingham, been endeavouring to trade in South Africa in the said business. Petitioners proposed to institute an action against him for damages for breach of contract, and for an interdict restraining him from being interested, directly or indirectly, in gun and ammunition making and selling in South Africa.

Order granted as prayed, costs to be costs in the cause, citation returnable on the 12th January, 1908, with leave to serve intendit and notice of trial with citation, personal service to be effected, failing which service to be effected upon the secretary of Hillsdon and Hillsdon, Ltd., of Birmingham.

De Villiers intimated that on the return day there must be a clear proof, if personal service had not been made on respondent, that it could not be effected.

#### *Ex parte* ESTATE SAVAL (OR SAWAL).

Mr. Douglas Buchanan moved on the petition of the executrix testamentary and the assumed executor for leave to raise a loan of £150 on mortgage of landed property in Caledon-street, Cape Town, in order to pay off an existing bond and meet other charges.

Order granted as prayed.

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

WARD V. WARD. { 1907.  
Nov. 8th

This was an action brought by George Ward, of Cofimvaba, against his wife Elizabeth Russell Ward, of Kimberley, for restitution of conjugal rights, failing which, a decree of divorce.

The plaintiff in his declaration alleged that the defendant refused to live with him.

Defendant pleaded cruelty, and claimed in reconvention a judicial separation.

Mr. Long was for plaintiff; Mr. W. Porter Buchanan, K.C. (with him Mr. Wallach), was for defendant.

Plaintiff, in his evidence, said that he was married to defendant in 1883. Prior to the marriage he lived at Willowmore, subsequently in Griqualand West. His son was born in December, 1885. They were then living at Hope Town, where they carried on business. His wife mismanaged the business, and unpleasantness took place as a consequence. In 1893 witness was appointed a sheep inspector at Umzimkulu. His life with his wife had never been happy. She had a violent temper. Owing to defendant's refusal, they had never lived together as man and wife since the birth of the child. In 1896 he went to see his wife; a reconciliation took place, and he took her to Kimberley. He had had a house built at Cofimvaba, but his wife refused to come and live with him. He again saw her in March, 1907, but she refused to have anything to do with him. He had endeavoured by kindness and everything else he could think of to induce defendant to live with him, but it was all in vain. He was prepared to take her back, provided she would live with him. She was very religious. The business at Hope Town had been purchased with his money, and witness had never had anything out of it.

Cross-examined: His wife was a delicate woman; he had been told about it before he married her. In 1890 his wife went to a hospital at Graham's Town. He had not struck her with a ledger when she came back from the hospital. In 1901 the defendant was in a violent temper; he put his hands on her shoulders to keep her quiet, but he had not struck her or assaulted her. He had always mended his own clothes: one day she had pulled an old "kapje" belonging to a Griqua woman out from under the bed, and asked him what it

meant. He got angry with her then, and shook her, and turned her out of the room. He never swore at her.

For the defence, Mr. Buchanan called Elizabeth Russell Ward (the defendant), who said that when she married the plaintiff she had £85. The plaintiff had no farm when she married him. He left her soon after they were married. He did not come back to her till her son was born. He never gave her £600 to start business. He only gave her £20. Subsequently she got some money from her father, and she enlarged her business. She supported her husband out of the business. She was very ill for some time after that, and had to go to hospital. In 1890, when she returned from hospital, the plaintiff struck her with a ledger. On another occasion there was a quarrel about his swearing before her son, and then he took her and forced her backwards over the bed. On another occasion there was a quarrel because he was selling her goods under cost price, and then he put his knee into her side and struck her. She had to go to bed for a fortnight in consequence. She would never go back to live with him.

Cross-examined: She refused to live with the plaintiff because of the doctor's orders. Defendant ill-treated her in 1892 and he left her in 1892.

By the Court: She admitted having written letters to the plaintiff during the three following years. These were all couched in friendly terms. He had shown that he did not want to have her back.

Mr. Long (in answer to the Court) said that his client desired to obtain a divorce.

Buchanan, J., asked counsel to ascertain if his client would consent to a separation.

Mr. Long said that the plaintiff would leave himself in the hands of the Court.

John S. Ward (son of the parties) said that in Hope Town he saw his father push his mother across the foot of the bed, and heard her cry out. He remembered an occasion when plaintiff tried to push his mother out into the street. His father used to be very violent. Witness was very young when these incidents occurred. He had supported his mother more or less since he was 12 years of age.

This concluded the evidence.

Mr. Long, in argument, cited *Gibbon v. Gibbon* (2 E.D.C.), and *Heathershaw v. Heathershaw* (1 Roscoe, 186).

Buchanan, J.: This is an action brought by the plaintiff (the husband) for an order of restitution of conjugal rights on the ground of malicious desertion, and, failing compliance with such order, a decree of divorce. He candidly admits that his ultimate object is to obtain a divorce, but he states that he is willing, if his wife will come back and

conduct herself in a wifely manner towards him, to take her back and live together. There would be nothing in this statement of the husband which would justify the Court in refusing a decree, provided that malicious desertion was proved. But that is a point on which the plaintiff's case fails. The parties were married in 1885, and there is one son issue of the marriage. Since the birth of that child plaintiff's statement, which however the defendant does not corroborate, is that there has been no matrimonial intercourse. It is clear that soon after the marriage disputes did arise between the parties, and it is alleged that there was some cruelty shown by the husband to the wife. I think this cruelty has not been so excessive, or of such a nature as would alone justify the wife in refusing to return to her husband. As far back as 1892 the husband left the wife and went to live elsewhere. In 1893-4-5 affectionate letters were written by the wife to her husband, and in one of those letters she states that there is a home for him when he chooses to come. He did pay a very casual visit in between to the wife, but went away again, and afterwards, in 1896 and 1897, he wrote such letters as showed that his affection for his wife had completely gone; he talked about asking her to get a divorce, and made other statements, which justified her in concluding that he had no longer any feeling of affection for her, and she would not go and live with a man who has no feeling of affection for her. Under all the circumstances I do not think the Court is justified in holding that there has been malicious desertion on the part of the wife. I think it would be stretching the law too far, and that it would be an improper thing after the plaintiff's behaviour to grant him a decree of restitution. The defendant has asked for a judicial separation on the ground of cruelty. I am not prepared to grant her prayer. She says that she would not have made this application but for having been brought into court. As there are no minor children in the case, I think it would have been judicious for the parties to agree to a separation. The defendant wishes a separation, and the plaintiff now states through counsel that he is willing to leave the matter in the hands of the Court. While, therefore, being unable to grant a restitution of conjugal rights, or on the evidence a decree of separation, by consent of parties. I will grant a decree of judicial separation. As the parties were married by ante-nuptial contract, and as each will retain his or her property, the decree will be limited to one of judicial separation. As to the matter of costs, the plaintiff has failed on the main issue, and, under the circumstances, although I make a decree of separation, the plaintiff will

have to pay the costs. There will be no question of division of property, but I think the husband's marital power should be suspended during the existence of this separation.

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

ADMISSION. { 1907.  
{ Nov. 8th.

Mr. Sutton moved for the admission of Albert Whitaker as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Indwe.

### REHABILITATION.

Mr. Roux moved for the discharge from insolvency of Clement Handlev. under 117th section of the Ordinance. There was a certificate from the Master that all the creditors consented.

Application granted.

### GENERAL MOTIONS.

#### *Ex parte* GABRIEL.

Mr. Roux moved to have a rule nisi under the Derelict Lands Act made absolute.

Rule made absolute.

#### ESTATE CLASSENS V. COLONIAL GOVERNMENT.

Mr. P. S. T. Jones, for the applicant, moved to have the award of the arbitrators made a Rule of Court, with costs of the application to be costs in the arbitration. Mr. Howel Jones, K.C., for the respondents, appeared to consent.

Application granted.

#### *In re* ESTATE B.S.A. ASPHALT AND MANUFACTURING CO., LTD.

Mr. J. T. Molteno moved for the confirmation of the third report of the official liquidators.

Application granted.

#### LINDSAY V. LINDSAY.

Mr. Howes moved that the order granted in this case of the previous day



should be amended to read: "the said children remaining in the meanwhile in the custody of the defendant in reconviction." Counsel said there was a power of attorney already in existence, and it would save expense if the present power of attorney were merely endorsed instead of a new one issuing.

[De Villiers, C.J.: What would it cost to have a new power?]

Mr. Howes: A sovereign stamp.

De Villiers, C.J.: The cost of this application is a good deal more than a guinea. I really think the power should be granted in proper form, and attached to the irrevocable power. To make assurance doubly sure, I shall make the other condition.

*Ex parte FOURIE.*

Dr. Greer moved, on behalf of the petitioner, for a rule nisi to act as an interdict calling on the respondent, Carl F. W. Grant, to show cause why he should not be restrained from interfering with the petitioner in his lawful use and enjoyment of a farm which he had purchased from the respondent.

Application granted, rule returnable on Tuesday next.

*Ex parte TRUTER.*

Mr. Swift moved, as a matter of urgency, for the appointment of a *curator bonis* to administer the estate of Daniel Gerhardus Truter, of Hopefield. There was a solemn declaration by the wife of the petitioner that her husband was incapable of administering his property, and there was a consent by the respondent to the appointment of his wife as curator. There was a declaration by the Rev. Mr. Neethling, the D.R. Minister, of Hopefield, to the effect that the respondent was frequently drunk, and was not perfectly sound in mind when under the influence of liquor. In this state he recklessly squandered his money. Unless a curator was appointed he would in a short time squander his estate. In his proper senses he signified himself willing to his wife acting as *curator bonis*. Counsel cited the case of *In re Chisholm* (9 Juta), where there was a similar application. In that case a rule nisi was granted, and on the return day the respondent appeared in person.

[De Villiers, C.J.: I don't think the Court has ever appointed a curator except in a case of unsound mind or prodigality or some cause of that kind.]

Mr. Swift: Would your lordship follow the procedure in the case of *Chisholm*?

[Yes. Is there no one but the wife whom the Court could appoint?]

Mr. Swift: That I am not instructed upon. Apparently Mr. Neethling considers the wife the most suitable per-

son, and the respondent has consented to the wife acting as curator.

De Villiers, C.J.: He has consented, but if he knew upon what ground he might not consent. That is why I think there should be a rule. You can take a rule in the same terms as in the case of *Chisholm*, the petitioner, Mrs. Truter, to act as *curator bonis* in the meantime, the rule returnable on December 12.

*Ex parte DRAKE.*

Mr. P. T. Lewis moved for the appointment of a *curator bonis* to manage an hotel in the insolvent estate of W. F. and J. F. Meyer and Jessio Bruce Meyer.

Mr. H. J. R. Pope, of the Board of Executors, East London, was a suitable person to act as curator. The petitioner Drake and other creditors would suffer if the hotel were closed.

The Master was authorised to appoint as *curator bonis* Mr. H. J. R. Pope, in his capacity as secretary of the East London Board of Executors.

MELCK V. LOUW. { 1907.  
Nov. 8th.

Grazing of cattle—Letting of rights of grazing—Death of cattle.

*The plaintiff, being the owner of a large and enclosed farm, allowed the defendant and other owners of cattle to send their cattle to the farm and charged a certain monthly rental per head. The custom was for the defendant to turn his cattle on to the land, and when he wanted them to send a servant, who collected them with the assistance of the plaintiff's servants. A cow thus sent by the defendant was lost, and there were indications of her having died a natural death, but there was no evidence of the plaintiff having done anything which contributed to her death.*

*Held, that the plaintiff was not liable to the defendant for the loss of the cow.*

This was an action brought by Johannes Albertus Melck, a farmer, of Darling, to recover from the defendant, Johannes G. Louw, a farmer, of Durbanville, the sum of £41 19s. 6d., less £2

10s., in respect of money due for grazing certain stock.

The plaintiff's declaration was as follows:

1. Plaintiff is a farmer residing in the district of Darling; defendant is a farmer residing at Phesente Kraal, Durbanville.

2. In the month of July, 1906, plaintiff and defendant entered into an agreement whereby plaintiff undertook to allow certain cattle, the property of the defendant, to graze on his (plaintiff's) farm at a uniform charge of two shillings per head per month, and on or about July 29, 1906, in pursuance of this agreement, defendant placed such cattle on the farm.

3. There is due and owing to the plaintiff in respect thereof the sum of £29 14s.

4. Defendant is likewise indebted to plaintiff in the sum of £1, being the reasonable cost of hand rearing a certain calf left by defendant or his servants on plaintiff's farm when removing *inter alia* the mother thereof on the day on which it was born, and for which hand-rearing plaintiff is entitled to make such reasonable charge.

5. Defendant is further indebted to plaintiff in the sum of 15s. 6d., being in respect of food supplied to his cattle herds, and for services rendered in gathering in his cattle at his request in the month of November, 1906.

6. Plaintiff is indebted to defendant in the sum of £2 10s., being in respect of the purchase of certain two bull calves bought by him, which such he has tendered and herein tenders to set off against the claim made herein. Wherefore plaintiff prays for judgment for the sum of £29 14s., £1, and 15s. 6d., making a total of £31 9s. 6d., less the sum of £2 10s., with interest and costs.

The defendant's plea was as follows:

1. The plaintiff admits paragraph 1 of the declaration.

2. He admits paragraph 2 thereof, save that he says the said agreement was an old one of some three years' standing.

3. As to paragraph 3, the defendant says that he was indebted to the plaintiff in respect of the grazing of the cattle in the sum of £27 19s. 3d. but the plaintiff still has in his possession one cow, which the defendant sent with his other cattle for grazing, and the plaintiff neglects and refuses to restore or return the said cow to the defendant, though frequently requested to do so. The defendant values the said cow at £20, and he claims that he is entitled to retain that sum as against the plaintiff's claim until the said cow is returned to him. There are also some minor sums which the defendant claims to set off against the plaintiff's claim, and which are set forth in the contra account. The balance shown as due to the plaintiff upon deduction of

the said sums is £5 18s. 2d., which the defendant duly tendered to the plaintiff before action was brought, and which he is still willing to pay. Save as above, he denies paragraph 3.

4. As to paragraph 4, the defendant is willing to pay the £1 as a reasonable sum for maintenance of the calf, and he says he tendered before action was brought to pay such reasonable maintenance, but the plaintiff never rendered any account thereof until the filing of his declaration.

5. The defendant admits the item of 15s. 6d. mentioned in paragraph 5 of the declaration, but says that the same is included in the sum of £27 19s. 3d. figuring in his account.

6. He admits that the plaintiff owes him £2 10s. as alleged in paragraph 6, and says he has allowed for the said debt in arriving at the said sum of £27 19s. 3d.

7. The defendant therefore admits his liability for the said sum of £5 18s. 2d., and the said sum of £1, and hereby tenders the same, amounting together to £6 18s. 2d., in satisfaction of the plaintiff's claim. Subject to the said tender, the defendant prays that the plaintiff's claim may be dismissed, with costs.

8. For a claim in reconvention, the defendant (now plaintiff) craves leave to refer to the pleadings in convention.

9. Among the cattle sent to the plaintiff (now defendant), as aforesaid, for grazing, was a certain Canadian heifer, the property of the defendant, which is still in the plaintiff's possession, and which the plaintiff neglects and refuses to return to the defendant.

10. The plaintiff has also in his possession the hand-reared calf belonging to the defendant, and referred to in the declaration, which the defendant is entitled to have delivered to him.

11. On or about September 15, 1904, the defendant sent seven young oxen to graze on the plaintiff's farm, on the understanding that the plaintiff could use the same until the defendant required them, and that in consideration of the plaintiff so using them, the defendant need not pay plaintiff for the grazing thereof.

12. The defendant has frequently requested the plaintiff to return the said young oxen to him, but the plaintiff neglects and refuses to do so. The defendant (now plaintiff) claims (a) the return of the said Canadian heifer, the said hand-reared calf, and the said seven young oxen, or, in the alternative, payment of their value in the sum of £10, £5, and £77 respectively, with costs of suit.

For a replication, the plaintiff says:

(1) That with regard to the cow referred to in paragraph 3 of the plea, he says that she is dead or has strayed, and her whereabouts is not known to

him. He says, further, that by arrangement with defendant he (plaintiff) was not responsible for the safekeeping of his (defendant's) cattle or other loss by death or straying. He denies that the value of the cow was £20. (2) Same as is herein stated, and save in so far as the plea admits the allegations in the declaration, he joins issue thereon, and says that the tender in the plea is wholly insufficient, and again prays for judgment, with costs. And for a plea in reconvention, plaintiff (now defendant) says (3) he craves leave to refer to his allegations in convention. (4) He says that on or about November 9, 1906, when the plaintiff in reconvention sent for certain of his cattle, there was a heifer on his (defendant in reconvention) farm which was not marked with the mark of plaintiff in reconvention. That the plaintiff in reconvention had promised to send a cattle-herd who was familiar with his cattle, but the cattle-herd sent was not familiar with them, and failed to identify the heifer in question. That defendant in reconvention was also unable to identify the heifer as the property of the plaintiff in reconvention, and it was accordingly left behind. That from descriptions subsequently given by the plaintiff in reconvention, the defendant verily believes this heifer to be the Canadian heifer referred to in paragraph 9 of the claim in reconvention. That he has always been ready and willing to allow plaintiff in reconvention to remove this heifer upon identification by the plaintiff in reconvention, and upon payment of the amount due in respect of the grazing thereof, which sum is included in the amount of £29 14s. referred to in the declaration. (5) He says that he is ready and willing to deliver the calf referred to in paragraph 10 of the claim in reconvention, upon payment of the sum of £1, in respect of the charge for hand-rearing of the same. (6) As to the allegations in paragraphs 10 and 11, he says that he admits the seven young oxen were sent to his farm on or about September 15, and he says they were sent in poor condition, and upon the understanding that they should be left on the farm until they were fit as slaughter-oxen, and until such time he be entitled to use and work them, no charge being made for grazing. He says, further, that they are not yet fit as slaughter-oxen, and that he has refused to return them, as he is at present entitled to do.

Mr. Benjamin, K.C. (with him Mr. Inchbold) for plaintiff. Mr. Upington (with him Mr. D. Buchanan) for defendant.

Mr. Benjamin said there was certain correspondence between the parties, which showed that practically the account referred to by the defendant had been accepted by the plaintiff, and

plaintiff was prepared to accept that amount, which he said was owing in respect of grazing. That would be £25 18s. 2d. In the annexure to the plea, there was brought up a balance of £5 18s. 2d., and that was arrived at by deducting one cow valued at £20. Mr. Melck said he was not liable for the loss of the cow, and the defendant in reconvention set up a claim for the loss at £20, and the £5 8s. 2d. made £25 8s. 2d. That was the amount Mr. Melck was prepared to accept together with the sum of £1 for hand-rearing the calf, which made £26 18s. 2d. In addition, there was 16s. in respect of the grazing of the Canadian heifer, but Mr. Melck did not care about pressing that, so that he was prepared to accept the sum of £26 18s. 2d. The only matters which would come before the Court would be in respect of the liability for the loss of this cow, which was set up in reconvention, the amount claimed in respect of that being £20, and in respect of the seven young oxen. Mr. Melck's contention in regard to that was that the seven young oxen were to be left grazing on the farm until they were of the age fit for the butcher, and there was to be no charge for grazing them in the meantime. It seemed to counsel that the onus was on his learned friend to establish his case. He would have to prove that the plaintiff was liable for the lost cow.

De Villiers, C.J., ruled that the plaintiff should proceed.

Evidence having been called, and counsel heard in argument on the facts,

De Villiers, C.J.: The amount which is admittedly due to the plaintiff for the grazing of the defendant's cattle is £26 18s. 2d., and for that amount plaintiff is entitled to judgment. The only question now is what is the position of the defendant: Whether the defendant has a counter claim in respect of the cow, the heifer, and the oxen? As to the cow, it is quite clear that the red and white cow formed part of the cattle which were delivered to the plaintiff. The custom seems to have been that people who sent cattle to graze on the plaintiff's land simply turned them into the land, and then afterwards sent their own man to collect the cattle again upon the plaintiff's farm, in the presence of a servant of the plaintiff, and then take them back to their master. There seems to be no definite contract in the nature of what the English law has called agistment, or of what is known in our law as the letting of the right of grazing upon a man's land. Certainly, if we look at the custom in this particular case, it was simply for the owners of cattle to send them there and then to fetch them back again when they wanted their cattle back. The farm was fenced, and was known to all parties to be fenced. If any cattle had

strayed from the farm by reason of the fence not being kept in order an important question might have arisen as to the guarantee of the plaintiff. At all events, the farm is properly fenced, so that no cattle got out of the property, but there is no question in the present case of the cow having strayed, and if the cow is not on the farm at the present moment, one can only suppose that the cow has died there. If the cow died there under such circumstances as the present, I do not think that there is any presumption in law that the death took place from the neglect of the plaintiff. If, however, it were clearly proved that the defendant had asked for the cow, and the plaintiff had refused to deliver it, there is great force in the reasoning of Mr. Upington that the plaintiff should be held liable if from whatever cause the cow afterwards perished. It is not necessary now to decide the point, nor is it necessary to consider whether the authorities cited in *Momson v. Mostert* (1 Juta, 185) which apply to a depositary refusing to deliver up the thing deposited also apply to a case like the present, because I am not satisfied that there was ever a refusal on the part of the plaintiff to deliver this particular cow. Unfortunately, Barend is not supported by Stephanus, who accompanied him, and he is also a witness for the defendant. According to Stephanus there was the red and white cow, and the heifer, and according to him, Mr. Melck, the plaintiff, refused to deliver both. Mr. Melck, on the other hand, says that the only animal in regard to which there was a question was in regard to the black and white heifer, and it is that animal that he wished for proof of ownership. I am not satisfied from the evidence that there was any refusal on the part of plaintiff to deliver this red and white cow. I am not satisfied that the cow perished from any cause for which the plaintiff is to blame. There seems to be no proof of neglect on the part of the plaintiff, and in the absence of a demand for this cow, and a refusal of the plaintiff to deliver it, I am not prepared to say that the defendant is entitled to recover the cow or its value. In regard to the black and white heifer, clearly he is entitled to recover that, and the plaintiff is willing to deliver it up. The only other point in dispute is in regard to the seven oxen. I am entirely with the contention of Mr. Upington that these oxen were delivered upon an arrangement that if at any time the plaintiff wished to use them he might do so, but I do not consider that there is any contract by which the defendant is bound to leave these oxen with the plaintiff until they were of a fit age for slaughtering purposes. Supposing cattle had risen very much in value, and supposing a great demand for cattle had arisen and the defendant wished to sell

his oxen, surely at any time he could have gone to the plaintiff and demanded these seven oxen, which he wished to deliver to the purchaser. I do not think there is any binding contract upon him to prevent him from claiming delivery of those oxen at any time, and the correspondence so far as it goes appears to me rather to support the version given by the defendant than the version given by the plaintiff. The plaintiff is entitled to succeed in his claim in reconvention to this extent, the defendant in reconvention must return to the plaintiff in reconvention the Canadian heifer, and the seven oxen, and, failing such return, to pay to the plaintiff in reconvention the sums of £10 and £77. Well, now comes the question of costs, which raises the most difficult question it seems to me. It is a pity gentlemen who seem good friends should come to law in this matter, and I fear the result will mean a considerable payment of costs. The Court will have to give judgment for the plaintiff for £27 18s. 2d., with costs on the claim in convention, and there will be judgment for the plaintiff in reconvention for a return of the Canadian heifer, seven oxen, and the calf, or payment of £10, £77, and £5, with costs in reconvention.

[Plaintiff's Attorneys: Syfret, Godlonton and Low. Defendant's Attorneys: Berrangé and Son.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDOEP.]

SOUTHERN LIFE ASSOCIATION V. TROLLIP. { 1907.  
Nov. 11th.  
Dec. 3rd.

Accident policy of insurance—  
Condition precedent—Written demand for arbitration—  
Waiver.

*In an action for £500 on an accident policy, the defendant Company pleaded that the plaintiff had failed to make a written demand for arbitration in terms of one of the conditions of the policy which*



provided that, if no written demand for arbitration be made by the insured within six months from the date of the accident, the insured shall be held to have waived and abandoned all claim against the Company, whose liability to the insured shall thereupon absolutely cease and determine. The action was tried before a jury, which awarded the sum of £500 to the plaintiff. An objection was taken on behalf of the Company that, as the plaintiff admitted that no written demand for arbitration had been sent, the judgment should be entered for the Company; but the presiding judge decided, as matter of law, that the condition did not apply, and judgment was entered for the plaintiff.

Held, on application to the full Court, that judgment should be entered for the defendant Company.

This was an application upon notice to respondent, Roland James Wm. Trollip, farmer, Bedford district, to show cause why a judgment given by Mr. Justice Hopley in a recent jury trial should not be set aside.

It will be remembered that the respondent recently sued the applicants for a sum of £500, to which he claimed to be entitled under certain policy of accident insurance. Respondent said that, in consequence of an accident on his farm, in July, 1906, he had sustained "complete and irrecoverable loss of sight," in one eye, within the meaning of the policy. The jury found for plaintiff for £500, and Mr. Justice Hopley entered judgment accordingly with costs (17 C.T.R., 940).

The present application was brought on the ground of non-compliance with clause 8 of the conditions of the policy, and also on the ground that the verdict of the jury was in conflict with the weight of evidence. Clause 8 stipulates that, in the event of a dispute, the claimant must, within a period of six months from the occurrence, make a demand for arbitration. At the trial this question was raised by the plea in bar, on which the learned judge ruled against the defendant association. Applicants further submitted that the finding of the jury that the respondent had sustained "complete and irrecoverable loss of sight" in one eye was

against the weight of evidence and, in the event of the legal objection failing, they claimed that on this other question they were entitled to a new trial.

Mr. Schreiner, K.C. (with him Mr. W. Porter Buchanan, K.C., and Mr. P. S. T. Jones), was for applicants; Mr. Upington (with him Mr. Sutton) was for respondent.

Mr. Schreiner said that the question between the parties was whether plaintiff was entitled to compensation for permanent partial disablement or temporary partial disablement. If the former, he was entitled to payment of £500, and if the latter, £6 per week for six weeks, and £2 per week for the remaining period of 14 weeks, or a total of £64. This latter amount was the absolute maximum that the association said plaintiff could have recovered if he were not barred, as they said he was barred. Continuing, counsel quoted section 39 of Act 23, 1891, order 40 of the English Rule of Court. No. 10 (Annual Practice, 1905, p. 563), *Bobbett v. South Eastern Railway Co.* 9 Q.B.D., 424, *Bryant v. North Metropolitan Tramway Co.* (6 Times Reports, 393).

Mr. Upington intimated that he did not propose to take any objection to the form of the procedure, so far as the legal point was concerned.

Mr. Schreiner (proceeding) quoted the 8th clause of the conditions attached to the policy, dealing with the question of arbitration, and submitted that that was a perfectly binding and valid stipulation, perfectly fair and reasonable, and it was, he observed, inconceivable why, when that was specifically pleaded and when on the pleadings an admission was definitely made that no demand was made for arbitration, and on the evidence before the Court, there was no trace of any kind of a demand having been made for arbitration, and no attempt had been made on the part of the association to abandon that condition, the plea in bar had not been upheld. He cited *Castle v. Southern Life Association* (16 C.T.R., 562).

[De Villiers, C.J.: Did the jury find that there had been a waiver of the condition?]

Mr. Schreiner: The only waiver they found was in regard to the notice being given within 21 days of the occurrence.

[When was the action commenced?]

Mr. Schreiner: Within the 12 months. Counsel cited *Kannemeyer v. Sun Insurance Co.* (13 S.C., 461) and *Hollander v. Royal Insurance Co.* (4 Juta, 66).

[Was the plaintiff's attention called by the association to the fact that, according to the conditions of the policy, he must demand arbitration within six months?]

Mr. Schreiner: No; because they radiated altogether, and they simply left him to his own devices. He cited *Gamble v. Accident Insurance Co.* (Irish

Reports, 4 C.L., 204), *Estate Vink v. New Zealand Insurance Co.* (22 S.C., 470), *Van der Spuy v. Directors Paarl Bank* (7 Juta, 245), *Davies v. South British Assurance Co.* (3 Juta, 416, and *Scott v. Arery* (5 House of Lords, 811). Counsel also quoted Act 29, 1898 (section 6) and *Myburgh v. Protecteur Fire Insurance Co.* (1878, Buchanan, 152). Coming to the second branch of the case, counsel pointed out that the words of the policy were: "Complete and irrecoverable loss of the sight in one eye." These were words, he submitted which were to bear their ordinary meaning. It was not sufficient that the loss of sight should be "irrecoverable." The jury appeared to have left out of mind the necessity of the loss of sight being "complete." Could a man who said that he could not see so well, but who did not say that he had completely lost the sight of his eye, be said to have suffered "complete and irrecoverable loss" of sight? Counsel proceeded to read the evidence given at the trial, from which he contended that there was no evidence to prove that the sight was irrecoverable. The medical adviser to the company stated in his evidence that Trollin's eye must have improved after it had been operated on. One of the plaintiff's witnesses stated he would not operate on the eye, as he might totally lose the sight. "How could he lose the sight of an eye when there is no sight?" queried counsel.

[De Villiers, C.J.: Your contention is that irrecoverable loss of sight means total blindness?]

Mr. Schreiner: Yes, my lord.

[I do not find any provision for permanent partial disablement of one eye. That is what has occurred in this case. If this is not a case of total disablement, then he has no redress.]

Mr. Schreiner: Except to the extent of 20 weeks' pay.

[Buchanan, J.: If he lost one of his fingers he could not recover.]

Mr. Schreiner: There was a case tried in Natal the other day, where a man lost two fingers, and the Court gave judgment in favour of the company, although it was proved that his hand was stiffened.

[Buchanan, J.: Unless it appears that the loss interferes with his business then, he can get no compensation?]

Mr. Schreiner: Quite so. Your lordship must remember the big risks undertaken.

Counsel (continuing) quoted from the evidence of Dr. Wood, whom he called the "high water-mark," and which stated that to all practical purposes the sight was irrecoverable.

[De Villiers, C.J.: What did he claim for on the previous occasion when he was pricked with a prickly pear in the right eye?]

Mr. Schreiner: I do not think the documents in connection with that claim

have been put in, but he accepted £5 in settlement of it, so it cannot have been very serious.

Mr. Upington contended that the first point to be decided was the wording and validity of clause 8. Counsel contended that the insertion of a clause in the policy to the effect that the matter shall be referred to an arbitration at the instance of one party only was not valid. Counsel quoted the cases of *Scott v. Mercantile Insurance Company* (66 Law Times Reports, 111), *Collins v. Locke* (4 Appeal Cases, 674), in support of his contention. The effect of the clause in question, he contended, was to refer everything to arbitration, and that it went very much further than the English cases. In the case of *Alexander v. Campbell* (27 Law Times, 25) it was held that all points were not to be referred to arbitration. Then there came the further question whether even if this clause was valid, the company could lie by and wait until the period for sending in a demand for arbitration had expired, and then said: "You have abandoned your claim." The position the company had taken up to that stage was different altogether. Considering the circumstances, was the company entitled to rely on a purely technical omission. The real object of the arbitration clause, he submitted, was to give the Insurance Company option of going to arbitration. The question to be determined, whether or not there had been such a breach of the condition requiring a demand for arbitration, as to disentitle the plaintiff to any relief or to claim under the policy, must be taken in that sense. The company had not made any demand for arbitration. They were relying upon a purely technical breach of the conditions, which had not damnified them in any way. Non-compliance with the condition could not be relied upon by the company merely because there had been an informal breach of it. This was not a condition precedent. A stipulation of this kind should be construed strictly in favour of the insured and of public trade. The clause was somewhat ambiguously worded. "Demand" in clause 8 could fairly be construed as meaning a demand for payment of compensation. There would be in essence no prejudice to the company in reading the clause in that way. The earlier part of the clause was distinctly obscure and misleading. Counsel quoted Porter on Laws of Insurance (3rd edition, pp. 30 and 31). If there was any ambiguity in the clause, surely the company and not the insured should suffer. This clause was in a way repugnant to the other clause of the policy which said that the association shall not be liable in any sum until the termination of the disablement upon which the claim was based. His client's disablement was not finished yet. On the contrary, all

the evidence in the case went to show it was permanent. Touching the question of fact, counsel submitted that his client had, as the jury had found totally and irrecoverably lost the sight of one eye. When the medical men talked of vision they referred to the sensibility of the eye, and they all agreed that for all practical purposes the plaintiff's eye was useless to him. The verdict was a perfectly fair one, and in accordance with the medical testimony. Counsel referred to *Hunter's case* (17 S.C.R., 80); there was a loss of sight which was complete, and counsel submitted that the policy must be read throughout from a practical point of view.

Mr. Schreiner, in reply, said it was not open to his learned friend to contend that this eighth clause could be capable of any other construction than that the written demand was a demand for arbitration, and the provision was beyond question. The question of loss of sight was considered in *Boardman v. London, Edinburgh and Glasgow Insurance Company* (1892, 2, Queen's Bench, p. 384). On the question of referring the matters to arbitration, counsel quoted the case of *Fookes v. New Zealand Insurance Co.* (4 Official Reports of the High Court of Justice of the S.A. Republic, p. 302, 1897), *Cook v. Southern Life Insurance Co.* (Digest of Natal Reports, part 2).

*Cur. Adv. Vult.*

*Postea* (December 3rd).

De Villiers, C.J.: It is with extreme regret that I have arrived at the conclusion that the judgment of the Court ought to have been entered for the defendant company. The action was on an accident policy issued by the defendant company in favour of the plaintiff, and there can be no doubt that the plaintiff did sustain serious bodily injury, resulting in a permanent deterioration of the sight of his right eye. He claimed £500, on the ground that the loss of sight was, in the terms of the policy, "complete and irrecoverable," and one of the defences raised in the action was that, as the plaintiff retained some degree of vision which enabled him to read letters of about 4 inches in length, to count the fingers of a man against a black coat at a distance of about 3 yards, and to see, although not to distinguish, people at a few yards distance, the loss of sight was not complete and irrecoverable. The jury, however, before which the case was tried found that the loss was complete and irrecoverable, and awarded to him the sum of £500, which is the amount that under the policy of the company had undertaken, subject to certain conditions, to pay him in case of the complete and irrecoverable loss of sight in one eye caused by violent, accidental,

external, and visible means. The learned judge who presided at the trial entered judgment for the plaintiff for £500, and the defendant company now applies that judgment may be entered in its favour, under the 39th section of Act 23 of 1891, on the ground that the admitted facts in the case prove that the loss of sight sustained by the plaintiff was only partial, and not complete. In the view, however, which I take of the case, it becomes unnecessary to determine this question, for upon another ground, which is also raised in the present application, the liability of the company under the policy had ceased before the present action was brought. The third paragraph of the plea raises the defence that the plaintiff had failed to make a written demand for arbitration within six months from the date of the accident, and the replication admits that no such written demand for arbitration had been made. The learned judge held, as a matter of law, that, notwithstanding the plaintiff's failure to make such a written demand for arbitration, he was not debarred, under the 8th condition of the policy, from enforcing his claim against the company. The condition reads as follows: "In case of any difference between the association and the insured regarding any claim under this policy, it shall be in the option of the association to have the said difference decided by arbitration or by action in the ordinary manner, and the association shall declare within fourteen days after written demand has been received at the chief office from the insured whether the same shall be decided by arbitrators to be mutually chosen, and in case the arbitrators shall not agree, by an umpire chosen by them prior to commencing arbitration, whose award in writing shall then be conclusive and binding on both parties . . . and in case the association shall decline to refer the said difference to arbitration or shall give no answer to the demand therefor within the aforesaid fourteen days the insured may proceed by action in the ordinary manner. . . . Provided, however, that if no written demand for arbitration as abovementioned be made by the insured within six months from the date of the accident in respect of which the claim is made, the insured shall be held to have waived and abandoned, and he hereby agrees to waive and abandon, all claims against the association, whose liability, if any, to the insured shall thereupon absolutely cease and determine." This condition is very prolix and involved in its terms; it is extremely one-sided, but its meaning is reasonably clear. The "written demand" mentioned in the first part of the conditions manifestly refers to the "written demand for arbitration" mentioned in the proviso. Within six months after

the accident the insured must send in a written demand for arbitration. Within fourteen days after receipt of such demand the company must declare whether it accedes to the demand, and if it declines or gives no answer, the plaintiff may proceed by action. But if the plaintiff fails within six months after the accident to send in his written demand for arbitration, he agrees to waive and abandon all claims against the company. He agrees, in other words, that if it should be found six months after the accident that he had not by that time sent in a written demand for arbitration the liability of the company under the policy shall be held to have absolutely ceased and determined. It being admitted that the plaintiff did not within six months after his accident send in a written demand for arbitration, it would follow that he has no claim under his policy. It has been urged on behalf of the plaintiff in the argument on appeal that as the company had repudiated its liability before the expiry of the six months it could not take advantage of the condition, but the replication, while admitting that a written demand had not been made, does not plead a waiver by the company of this condition, although it specially pleads a waiver of another condition. Even if waiver had been pleaded it would have been impossible to hold that because the company repudiated liability it dispensed with the obligation resting on the plaintiff to send in a written demand for arbitration. If such a written demand had been sent the company could have exercised its option whether to have the difference decided by arbitration or in a court of law, but until the demand was sent the company cannot be held to have refused to go to arbitration. This is not a case, therefore, like that of *Myburgh v. Protector Fire Assurance Company* (Buch. Rep., 1878, p. 152), where the accomplishment of the condition was prevented by the conduct of the defendant himself. The repudiation of liability would not necessarily lead the plaintiff to believe that the company would not consent to arbitration upon a written demand being sent to it. In the case of *Daries v. South British Insurance Company* (3 Juta. 415), I took occasion to point out that there was no reason, on principle or on authority, why persons shall not be at liberty to agree that any disputes arising out of a contract between them should in the first instance be referred to arbitration. In that case, the dispute was as to the amount of loss sustained by the plaintiff, but the Court did not decide that other disputes arising out of the policy could not be referred to arbitration. Since that date, the Act 29 of 1898 has been passed, which makes it clear, whatever doubts might previously have existed, that with the ex-

ception of criminal cases, matters relating to status, matrimonial causes, and matters in which minors or other persons under legal disability are concerned, all differences may, without leave of the Court be referred to arbitration. The interpretation clause defines "submission" as meaning "a written agreement to submit present or future differences to arbitration whether an arbitrator is therein named or not," and the third section enacts "that a submission, unless a contrary intention is expressed therein shall be irrevocable except by leave of a court or a judge or by consent of all the parties thereto." To assist arbitrators in the decision of questions of law arising in the course of the reference, the 27th section enacts that such arbitrators may at any stage of the proceedings, and shall, if so directed by the court or a judge, state any question of law so arising for the opinion of the court. In the present case, the policy contained no such "submission" as is defined by the Act, and I only cite the Act as showing that the differences which arose between the parties were legally capable of being decided by arbitration. If, then, there was no reason in law why those differences should not be so decided, I cannot follow the contention of the plaintiff's counsel that the 8th condition was against public policy or otherwise illegal. In case of a reference the arbitrators would have had none of the matters excluded by the Act to try, and they would have been entitled to the assistance of the Court upon any question of law that might have arisen. To speak of ousting the jurisdiction of the courts in such a connection appears to me to be a complete misnomer. The condition is a hard one, it might almost be called an unreasonable one, but it is not on that account illegal. But for the circumstance that insurance companies must be presumed to know their own business best, I should have thought that it was against their own ultimate interest to make a one-sided agreement by which they have the option of going to arbitration or not, whilst the insured is not only bound to propose arbitration, but loses his right to any claim under the policy if he fails within six months after the accident to make a written demand for arbitration. If, however, the insured is satisfied to accept such a condition, he must be prepared to act upon it before seeking to recover on the very policy in which the condition is incorporated. He, probably, like so many other people doing business with insurance companies, never carefully read the policy with its cumbersome conditions, but that is his fault, for which the company is not responsible. If he had carefully read it, he would certainly have taken care that six months did not pass by after his accident without a written demand for



arbitration being made to the company. He has failed in doing so, and the company, acting on the strict letter of its agreement, says that before action was brought its liability had "absolutely ceased and determined." It is for the company to judge whether it should take advantage of the informality, but if it insists, the Court, however much it may sympathise with the plaintiff, must give effect to the terms of the agreement. The result is that, notwithstanding the verdict of the jury, the judgment must be set aside as wrong in law upon the facts admitted in the pleadings. It is to be regretted that the opinion of the Court upon the point was not taken before the expense of a trial by jury was incurred. The plaintiff might have obtained such opinion by excepting to the third paragraph of the plea, and possibly the defendant company could have done so by excepting to the replication. After verdict and before judgment the defendant company's counsel again took the objection that the plaintiff's failure to comply with the proviso to the 8th condition disentitled him to relief, but the learned Judge decided, as a matter of law, that the plaintiff was not so disentitled. The Court, sitting as a Court of Appeal, will now enter judgment for the defendant company, and as the company is not specially to blame for the unnecessary expense, the judgment must be with costs in this court as well as in the court below.

Buchanan and Maasdorp, J. J., concurred.

[Applicant's Attorney: G. Trollip.  
Respondent's Attorneys: Dold and Van Breda.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SIVERTSEN AND OTHERS v. ( 1907.  
ESTATE SIVERTSEN. ) Nov. 12th.

Will—Informal execution—Witnesses—Ordinance 15 of 1845.

This was an action brought by Anthon L. Sivertsen, Sivert C. Sivertsen, Peter Nelson (married in community to Maria

E. Sivertsen), and Johanna D. Sutherland (born Sivertsen, married out of community to George Sutherland), against John Edwin Paul Close, as executor dative in the estate of Maria Elizabeth Sivertsen (born Behr), to have certain will declared null and void.

The ground of the action was that the mutual will of the late Hans Sivertsen and Elizabeth Maria Sivertsen was informally signed and executed. It was alleged that the document purported to have been signed and executed in the presence of two witnesses, Albert Gerard Anning and E. Barry, while, in truth and in fact, it was not so signed and executed. Mrs. E. M. Sivertsen did not acknowledge her signature in the presence of the said witnesses. Plaintiffs prayed for a declaration that the said document was null and void in so far as it purported to be the last will and testament of the late Elizabeth Maria Sivertsen, and for an order setting aside the appointment of Mr. J. E. P. Close as executor dative.

Defendant, in his plea, did not admit the allegations in the declaration as to the alleged irregularities, and put plaintiff to proof thereof.

Mr. McGregor said that the plaintiffs did not press the second part of the prayer, but simply prayed that the will be set aside as invalid as not being in conformity with the requirements of Ordinance 15, 1845. Counsel added that the will had already been set aside in so far as it purported to be the last will and testament of Hans Sivertsen.

Mr. McGregor, K.C. (with him Mr. Sutton), was for plaintiff; Mr. J. E. R. de Villiers was for defendant.

Evidence was led by Mr. McGregor.

John Commaille, a clerk in the Master's Office, produced a document purporting to be the joint will of Elizabeth Maria and Hans Sivertsen.

Albert Gerard Anning, a commercial traveller, of Observatory, said that he entered the employ of Mr. Sivert Sivertsen, chemist, Observatory (a son of the late Hans Sivertsen), in the latter part of 1903. Some time afterwards Hans Sivertsen called him into the office and asked him to sign a will as a witness. Witness went into the office and signed the will, and went out again. The signature on the document produced was witness's. The document was dated 12th January, 1904. After that, Mr. Barry (another assistant of Mr. Sivertsen's) was called in to sign the will. Witness did not see Mr. Barry sign the will, but when he had returned from the office he told witness what he had done. Mrs. Elizabeth Maria Sivertsen was not present that day. She had never on any occasion mentioned the matter to witness.

Cross-examined: Witness did not read the document when he signed it. He could not say whether it bore the date when he appended his signature. Old

Mr. Sivertsen asked him to witness his will. He did not understand that he was witnessing Mr. Sivertsen's signature simply. Mr. Barry was an assistant in Mr. Sivert Sivertsen's shop at the time. He did not know where Mr. Barry was. Witness had never signed any other document as a witness.

Maasdorp, J., asked counsel what would be the net result if the wills were set aside?

Mr. De Villiers: The net result would be that the property would be inherited in exactly the same way, but that it would be free from a *fidei commissum*.

Further cross-examined, witness said he was sure that he had not signed any document in Mrs. Sivertsen's presence.

Mr. McGregor (in answer to the Court) said that they had been unable to trace Barry.

Sivert Christian Sivertsen, chemist, Observatory (son of the late Hans Sivertsen), also gave evidence as to his two assistants going into the office at the request of his father to witness his will. Mrs. Sivertsen was an invalid at that time, and was not present when the two assistants went into the office. Barry left witness's service about a month afterwards, and his present whereabouts were unknown to him.

Cross-examined: The signatures on the document produced were, he believed, those of his father and mother. Witness was not aware at the time that it was informal to have the witnesses to attest the signature at different times.

Mrs. Johanna D. Sutherland (daughter of the testator and testatrix) and George G. Gie (of Herold and Gie, attorneys) also gave evidence.

Mr. De Villiers said that he did not propose to take up the time of the Court. The executor felt in duty bound to put the plaintiffs to proof of the allegations contained in the declaration.

Maasdorp, J.: The executor in this case was entitled to require the best proof that the will had not been properly executed, and the only proof that could be satisfactory would be the proof that would be expected to be given in this Court. It is quite clear now that the will was not executed properly in terms of section 3 of Ordinance 15, 1845, and it is consequently invalid. The will is declared invalid, costs to come out of the estate.

MULDER AND OTHERS V. { 1907.  
ESTATE GRUNDLING AND { Nov. 12th.  
ANOTHER. " 19th.

Will—*Fidei commissum*.

*G. and his wife made a mutual will, bequeathing their joint immovable property "to their*

*children till the third generation, that no one shall be entitled to sell or mortgage it, but the will shall remain in force and cannot be broken until in the third generation."*

*No heir was to claim his inheritance until after the death of the survivor. G. predeceased his wife, who adiated under the will. There are four daughters of the marriage, who now contend that, subject to the life interest of their mother, they are entitled to receive their respective shares of the inheritance free and unencumbered. The mother (defendant) contends that such shares are subject to fidei commissum in favour of her grandchildren and great grandchildren.*

*Held, that as the will contains a prohibition against alienation until the third generation and an indication of the persons in whose favour the prohibition was made, the defendant's contention must be upheld.*

This was a special case for determination of the construction of certain clause in the will of the late Andries Everhardus Grundling.

The special case was set out in the following terms:

1. The plaintiffs are: (a) Frederick Swerus Mulder, married with community of goods to Magdalena Cornelia Grundling; (b) Pieter Wouter Steyn, married with community of goods to Susanna Johanna Susara Grundling; (c) Pieter Jacobus Redelinghuys, married with community of goods to Anna Wilhelmina Maria Grundling; (d) Christian George Frederick Rheeder, married with community of goods to Wilhelmina Johanna Grundling.

The defendants are: (1) Magdalena Cornelia Olivier, a widow, who is sued both personally and in her capacity as executrix testamentary of the estate of the late Andries Everhardus Grundling, who was her first husband, to whom she was married with community of goods; (b) Jean Etienne Reenen de Villiers, who was appointed *curator ad litem* to the minor children of the second and third generations referred to in the will of the late Andries Everhardus Grundling, by order of this Honourable Court, dated October 15, 1907, and who is sued in his said capacity of *curator ad litem*.

2. On or about February 23, 1889, the late Andries Everhardus Grundling and his wife Magdalena Cornelia Grundling, the defendant—hereinafter called the testators—executed a joint will, of which a copy and a sworn translation are hereto annexed, marked "A." and "B." respectively, to the terms of which the parties crave leave to refer.

3. On or about February 7, 1892, the said Andries Everhardus Grundling died, leaving the said will of full force and effect, and the said Magdalena Cornelia Grundling adiated and accepted benefits under the said will.

4. By the said will the testators appointed the survivor of them executor or executrix of their joint estate and guardian of the minor heirs, and made certain specific bequests. Among the said bequests a one-fifth share in the farm Welbedacht was bequeathed to each of the plaintiffs. In regard to the said bequests the will provides, in Dutch, as follows: "Daar de testateuren over een zyn gekomen om huune vaste gronden hun eigendom te vermaken aan hunne kinderen tot in het derde lid dat niemand de regt zal hebben om het te verkoopen of te verbinden maar dat de testament zyn kracht zal houden en niet verbroken kan worden tot in het derde lid." ("Whereas the testators have agreed to bequeath their immovable lands, their property, to their children till in the third generation, now, therefore, nobody shall be entitled to sell or to mortgage, and the testament shall remain in force, and cannot be broken until in the third generation.")

5. The plaintiffs contend that according to the true intent of the said will they are entitled to their respective shares in the said farm free from any restraint or *fidei commissum*, and, further, that they are entitled to free and unencumbered transfer of their said shares, subject only to the life interest in favour of the defendant.

6. The first defendant says that in her personal capacity she is ready and willing to consent to transfer being passed to plaintiffs subject only to the life interest in her favour, but in her capacity as executrix she contends, and the second defendant likewise contends, that under a true construction of the said will, the bequest of the said landed property is subject to a *fidei commissum* extending to and in favour of the second and third generations, i.e., in favour of the grandchildren and great-grandchildren of the testators; or, alternatively, in favour of the grandchildren of the testators; and she contends that plaintiffs are only entitled to transfer of their shares subject to such *fidei commissum*.

Wherefore, the parties pray for judgment on their respective contentions, and for such order as to costs as to this Honourable Court may seem fit.

Mr. Schreiner, K.C. (with him Mr.

Watermeyer) was for plaintiffs; Mr. M. Bisset was for the first defendant; Mr. J. E. R. de Villiers appeared as *curator ad litem* of the minors.

Mr. Schreiner cited *Lind v. Calitz* (9 Juta, 268), *Rahl v. De Jager* (1 S.C., 38), *Kruse v. Pretorius's Executors* (1879, Buchanan), *Drew v. Drew* (1876, Buchanan, 203), *Zipp's Case* (1876, Buchanan, 181), *Du Plessis v. Smallberger* (3 Searle, 383), Voet, 36, 1, 10, and 36, 1, 27, Sande on Restraints (Webber's Trans., p. 168), Burge, vol. II., p. 113, *Galliers v. Ryckroft* (17 S.C., 514), *In re Beck* (1 Menzies, 332), *Rykliet v. Rykliet's Executors* (13 S.C., 64), *Nel v. Nel's Executors* (8 Juta, 189), Voet (McGregor's Trans. Note to 36, 1, 22), *De Villiers v. Stiglingh* (14 S.C., 368), and Nathan's Common Law of South Africa, vol. 3, sec. 1889, p. 1,910).

Mr. Bisset cited *In re Beck* (1 Menzies, 332), *Pretorius v. Pretorius* (2 Juta, 293), *Vermaak v. Vermaak* (21 S.C., 463), Voet, 36, 1, 22 (McGregor's Trans., p. 50), *Spengler v. Higg* (1 Roscoe, 227), *In re Bergh* (7 Juta, 305), Voet, 36, 1, 27, and 36, 1, 33, and *Rykliet v. Rykliet* (13 S.C., 67).

Mr. De Villiers said it was the desire of the minors that the Court should, if possible, decide the question whether the *fidei commissum* should extend to the great grandchildren, or the great-great-grandchildren.

Mr. Schreiner having been heard in reply,

Cur. Adv. Vult.

Postea (November 19th).

Maasdorp, J.: Amongst other dispositions in the last will of Grundling and his wife Magdalena appears the following: "Whereas the testators have agreed to bequeath their immovable lands, their property, to their children till in the third generation, that no one shall be entitled to sell or mortgage it, but the will shall remain in force and cannot be broken until in the third generation. These are the names—." Then follow the names of the testators' children, with the specific portion of land bequeathed to each. Then follows the passage: "The testators declare by these that no heir shall lay claim to his inheritance until after the death of the survivor." Magdalena, who survived her husband, and adiated under the will, is desirous of passing transfer to the plaintiffs of the land bequeathed to them respectively, subject to her life interest, but she contends that under a true construction of the will, the bequest to the plaintiffs of the land is subject to a *fidei commissum* in favour of the second and third generations, i.e., in favour of the grandchildren and great-grandchildren of the testators. The plaintiffs, on the other hand, contend that under

the will they are entitled to their respective shares of the farm free from any *fidei commissum*, and they are entitled to the unencumbered transfer of their shares, subject only to the life interest of the widow. Considering the nature of the sub-divisions of the farms mentioned in the will, it is quite conceivable that if the property should ultimately pass to the great-grandchildren, a very awkward state of affairs may arise through the smallness of the shares coming to each. But that consideration cannot weigh with the Court in endeavouring to ascertain the intention of the testators. It is certainly true that burdens imposed through the creation of a *fidei commissum* are regarded with such disfavour by the law that the rule has been established, in the interpretation of wills, to reject a construction which admits such a burden, where serious doubt occurs upon the subject. But here, again, the Court will not disregard the intention of the testator, merely because it is not expressed with absolute clearness. It seems to me that in this case, although the will is awkwardly worded, both the chief elements are present which go to constitute a *fidei commissum*. There is a prohibition against the alienation of the property, and an indication of the persons in whose favour the prohibition is made. If we had only the words: "bequeath their lands to their children till in the third generation," there might have been a question, whether this gives rise to a direct substitution or to a *fidei-commissary* substitution. But this difficulty is cleared up by the succeeding words, that no one shall dispose of the land until the third generation. Neither the children nor the grandchildren can dispose of the property, because it must pass to the great-grandchildren. If the prohibition had stood alone until the third generation, it might have allowed of a doubt as to whom it was intended to benefit. But the preceding words remove this doubt, because the prohibition must operate in favour of those to whom the bequest is made, and they are the grandchildren and great-grandchildren. It was further contended, as negating a *fidei commissum*, that the prohibition is directed only against the selling and burdening of the property, which might, therefore, be freely disposed of by last will. It seems to me, however, that the testators guarded against that by providing that the will shall remain in force and cannot be broken until in the third generation. Clearly indicating thereby that their desire to benefit the different generations in succession must not be defeated by tampering in any way with the provisions of the will. In my opinion, the contention that the land is subject to a *fidei-commissum* in favour of the grandchildren and great-grandchildren must succeed. A declaration

is made accordingly. Costs to come out of the estate.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Bisset and Hofmeyr.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, F.C., K.C.M.G., LL.D.).]

CORDEROY V. COLONIAL GOVERNMENT. { 1907.  
Nov. 12th.  
" 15th.

This was an action in which John Matthews Corderoy, lately on the Fixed Establishment of the Civil Service, sued the Treasurer-General for £750 damages and his re-instatement in the Service, or, in the alternative, £4,000 damages, by reason of his wrongfully enforced retirement or dismissal. The plaintiff's declaration was as follows:

1. The plaintiff is John Matthews Corderoy, who resides at Sea Point.
2. The defendant is Edgar Harris Walton, who is sued in his capacity as the Treasurer-General of the Cape Colony, and as such representing the Colonial Government.
3. The plaintiff entered the Civil Service of the Cape Colony on the 1st day of July, 1897, when he was appointed a clerk in the Department of Agriculture, in which department he remained for a period of six months, after which he was appointed a clerk in the Public Works Department of the Cape Colony.
4. Plaintiff was placed on the fixed establishment of the Civil Service on the 1st July, 1903, pursuant to the provisions of Act No. 32 of 1895, when he was transferred from the Public Works Department to the Control and Audit Office, in which office he held the post of Travelling Inspector until his enforced retirement on the 7th October, 1906.
5. On the 7th day of October, 1906, without any lawful cause or excuse, the services of plaintiff were dispensed with.
6. The plaintiff has always been physically and mentally fit to discharge efficiently his official duties, and has always discharged his duties efficiently and well, and is ready and willing to continue to do so at an adequate salary as compensation for his services, but the defendant has refused, and continues to refuse, to employ him.
7. The plaintiff has suffered considerably through being dismissed from the Government Service; he has lost his



prospect of preferment, with its accompanying increase of salary; has lost prestige by reason of his dismissal, and by reason of the prevailing depression he is unable to obtain another appointment.

Wherefore plaintiff claims: (1) His reinstatement at a salary of not less than £600, on the Fixed Establishment of the Civil Service of the Government of Cape Colony; (2) the sum of £750, as and for damage sustained by reason of his wrongfully enforced retirement or dismissal from the Civil Service; (3) costs of suit, or, in the alternative, (a) the sum of £4,000 as and for damages sustained by reason of his aforesaid wrongfully enforced retirement or dismissal from the Civil Service of the Cape Colony, (b) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, 3, and 4 of the declaration.

2. He denies paragraph 5, and says that it was found necessary to remove the plaintiff in order to facilitate improvements in the organisation of the department to which he belonged, by which greater efficiency and economy could be effected, and that the Governor accordingly on the 7th October, 1906, dispensed with his services under and by virtue of the 35th section of Act No. 32 of 1895, both Houses of Parliament having previously, to wit, on the 13th and 16th August, 1906, respectively, concurred in the said removal.

3. The plaintiff was, in terms of the said Act, entitled, in consequence of his removal as aforesaid, to a gratuity of the value of £325, but with the approval of Parliament a gratuity of £385 12s. 6d. was tendered to him before the institution of this action, which gratuity the plaintiff refused to accept. The defendant has always been willing to pay him, and hereby again tenders to pay him the said sum of £365 12s. 6d.

4. He admits that the plaintiff has always been mentally and physically fit to discharge his official duties, and has discharged them efficiently and well, but save as aforesaid denies paragraphs 6 and 7.

Wherefore, save as to the sum of £365 12s. 6d. tendered, he prays that the plaintiff's claim may be dismissed with costs.

The plaintiff appeared in person, and Mr. Howel Jones, K.C. (with him Mr. Nightingale), was for the Government).

The plaintiff said that the position was a very strange one. He was detached from another department, in which, although he was only a temporary man he was practically fixed; in fact, more fixed than he ultimately proved to be on the fixed establishment by reason of the work he had done for the department. When he went to the Public Works Department the accounts

were in a dire condition, and he was getting a free hand as a commercial man to get the work up and keep it up. In 1901, after some three and a half years of arduous services, and finding he was practically blocked, he wrote private notes to a few of the heads of departments, amongst others Mr. Gurney. In May, 1901, Mr. Gurney got into communication with him, and wanted to know whether he would come and take up the position of travelling inspector.

The plaintiff was proceeding to read a lengthy document, when

De Villiers, C.J., suggested that as he was making statements of fact it would be as well, in order to save repetition, to give his evidence at once.

The plaintiff, in the course of his evidence, said he entered the Civil Service in July, 1897, on a temporary appointment with the Agricultural Department in connection with the rinderpest. After that he became a clerk in the Public Works Department, from the 1st December, 1897. On the 1st July, 1903, he was placed on the fixed establishment. Then he was transferred from the Public Works to the Audit Office. Primarily his duty was understood to be that of travelling inspector in connection with the Harbour Boards.

[De Villiers, C.J.: How long did you retain that office?—Until the time of my summary retrenchment, October 7, 1906.

The plaintiff (continuing) said it was admitted he was an efficient officer.

[De Villiers, C.J.: I see you claim damages?—Yes, because when I was detached from the Public Works I went under the sincere belief that the promises made me would be fulfilled. That would have given me very substantial increase of salary. Had I remained at the Public Works the increase would have been even more satisfactory, as the letter from Mr. Gurney will show. Early in May Mr. Gurney was anxious to bring things to a head, and to get this post, which was standing vacant for two and a quarter years, on the estimates filled up. He telephoned me, and I went to his office, when he said he had authority to pay £450.

[You claim damages for enforced retirement?—Yes, and for loss of promotion.

[What is the amount?] I claim £750. I have had to break up my home, and have gone through all sorts of hardships ever since October 7, 1906.

[In addition to that you claim £4,000?—That is only if they want to get rid of me finally.

[You claim reinstatement, and £750, or £4,000?—Yes.

[I may tell you at once that, as a judge of this Court, I cannot reinstate you. Under the circumstances, that is impossible. The only question is: Can I award damages? Therefore

you must confine your claim to the second count. The Court has not the power to reinstate any man in the service. Of course, if you were illegally dismissed, then the Court will give you damages.]

In the event of section 35 having been illegally traversed, would the Court not have the power?

[No, the Court has no power. It is not part of the power of the Supreme Court to reinstate you. That is a matter for the Executive, but, of course, the Court can give you damages.]

Cross-examined, the plaintiff said that he relied upon Mr. Gurney's promises in May, 1903, although Mr. Gurney was not then Auditor-General, and perhaps had no authority to promise to better his (plaintiff's) position by promotion. Otherwise, plaintiff would never have left the Public Works Office. Mr. Gurney asked him to leave.

Mr. Jones: There is a conflict of evidence on that point.

Plaintiff admitted that he had made £170 out of a motor-car trip. On another trip he lost.

De Villiers, C.J., said he did not see how this affected the case.

Plaintiff further admitted that he became dissatisfied with affairs in the office, and he wrote a letter asking for a transfer. There was no room elsewhere, and Mr. Gurney sent for him. He did not say he could not have a man who made complaints. Plaintiff held that he had hopelessly been duped. Certainly Mr. Gurney asked him to reconsider his position in regard to his request for a transfer. Witness made a written statement of his case. He maintained throughout that Mr. Gurney had failed in his explicit promises. In February, 1906, he did not apply to Mr. Gurney to go on a trip to the Transkei, and say at the same time that he would only be remaining in the office four and a half months.

[De Villiers, C.J.: If the law did not allow of his enforced retirement upon gratuity, can a resolution of Parliament make it legal? The Government can only act by Act of Parliament, not by resolution.]

Mr. Jones: With regard to the additional gratuity to add £40, that is the object of the resolution, not to make it illegal to give a gratuity, instead of a pension. Under section 35, he is only entitled to a gratuity, not a pension, because he has under ten years' service, but it was suggested to give him an increased gratuity, and the resolution of the Select Committee of the House of Parliament was that this increased gratuity be allowed him.

[I am referring to the proviso: "No person shall be removed from the service in order to facilitate improvements in the department to which he belongs, without the previous concurrence of

both Houses of Parliament." Where is that concurrence?]

Mr. Jones: It is implied, I submit. Counsel then proceeded to read from the Votes and Proceedings of the Select Committee on Pensions.

[It is important that I should have the terms of that resolution.]

Mr. Jones: I will put them in. That is the report of the Select Committee on Pensions and Gratuities, which had power to take evidence and call for papers. They report they concur in the proposal contained in the paper submitted, and recommend the additional gratuity of £40 12s. 6d. to James Matthews Corderoy.

[Is that a concurrence that he shall be removed from the service?—Impliedly it is, but it is a resolution formed upon the consideration of the whole case. All the papers, as I understand, were before the Select Committee.]

[The object of that is to obtain a gratuity for him, but it would not decide whether he might be removed from the service. That was not the question raised?—The object of putting all the papers before the Select Committee was to obtain their concurrence to his removal.]

[Was it brought before Parliament that he was compulsorily retired?—All the papers were put before the Select Committee on Pensions, and then there was this resolution. I quite admit it is rather a bald resolution to pass, but the fact of passing it shows they concurred in his removal, as they had all the facts of the case before them. There is the further adoption of their report by both Houses of Parliament.]

The plaintiff, continuing under cross-examination, said he sent a petition to Parliament, and he did so because the members of the Pensions Committee assured him they had no idea at all of the facts of the case. He was willing to abide by the decision of the committee, because he was given to understand they would give him a hearing. The Pensions Committee refused to hear him even when he appealed to the House of Parliament. In each instance his ministerial chief was chairman of the Select Committee. He circularised practically every member of Parliament, but in the circular did not set out all the material facts. Mr. Jagger persuaded him not to petition for a Select Committee.

[Were you not before the Select Committee?—No.]

[Where was the hearing, Mr. Jones?—By a circular to the members.]

The witness (proceeding) said if he had been a criminal he would have had a hearing.

Mr. Jones: He put a statement of facts before every member of Parliament, so that it would hardly be necessary to call him. (To the Witness): Upon what do you base your damages.

Have you attempted to get other employment?—I have had temporary employment at the South African College for four and a half months.

Why did you leave it?—I was only there temporarily.

Surely you could get another billet?—If I were to take employment that was *infra dig.*, I would leave the Colony.

What do you mean by that?—I would not take a position at £200 or £300 a year in the Colony.

What is the least you would expect?—It would depend entirely on the circumstances of the position offered.

Would you accept £500 outside the service?—Yes.

Have you tried to get employment?—Yes.

Proceeding, the witness said he had tried to get employment in Johannesburg, but failed to find anything suitable. After he read Mr. Gurney's note about his retirement, he wrote and told him he would appeal to "Cæsar."

Walter E. Gurney, Auditor-General, stated that owing to Parliament not meeting the position of Harbour Board Inspectors which was on the Estimates remained vacant for something like 18 months. The plaintiff seemed very anxious to go to the audit office.

[De Villiers, C.J.: If Parliament authorised the removal, the Court cannot interfere.]

Plaintiff: I understand the first part of that section 35 really does not appertain to my case at all—whether I was efficient or not.

[De Villiers, C.J.: If Mr. Gurney says it was found necessary to remove you in order to facilitate improvements in the organisation of the department, then, of course, I cannot go into the question whether it was necessary or not. If Mr. Gurney thought it was necessary, I am not the Executive.]

[To the Witness: Was it found necessary to remove the plaintiff in order to facilitate improvements in the organisation of the department?

Witness: It has been found necessary in the last two years to remove twenty men from the audit office in consequence of the abolition of departmental audit, whereby £6,000 per annum has been saved, and it was found necessary to remove Mr. Corderoy as one of these.

[And greater efficiency and economy were thereby effected?—Undoubtedly, in the organisation of the department.

Plaintiff: In the organisation of the travelling inspector branch?

The witness, proceeding, said there was nothing special in his previous career which would not make it necessary to remove him. There was nothing said against the plaintiff's efficiency, but he had by his attitude in the office shown that he was not a settled down officer ready to take up any responsibilities which were thrown upon him.

[De Villiers, C.J.: Was it necessary to remove him in order to facilitate the improvement?—Yes.

Continuing, the witness said the papers in which the proposal was made included a minute from the Governor in Council proposing to retire him under this section. These papers were laid by the Treasurer before the House, and referred by the House to the Committee on Pensions, and the Pensions Committee did not see fit to call Mr. Corderoy, but they passed a resolution to the House approving of an increased gratuity of £40 12s. 6d.

[De Villiers, C.J.: The minute was before the committee. Was it before Parliament itself?—Yes, and that resolution was adopted as shown by the minutes of the House.

[In what manner was it brought to the notice of the House that Mr. Corderoy was removed compulsorily from the service?—The papers in Mr. Corderoy's case were all laid on the table of the House.

[I would like to see some papers that he was removed from the service compulsorily.]—The Treasury probably can produce them.

In reply to plaintiff, witness absolutely denied that a personal matter was the cause of his first thought of retrenchment.

George Alexander Perrain was called by the plaintiff.

[De Villiers, C.J.: What is your position?—Inspector in the Audit Office.

[I understand the question the plaintiff wants to put to you is whether it was necessary to remove him in order to facilitate the improvements in the organisation of the department?—That is a question for the head of my department.

Plaintiff: What was your previous training prior to—

Mr. Jones: I object to that question. He did not take Mr. Corderoy's place.

[De Villiers, C.J.: Did you take his place?—No.

Ernest Fuller Kilpin, the Clerk of the House of Assembly, produced the papers placed before the House in regard to the plaintiff's case in 1906.

[De Villiers, C.J.: Were these papers placed direct before the Select Committee, or were they placed before the House, and then by the House referred to the Select Committee?—Yes; they were laid on the table by the Government, and referred to the Select Committee.

[I should like to put a few questions to Mr. Gurney.]

Mr. Gurney was recalled.

[The first of these papers purports to be an application by Mr. Corderoy for gratuity?—That is the usual form that is used in cases of retirement, in order to give the necessary details.

[It was not, I think, signed by Mr. Corderoy?—That is the usual form filled in in order to get the details.

[Yes; but then Parliament was led to suppose that Mr. Corderoy had applied to be—?—I do not think so, in view of the memorandum addressed to the Treasury on the subject.

[Because here it is—name of applicant in full, "John Matthews Corderoy?"]  
--Yes.

[He is not an applicant?—It is the usual form but the memorandum practically explains that.

[Which memorandum?—The memorandum addressed to the Treasury.

[That is the one of the 26th July?—Yes, that sets forth his previous circumstances, and it closes by saying he has written it in order that the committee may know all the facts of the case, and that he will loyally accept the decision of the committee, whatever it may be.

[Under the 35th section of the Act, provision is made for a temporary pension?—A temporary pension in the case of an officer who has had over ten years' service.

[What is the section which refers to under ten years?—The same section goes on to say, but if the service be less than ten years, he shall be retired exactly as though he were not on the fixed establishment, and that is provided for under section 29, where it provides for a gratuity of one month's salary for each year's service. On that basis, he would have got the smaller sum, but the £40 was added.

After hearing the plaintiff and Mr. Jones,

De Villiers. C.J.: The main object of the evidence which is produced by the plaintiff in this case was to show that his removal from the position which he held in the Auditor's Office was not necessary, because it did not facilitate improvements in the organisation of the department, and that by reason of his removal there was no greater efficiency or economy effected. I said at the outset, and I repeat, that these are not questions which a Court of Law can enter into. It is a question entirely for the heads of the department to deal with. They are in the best position to judge as to whether improvements in the organisation of the department would be facilitated by the removal, or as to whether there would be greater efficiency and economy. The Courts of Law cannot enter into the question of efficiency of the service of any department. Now, this case itself is an illustration. One of the witnesses called by the plaintiff is a Mr. Perrain, who is his successor, and the object of the plaintiff in calling him was to show that Mr. Perrain was not equally efficient. How is the Court to judge of that efficiency? It is a matter upon

which the head of the department can form an opinion, but no one else is in a position to form an opinion as to such efficiency. Parliament has seen fit to protect the servants by this proviso: "That no person shall be removed from the service in order to facilitate improvements in the department to which he belongs, without the previous concurrence of both Houses of Parliament." That is one protection, but, of course, I do not say that is the only protection, because the Court must see that the head of the department is doing his duty in the matter, and acting in perfect *bona fides*, and that he has satisfied himself that these improvements would be facilitated by the removal. But the proviso which I have just read gives a further protection, and the point which I have to decide is whether that protection has been furnished in the present case. The difficulty which I at first experienced was that the application which was placed before Parliament purported to come from the plaintiff himself, and if that were the only document before Parliament I should say at once that Parliament has not concurred in his removal by granting the gratuity. But it is not the only document which was before Parliament, because there were other documents before Parliament which were afterwards submitted to the Select Committee, which makes it quite clear that it was not a case of voluntary retirement on the part of Mr. Corderoy, but a case of compulsory retirement. Amongst the papers laid before the Parliament was a memorandum by Mr. Walter Gurney, the Auditor-General, in which he speaks of this gratuity being required, because Mr. Corderoy was being retired, and he strongly recommends the favourable consideration of Parliament, as Mr. Corderoy was only two months short of ten years' service, and that he should be granted an additional £40 12s. 6d., to which he would have been entitled. Then there is a further memorandum by Mr. Walter Gurney, from which it would also clearly appear that it was a case of compulsory retirement, because he says: "I feel bound to mention that the proposal that he should be retired did not come upon him as a surprise upon his return from the Transkei. I had written to him on the 12th ult., telling him what was going to happen on his return." That is laid before Parliament. In addition to that there is a letter from Mr. Corderoy to the Treasurer of the Colony, dated July 25, 1906, in which he says that he has the honour to refer to my conversation with the Assistant-Treasurer, and, in conformity with his suggestion, to place on record some special features relating to my case. May I ask that this memorandum be attached to the papers to be placed before the Select Committee on Pensions, of which you are the chair-



man, so that the matter may be considered from all points of view, and I shall cheerfully accept the ruling whatever that may be"; and then he goes into the full statement of what he had done during his service. There is an appeal here, therefore, to Parliament to deal leniently with him, and so on. He had begun by saying he would cheerfully accept the ruling of Parliament on the question. It is upon this proviso that I fear that there will be great difficulty for the plaintiff to make out his case, but before I finally decide the point I should like further inquiries to be made as to what the practice has been hitherto in regard to these cases. Mr. Kilpin has stated that this is the usual form in which Parliament approves of the removal from the service by simply approving of the gratuity, but, of course, he did not come prepared to answer this question sprung upon him, and perhaps, if he has time to look up the records, he may find cases in which there has been special concurrence with the removal. Before I gave judgment I should like to know what the practice has been in the past in that respect. I will postpone the final judgment until I have further information on the point. If there is a practice to concur in the removal, I do not think the Court can take the mere granting of a gratuity under the circumstances as a concurrence of the removal.

*Postea* (November 15th).

De Villiers, C.J., said that amongst the papers in the case was a consent by Corderoy to which the Court's attention had not been called at the trial. In this consent plaintiff admitted that his removal from the Civil Service was concurred in by both Houses of Parliament.

Mr. Jones said that he had not desired in any way to prejudice the plaintiff's case.

Plaintiff said that he signed the admission at Messrs. Reid and Nephew's office on the assurance of Mr. Reid that it would not prejudice him in any way. He added that he was prepared to go behind the consent.

[De Villiers, C.J.: The Government must then have an opportunity of giving further evidence.]

Plaintiff said that he could produce evidence to show that neither the members of the Pensions Committee nor the members of the House knew what they were doing when his case was before them. His was not an ordinary case. As an extraordinary case, it demanded exceptional treatment, which it did not get. If the hearing could be adjourned for a few days, he could get the necessary evidence to show that.

De Villiers, C.J., said that such evidence would not be admissible.

Plaintiff: Of course, your lordship is the best authority in the Colony on this

matter of the practice of the Houses of Parliament in relation to the Service.

[I can only speak as to the Legislative Council. I cannot speak as to the Assembly.]

Plaintiff: Yes, quite so, but, after all, the Council have to put the finishing touch on.

De Villiers, C.J.: The House subsequently next session, when your petition was before it, refused to grant relief. If I thought there was any possibility by postponing of throwing a different complexion on the case I should grant it. His Lordship then proceeded to deliver judgment as follows: On looking over the documents produced in this case I find the following admission paper signed by the plaintiff on the 11th of November, 1907: "I do hereby admit that my removal from the Civil Service on the 7th of October, 1906, was concurred in by both Houses of Parliament, to wit, on the 13th and 16th August, 1906, respectively." If my attention had been called to this admission, I would have given final judgment immediately after the hearing. I am bound, however, to say that the practice of treating the mere award of a pension or gratuity by Parliament to a Civil Servant removed under the 35th section of Act 32 of 1895 as a concurrence by both Houses of Parliament in such removal is open to grave objection. The Act was manifestly intended for the benefit and protection of officers in the Civil Service, and where such an officer is dismissed from the service without due observance of the requirements of the Act, he is clearly entitled to the protection of this Court. In the case of *Faure v. Colonial Secretary* (Foord's Rep., p. 82), it was held that the Governor had the power summarily to dismiss a public servant, who held office during the pleasure of the Crown, but there are several points of difference between that case and the present. It was a condition of Mr. Faure's appointment that he should not thereby be admitted into the Civil Service, he was held to be an officer of this Court, holding office during the pleasure of the Crown, and his case was decided before the passing of Act 32 of 1895. That Act is the charter of every officer in the Civil Service of this colony, and no blame can attach to any such officer who invokes the aid of this Court against an infringement of his rights thereunder by the Governor or by a Minister of the Crown. It should be clearly understood, however, that whilst protecting officers of the service against illegality, this Court will not interfere with the executive duties of the Government, nor will it undertake inquiries into such question as whether a particular office ought to have been abolished under the 24th section of the Act, or

whether greater efficiency and economy would or would not be effected by the reorganisation of any department under the 35th section. As I remarked at the trial, the plaintiff in the present case concentrated all his efforts on an attempt to prove that the reorganisation which led to his removal did not conduce to greater efficiency or economy in the administration of the Audit Office. This is an inquiry upon a purely executive matter upon which this Court could not possibly enter. If the plaintiff could have proved that it was a case of abolition of office to which the more liberal provisions of the 34th section of the Act would apply, the Court would have had the power to direct that the scale of compensation should be in terms of that section, but he admitted that his office of inspector had not been abolished, his only complaint being that a less efficient officer had been employed in his place. By entertaining such a complaint the Court would usurp functions which do not belong to it, but are vested in the Responsible Government of the country. The safeguard against an improper removal under the 35th section is that "no person shall be removed from the service in order to facilitate improvements in the department to which he belongs without the previous concurrence of both Houses of Parliament." It is an extraordinary circumstance that the plaintiff's case was first brought before Parliament by means of an application purporting to be made by him, but to which he was really no party. If both Houses of Parliament had authorised the gratuity in the belief that the plaintiff was the applicant for a gratuity, I would have had no hesitation in holding that the mere grant of the gratuity did not amount to a concurrence in his removal. Unfortunately for the plaintiff he wrote a letter to the Treasurer in which he asked that the letter should be laid before the Select Committee on Pensions, and he added that he would cheerfully accept the ruling, whatever that might be. After Parliament had given its ruling by which it awarded to him a gratuity £40 in excess of what he could claim under the 29th section of the Act, he submitted a statement of facts to individual members of the Legislature in which he said: "The House of Assembly has just adopted the report of the Select Committee on Pensions, whereby I am to be retrenched from the 30th September next upon payment by Government of a gratuity of a sum of £360. . . . This decision has been arrived at by the committee through their non-acquaintance with the real facts of the case." Clearly, then, the plaintiff understood that Parliament had concurred in his enforced retirement. If Parliament so concurred the Court must accept its concurrence as a compliance

with the proviso of the Act, and cannot sit as a Court of Review of proceedings in Parliament. In the following session a petition from the plaintiff was laid before the House of Assembly, praying the House to consider the circumstances of his case and to grant him relief, but the committee reported that it was unable to recommend that the prayer be entertained. As regards the concurrence of Parliament in removals under the 35th section of the Act, the Clerk of the House has taken considerable pains to ascertain the general practice in obtaining such concurrence. The conclusion at which he has arrived is that the consent of Parliament has, with one exception, always been obtained, in the form of a resolution recommending the grant of a pension or gratuity, without any reference to the section or the Act. The exception is that of Mr. Pewtress, in whose case the resolution adopted by both Houses reads thus: "This House recommends the retirement from the public service of J. B. Pewtress, Inspector in the Control and Audit Office, and that he be awarded a gratuity in accordance with the regulations." I cannot conceive why the Government does not, in every case where it asks for concurrence in the removal of an officer under the 35th section, obtain a resolution expressing such concurrence, instead of leaving it to be inferred from the fact of a gratuity or pension being concurred in. In the present case, it was only the additional gratuity of £40 that was concurred in, for the balance of the gratuity could be granted by the Government, assuming that the 35th section was complied with, without the sanction of Parliament. The practice actually adopted by the Government leaves it open to the dismissed officer in every case to raise the objection that the requisite concurrence had not been given. It so happens that the plaintiff has irremediably committed himself, but it would have been difficult for the Government to escape liability, if the plaintiff had not, before the question of a gratuity was submitted to Parliament, consented to accept the ruling of Parliament on the matter. If instead of so consenting he had raised the question that the concurrence of Parliament was required before he could be removed, the Government would have been able to obtain such concurrence in express terms. That such concurrence would have been given may fairly be gathered from the fact that when in the subsequent session the plaintiff applied for relief, Parliament, with the facts stated in his petition before it, refused to assist him. Whatever doubts, however, might have been entertained by me are removed by the plaintiff's admission

filed of record in this case to the effect that his removal from the Civil Service had been concurred in by both Houses of Parliament. The judgment of the Court must therefore be for the defendant.

De Villiers, C.J., asked Mr. Jones if he had anything to say in regard to the question of costs.

Mr. Jones said that he left that matter entirely in the hands of the Court.

[Of course, the plaintiff himself has incurred no costs; he would not be liable to any costs himself; but in many respects it is a case of hardship, and it is impossible to conceal the fact that the whole matter was practically arranged while the plaintiff was absent on his inspection, and an attempt was made to get him to sign this application for a retirement allowance, and he refused to sign it, and yet, originally, the first application purported to come before Parliament from him. The papers which accompanied the application would have called the attention of Parliament to the fact that he was not really the applicant, and that it was a case of enforced hardship.]

Mr. Jones: I did not quite understand that he refused to sign it.

[Oh, yes, that appears from the correspondence. He refused to send in the application.]

Plaintiff: That is so.

De Villiers, C.J.: Parliament has the power to relieve the plaintiff still, but, as far as his strict legal rights are concerned, the Court is bound to hold that he has failed, and as defendant's counsel does not press for costs, there will be no order as to costs.

Plaintiff: With apologies, may I add a word as to the consent?

[No; I think I have heard you sufficiently. I have given your case all the consideration possible.]

[Plaintiff in person. Defendant's Attorneys: Reid and Nephew.]

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.

{ 1907.  
Nov. 12th.

Mr. Watermeyer moved for the admission of Robert Pringle Dewar as an attorney and notary.

Granted; oaths to be taken before the Resident Magistrate at Tarkastad.

### PROVISIONAL ROLL.

#### MOLTENO V. MAKOLILIS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £100, with interest at 6 per cent. from January 1, 1903, and costs.

The order was granted, the property specially hypothecated to be declared executable.

#### RIGG V. BURGER.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £150, with interest at 7 per cent. from July 1, 1903, less £15 15s. paid on account.

Order granted.

#### KOSTER V. WILLIAMS.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £100, with interest at 6 per cent. from July 1, 1906, and costs. It did not appear from the return whether a copy of the bond had been served on the defendant with the summons.

Ordered to stand over.

*Postea* (November 13th). Service of a copy of the bond on defendant having been proved, the Court granted provisional sentence.

#### VOS V. REYNOLDS.

Mr. Roux applied for a decree of civil imprisonment against defendant on an unsatisfied judgment of the Supreme Court for £87 3s. 5d.

Granted.

### ILLIQUID ROLL.

#### CAMPBELL V. HERBERT.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for an order compelling defendant to forthwith give transfer to plaintiff of a piece of land at Belleville, purchased by plaintiff from defendant on August 19, 1906.

Defendant appeared in person, and said that the land belonged to the firm of G. and T. Herbert, whose schedules had been filed. He admitted that the property was registered in his name.

Judgment as prayed granted.

#### MILLER V. BURGER AND ANOTHER.

Mr. Roux moved to have Johannes Stephanus Burger declared of unsound mind, and that Mr. Willem Petrus Burger be appointed curator to his person and property.

Mr. Howse appeared for the temporary curator to oppose the application.

Mr. Marais appeared for the *curator ad litem*.

Dr. Dodds, medical superintendent of Valkenberg Asylum, stated that Burger was at present an inmate, being detained by a Judge's order. He was still of un-ound mind, but it was probable that he would recover within the next couple of months. At present he was not fit to take charge of his affairs. Eleven years ago he was an inmate of the asylum.

Mr. Howse: It was stated in September that he would probably recover in from three to six months?—Yes.

Is that probable?—Yes.

Mr. Roux moved for an order declaring him of unsound mind, and appointing Mr. W. S. P. Burger curator.

Mr. Howse said Burger had been appointed with full powers.

[Buchanan, J.: But he did not avail himself of them.]

Mr. Howse: He could not at the time obtain security, and nothing could have been done in the estate up to the end of the present month.

Buchanan, J.: The Court must declare Burger of unsound mind, and Mr. W. P. Burger as permanent curator.

#### GENERAL MOTIONS.

RAWBONE V. RAWBONE. { 1907.  
Nov. 12th.

Mr. Alexander moved for a final decree of divorce in this action. This was the return day, and the defendant, Elizabeth Maria Rawbone, had failed to comply with the order of the Court.

Order granted.

BOYES V. BOYES.

Mr. De Waal moved for a final decree of divorce against the defendant, who had not returned to the plaintiff on or before the day fixed by the Court.

Order granted.

MALTINSKY V. MALTINSKY.

Mr. Sutton moved for the removal of this action, which was for an order for the restitution of conjugal rights, from the Supreme Court to the Circuit Court at Oudtshoorn.

Order granted.

*Ex parte* THE ESTATE OF THE LATE GRUNDLING.

Mr. P. S. T. Jones moved to have made absolute a rule nisi calling on all

persons to show cause why the Registrar should not pass transfer of certain land in the district of Oudtshoorn.

Granted.

*Ex parte* FULLER.

Mr. Wallach moved on behalf of applicant for leave to sue the Cape Government Railways *in forma pauperis* for damages for injuries received while travelling by train between Johannesburg and Kimberley in December, 1903.

Order granted.

*Ex parte* HELLAND.

Mr. Roux moved for leave to sue the Cape Town Council *in forma pauperis* for £500 damages for injuries received in the gas explosion in Adderley-street.

The matter was referred to Mr. Roux for consideration and certificate.

*In re* GRAND JUNCTION RAILWAYS.

Mr. Close (with him Mr. Schreiner) presented the fourth report of the Receivers.

The report was ordered to lie for inspection for the usual period.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HILL V. GUNDRY. { 1907.  
Nov. 13th.

Survey — Plan — Variation of written contract—Burden of proof.

*It is no part of the duty of a land surveyor to furnish his client with a plan of the land surveyed without extra remuneration unless he has specially agreed to do so.*

*The burden of proving a variation of a written contract lies on him who alleges such variation.*

This was an action brought by the plaintiff, Harry Lewis Hill, a land sur-



veyor, of Caledon, to recover from the defendant, Henry Gundry, storekeeper, of Caledon, £41 14s., being expenses incurred in the survey of the defendant's farm.

The plaintiff's declaration was as follows: (1) Plaintiff is Harry Lewis Hill, a land surveyor, practising at Caledon. Defendant is Henry Gundry, a storekeeper, and landowner, residing at Caledon. (2) On or about the 7th June, 1907, it was agreed between the plaintiff and defendant that plaintiff should survey the farm Uitkyk, the property of the defendant, and erect regulation beacons at all necessary points thereon, and defendant agreed to pay to plaintiff in consideration of the work the sum of £25, and to provide accommodation, and also conveyance to and from the said farm for plaintiff and his assistant. (3) Thereafter the said survey and erection of beacons were duly carried out by plaintiff in terms of the said agreement, and defendant thereupon became indebted to plaintiff in the sum of £25, together with certain disbursements, for which defendant is liable in a sum amounting to £11 9s. (4) In or about the month of August, 1907, plaintiff, at the special instance and request of the defendant, made a plan of the said farm Uitkyk, and supplied the same to the defendant, and defendant thereupon became indebted to the plaintiff in the sum of £5 5s., which plaintiff says is a fair and reasonable charge for preparing and supplying the plan. (5) Defendant has neglected or refused, and still neglects and refuses, to pay to plaintiff the sum of £25, £11 9s., and £5 5s., amounting in all to £41 14s., though frequently requested to do so. Wherefore plaintiff claims judgment in the sum of £41, with interest and costs.

The defendant's plea was as follows: (1) Defendant admits paragraph 1 of the plaintiff's declaration. (2) The defendant admits paragraph 2, save that he craves leave for greater certainty to refer to a certain letter written by plaintiff to defendant, dated June 7, 1907, and referring to the said agreement. (3) As to paragraphs 3 and 4, he says that at the time of entering into the agreement the plaintiff was well aware, and had been informed by the defendant, that defendant's said farm was registered and held under five separate diagrams, and that defendant desired to have a single diagram or plan embracing the whole of the farm. (4) The defendant says further that, according to the true intention of both parties at the time of entering into the agreement, and according to the proper construction of the said agreement, it was the duty of the plaintiff, under the agreement, to prepare and furnish the plan for the remuneration therein stipulated, and the plaintiff is not entitled to claim any additional remunera-

tion in respect of the plan. (5) As to paragraph 5, the defendant says that he has before action brought tendered, and hereby again tenders, to the plaintiff the sum of £36 9s., consisting of the sums of £25 and £11 9s. He admits he refuses to pay the sum of £5 5s. Wherefore, subject to the said tender, the defendant prays that plaintiff's claim may be dismissed, with costs.

The plaintiff's replication was as follows: (1) As to paragraph 3 of the plea, plaintiff denies that at the time when the agreement was made defendant said anything about requiring a single plan of the whole farm, or that he (plaintiff) agreed to supply such a plan. Plaintiff says that in or about the month of May, 1902, during a conversation between plaintiff and defendant, plaintiff offered to survey the farm and prepare a plan for the sum of £35, exclusive of disbursements, but the said offer was not accepted by the defendant. (2) Plaintiff admits that tender contained in para. 5 of the plea, but says that the said tender is insufficient, and he refuses to accept the same. (3) Save as above, and save per admissions in the plea contained, plaintiff denies all and singular the allegations of fact and conclusions of law in the said plea contained, joins issue thereon, and again prays for judgment as before, with costs.

Dr. Greer was for the plaintiff, and Mr. J. E. R. de Villiers was for the defendant.

Harry Lewis Hill, plaintiff, stated that in May last he was present at the attempted sale of the defendant's farm. Mr. Gundry sent for him, and said he did not know where some of the beacons were, and those he did not know of he wanted tested. He further mentioned he wanted to sell the farm, and asked witness what he would charge for a survey of the farm, to erect the beacons, and verify the existing beacons, and witness said it would cost about £35. The defendant hesitated, and finally seemed to think it was too much. After witness mentioned the fee, defendant produced a rough plan, and witness suggested he would give him a decent plan. Some time after, in June, witness offered to survey his farm and erect beacons for £25, but the defendant had to provide two boys to bring witness and his assistant to and from the farm, and provide them with accommodation. The defendant accepted that offer, and asked witness to put it in writing, which was done. Witness had not the slightest idea of supplying a plan in that sum. When the work was finished witness sent in a detailed account to the plaintiff. Witness's assistant made the plan, and it was handed along with the account to the defendant. When witness handed the plan to the defendant the latter did not say a word. When the defendant

asked for his documents, he asked plaintiff if he did not think it unreasonable on his part to expect the plan for nothing. Witness said that he might expect an amended title for nothing. At an interview the defendant said if he did not get the £5 5s. knocked off, he reckoned to be able to knock off £8 for provisions, etc. The defendant then made a tender for £36 9s. in full settlement, which was refused. The making of a plan was absolutely distinct from a survey and fixing of beacons.

Cross-examined by Mr. De Villiers: The main object of the defendant in having the survey was not to have one instead of five little diagrams. Witness did not say to the defendant that he would prepare a plan in the offer of £35. The offer of £35 was exclusive of disbursements.

Further evidence having been given for the plaintiff,

Dr. Greer closed his case.

Henry Gundry, the defendant, stated that on the occasion of the sale he had a conversation with the plaintiff. Witness asked plaintiff to survey the farm, and he thought it would be more convenient to sell it under one instead of five diagrams. The plaintiff was asked for a price to survey the farm, with the object of putting it under one plan and readjusting the beacons. The plaintiff agreed to do this for £35, provided witness gave him boys and conveyance to and from the farm. Plaintiff was to fix the beacons and give witness a diagram and survey the farm as a whole. Witness said he would leave the matter in abeyance and think the matter over. Later the plaintiff said he could do the same job for £25, on the same conditions as before. Witness then instructed the plaintiff to proceed. When the plaintiff mentioned the diagram witness reminded him it was part and parcel of the contract arranged between them. On that occasion witness told him that he would not pay for the diagram.

Mr. De Villiers having been heard for the defendant,

Maasdorp, J.: In this case the plaintiff claims five guineas for a plan of the defendant's farm with which the plaintiff had furnished the defendant. The defendant says in defence that the plaintiff had agreed to survey his farm and to supply the plan for the remuneration stipulated in the contract, which remuneration he has tendered to pay. A letter has been put in which is said on the part of the plaintiff to contain the terms of the contract. Now, upon the face of this letter it does not constitute a complete contract purporting to contain all the terms of the agreement which had been entered into by the parties. It is quite possible that in the negotiations which took place and which culminated in a contract, there may be either oral or written conditions

which would go to constitute the concluded contract. It is therefore upon the defendant to show that other conditions and terms were attached to this contract, upon which he is now entitled to rely for his defence. The question the Court has to decide is whether it has been proved that the condition relied upon by the defendant does form a part of this contract. The letter in question is the following, which the plaintiff writes: "I am willing to survey your property and erect regulation beacons at all corners not at present occupied by a well-defined and undisputed beacon. This I will do for the sum of £25, provided you supply me with two boys and take myself and assistant to and from the farm, and give us accommodation." Now, there is nothing expressly here which makes it an obligation on the part of the plaintiff to supply the defendant with a plan of the property, but it is quite possible that in his duties as a surveyor may be that of furnishing his employer with the plan of the property surveyed. The Court had therefore to ascertain whether in the practice of surveyors the obligation of supplying a plan forms part of the service which the surveyor has to render to the employer. Now, I am satisfied that the evidence goes to show most clearly that it is not a duty of the surveyor unless there is an express stipulation of furnishing such a plan. The question now arises whether there was an express agreement outside this letter that such a plan should be supplied. There is a direct conflict of evidence between the parties as to what took place between them on occasions prior to the writing of this letter. The defendant states that the main object he had in view was to obtain a general plan of the property, which would make it convenient for him to exhibit at a sale. Now, if that was his object, it is clearly not stated in this letter, and before the letter was written he requested the plaintiff to put the terms that they had agreed upon in writing, the plaintiff thereupon wrote this note, and the defendant approved of it, and so one may take it as pretty accurately setting forth the main terms of the agreement. I am therefore not inclined to accept it that the main object of the defendant was to get a general plan representing the whole of the property, and besides if this was his object, it was a most expensive manner of setting about obtaining it. A general plan, a picture representing the property to people at sale, could have been constructed pretty clearly and accurately from the diagrams in the shape of a compilation, and that compilation would have served all the purposes which the defendant had in view. It was not necessary for that purpose to ascertain the correctness of the beacons, and to have re-

gulation beacons erected. I am, therefore, inclined to think that the main object was to have a survey, and have the beacons erected as is stated they were. All the same though, it may not have been the main object, it may have been still one of the stipulations, but I am quite sure that the defendant is a man of great intelligence in matters of this kind, and he would have seen that the omission was corrected. Now, I do not say that perhaps, independently of the terms of the contract, the defendant did not expect that he might not get the plan, and had some idea he would obtain it. He requested the plaintiff to supply him with one, and it is admitted on all sides that the plaintiff said he must pay for it. Then, on the other hand, the defendant said he thought he should not be liable. There the matter ended as far as the plaintiff was concerned. If the plaintiff had thereupon made his plan, I would have said he accepted the terms of the defendant to do it for nothing, because the defendant had objected to paying. But the plaintiff did not thereupon go and make a plan. After this difference, the defendant goes to the plaintiff's assistant, and obtains a plan from him. That leaves the question open; whether the plaintiff is entitled to receive remuneration or not, and it is not affected in the least degree by the second conversation of the parties. According to the written document there is no duty upon the plaintiff as a surveyor to supply this plan, and there is no evidence that he expressly agreed to supply a plan, and he is now entitled to the remuneration for the extra work which he did in giving the defendant this plan. when the defendant requested him to do so, and he is entitled to what is characterised by the surveyors as a very fair remuneration of five guineas. Judgment will, therefore, be for the plaintiff for £41 14s., with costs, the plaintiff declared a necessary witness.

[Defendant's Attorney: R. G. N. McLeod. Defendant's Attorneys: Dempers and Van Ryneveld.]

## SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

STACK V. PEEL AND ( 1907.  
ANOTHER. ( Nov. 13th.

Mr. W. P. Schreiner, K.C., appeared for plaintiff, and Mr. Benjamin, K.C., for the defendant.

Mr. Schreiner said he wished to consent to judgment in terms of a consent paper put in.

Mr. Benjamin also agreed.  
Order granted.

### STIGANT AND WILSON V. LOUDEN.

This was an action in which Arthur Stigant, trading as Stigant and Wilson, of Woodstock, sought to recover from Henry Louden the sum of £172 10s. 4½d., for goods sold and delivered.

The plaintiff in his declaration claimed £172 10s., amount due for drapery goods purchased by defendant's wife and daughter on his account.

The defendant admitted the claim, but urged that it was in the form of a contra account, which existed between him and plaintiff.

Mr. Benjamin, K.C. (with him Mr. Swift), appeared for plaintiff. The defendant appeared personally.

Arthur Stigant, the plaintiff, stated he carried on business at Cape Town and Woodstock as a draper. Stigant and Wilson passed a second bond on their property for £1,000, in favour of Louden and the builder Munroe. The partnership was dissolved in November, 1904. The agreement was that Wilson was to take the immovable property, and witness the movable. Witness saw Louden with a view to Wilson taking over the property and the liability for the bond. Witness was to have a power of attorney made to him to collect the rents, and pay Louden and Munroe £50 a month off the bond. As a result of the arrangement, the bond to Louden and Munroe was cancelled, and a new bond passed by Wilson. There was a life policy on Wilson's life ceded to Louden, as additional security. At the time of the dissolution of partnership, there were a few items appearing against defendant, which were taken over by witness. Those few items were admitted by defendant in his plea. All the other items in the account were incurred subsequent to the partnership.

In cross-examination by defendant, witness stated that relations between him and defendant were always good.

Did we not treat you generously in giving you a second bond?—It was a business contract, and I do not know if business is generous.

Witness (continuing) said that at the time the dissolution took place, defendant had started a fresh account. The value of the property witness took over would be about £4,000.

Behind the bond we released you from there was £4,000 of security, and we released you from that, instead of foreclosing?—What about the other creditors?

Do you wish to put to the Court that I released you, when I had £4,000 worth

of security? Did I do that without any promise or consideration from you?—Yes. The only condition was that Wilson was to find additional security for the bond, and as a result, he gave you his life policy.

Did you not tell me that you would assist me financially?—No.

Do you have many retail accounts amounting to £172?—A few, but we have reduced them.

Witness (continuing) said he knew that defendant was away at Carnarvon last year, but he did not advise him of the extent of the account.

Can you give the Court any reason for me taking Wilson on?—You had security.

You were anxious to be released?—Yes.

Another month or two and your creditors might have had the business?—I won't say that, but I was glad to get out of it.

If we had closed down on our bond there would have been sufficient in the estate to meet our claim?—Yes.

From June, 1904, to June of the present year, you never asked me for money?—No.

Did you not treat this as giving the goods to me and debiting Wilson with it?—No.

Witness could not say why he should have been asked to hold the power of attorney. Witness may have said that his creditors would stop operations if he guaranteed anyone. Witness saw Mrs. and Miss Loudon at a sale he had after a fire, when they purchased a quantity of goods. At that time defendant owed over £100, but he supplied Mrs. Loudon with over £40 worth of goods.

Is it fair to me to allow an account to accumulate to the extent of £172 without advising me?—Certainly, if I think you are good for it.

I put it to you that you only sent in this account after you had lost the administration of the estate?—It was sent in periodically.

To whom?—To your address.

Witness did not know if it was customary for drapers to all give credit to the extent of £170 to retail customers.

By the Court: Loudon and Munroe never held a first bond. The amount realised on the first bond was to pay Loudon off the instalments due for building. At the time of the dissolution of partnership, witness did not like the way his partner was carrying on, so he approached him to dissolve. Witness took the business, and Wilson the immovable property. It was agreed that Loudon's second bond should be paid off in monthly instalments of £50 each. This was not always paid up to date. Witness denied that he gave Loudon any promise, if he would cancel the bond. Witness denied that he was to pay £50

per month if the rents did not realise that amount.

A partner of Mr. Boyd, the first bond-holder, stated since February last he had collected the rents of the property. Witness informed Loudon as to what he had done. There was not sufficient in rents to pay the interest and taxes now.

[De Villiers, C.J.: What did Loudon say to that?]

Witness: He took it as a matter of course. I informed him that if he would not agree that we would have to call up the first bond, and take over the possession of the property.

Mr. Benjamin closed his case.

For the defence, Mrs. Catherine Loudon admitted she bought the goods, and that even at the sale Mr. Stigant said that they were selling for cash, but that as Mrs. Loudon was one of their biggest customers they had better let her have goods on credit, as they had the money all right.

Miss Mary Loudon, daughter of defendant, gave corroborative evidence, stating that all goods were bought on a contra account. The accounts were always paid monthly.

Mr. Bungey, a one-time manager of plaintiff's shop, stated he knew nothing definite of a contra account. Unless there was an arrangement witness would not allow an account to run to £172 for two and a half years without applying for payment. When defendant's account stood at £70, the attention of one of the partners was drawn to it. Witness understood there was some arrangement about the account.

The defendant elected to give evidence, and said he had not heard of the dissolution until February, 1905. Witness consented to the cancellation of the bond, and took over one from Wilson. Stigant gave witness his word that he would assist financially to liquidate the debt by financial assistance, and a contra account. The arrangement was that Stigant was to collect the rents, and pay £50 a month in instalments, but he did not press him too hard, and many months received less. Witness considered that they had treated Stigant very well, by releasing the money in the way they had. Witness had tried to raise money on the £1,000 bond before the cancellation, but could not raise £100 on it. His whole desire was to treat Stigant well and help him on.

In cross-examination, witness said Munroe owed Stigant an account, and paid it before he left Cape Colony, but the amount was so small that he did not think it worth while waiting here while the case was being thrashed out. Witness denied that he had offered to pay the account by instalments.

Mr. Benjamin having been heard in argument, and the defendant having addressed the Court,



De Villiers, C.J.: It is quite clear from the documents put in before the Court that the bond for £1,000 was cancelled. That was a bond which had been passed by Stigant, the plaintiff, and Wilson in favour of the defendant and Munroe. There is a consent to the cancellation of the bond endorsed upon by the defendant and Munroe, and then the bond was passed by Wilson alone in favour of Loudon, the defendant, and the property which had been formerly the joint property of Wilson and Stigant, was transferred to Wilson alone. It is quite clear that the plaintiff, Stigant, would not have consented to this transfer unless he had been released from liability in respect of the bond. The bond was completely cancelled, and there was therefore a complete release of liability of the plaintiff, Stigant, and the consequent transfer by Stigant of his half-share of the property to Wilson alone. The defendant was aware of this arrangement, because he consented to the cancellation of the previous bond, and consented also to the arrangement by which the plaintiff had the power of attorney to collect the rents, and pay off on the mortgage out of the rents collected, and the amount was fixed at £50. The defendant in his plea says that £50 was the definite amount, but he admits to-day that he would not have been dissatisfied with less if the full amount could not have been obtained. I am of opinion that the agreement between the parties was that the plaintiff was to collect the rents and to pay out the balance after paying rates and taxes, and the sum of £50 was only mentioned because it was considered that that would be the outside amount. Well, when once it is clear that there was a release, it lies on the defendant if he now wishes to set off any claim as against another claim. It is for him to prove that there was some other arrangement by which the plaintiff was still to retain liability to him. He says it was arranged that he could buy goods at the shop and it would go off by payment in this way, but I cannot understand such an arrangement, as there was nothing owing by the plaintiff to the defendant, so there must have been a misunderstanding between Mrs. and Miss Loudon as to what took place. I am quite satisfied that there is some misunderstanding, and that the plaintiff never could have undertaken to allow defendant to buy goods at the shop because he owed the defendant something, as there was no liability. I cannot understand the possibility of an arrangement, that the plaintiff would allow the defendants enough to buy goods as against the contra account. It is impossible for the Court to sustain the defence. The plaintiff has proved that these goods were bought by the defendant or on his behalf. There is

no proof that there was any contra account. The defendant says: Is it likely he would have entered into such an arrangement if there was no liability on the part of the plaintiff to him? But the Court must remember that at that time everybody thought the property was worth the money. The defendant had built the property, he had been paid for building it, he knew what it cost, and he may well have thought that a second bond for £1,000 secured by a life policy was sufficient security for the £797 owing to him. I am of opinion, for these reasons, that the judgment of the Court must be for the plaintiff as prayed, with costs.

### THIRD DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

#### ILLIQUID ROLL.

PLASTIC DECORATION CO. V. { 1907.  
CROOKE AND ASHBY. { Nov. 13th.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £386 5s. 10d., liability taken over by defendants to pay creditors in terms of agreement. Order granted.

### MATRIMONIAL CASES.

#### KRIEL V. KRIEL.

This was an action brought by Anna M. Kriel, of Colesberg, against her husband, Jacobus E. Kriel, of Robertson, for divorce, on the ground of his alleged adultery with one Dinah Johanna du Preez.

Mr. Toms appeared for plaintiff; defendant had been barred.

W. T. Birch, of the Colonial Secretary's office, gave formal proof of registration of the marriage.

Plaintiff said that she was married to defendant at Colesberg in September, 1904. Defendant had not resided with her since June, 1906. In September they entered into a notarial deed of separation. The photo produced was that of her husband.

Frederick T. Parker, a waiter, at the Hotel Metropole, residing at Woodstock, said that he recognised the photo produced, which had been identified as that of the defendant. Defendant and a woman lived at the hotel two days and two nights as though they were man and wife. The woman accompanying the defendant was not the plaintiff.

Miss Robson, manageress of the Hotel Metropole, said that she recognised the

portrait produced as that of a man who stayed with a young woman from one Friday until the following Monday.

Decree of divorce granted, with costs.

#### AUSTIN V. AUSTIN.

This was an action brought by Mary E. Austin, against her husband, Robert J. Austin, described as a private in the C.M.P., in the division of Albany, for restitution of conjugal rights, failing which, a divorce, custody of the child, and forfeiture of benefits.

Mr. M. Bisset was for plaintiff; defendant did not appear.

The plaintiff said she was married to the defendant in 1896. There was one child of the marriage. They lived together until about the end of 1901. Defendant was employed at the Docks, but in 1902 he got into some difficulty, and was suspended. On the 3rd April, 1903, he left witness, without giving her any warning. A day or two later she received a letter from him from Bellville, where he had got a position. Witness was then residing at Salt River. She received a further letter from him from Bellville, where he continued to work for some time. He then lost this situation. He disappeared, and she did not see him until July, 1904. He joined the C.M.R. She had had no communication with him since July, 1904. He was afterwards drafted into the C.M.P.

Decree of restitution granted, with costs, defendant to restore conjugal rights on or before the 31st December, failing which, to show cause on the 4th February why a decree of divorce should not be granted as prayed, with costs.

#### KNOX V. KNOX.

This was an action for restitution of conjugal rights, failing which, divorce. Mr. Douglas Buchanan appeared for the plaintiff; the defendant was in default.

William Thomas Birch, officer in charge of the duplicate original marriage register in the Colonial Office, put in a true copy of the marriage certificate.

Honoris Gladys Knox, the plaintiff, said that she was married to the defendant at Simon's Town on June 21, 1901. Thereafter they lived at Simon's Town. They were not very happy, as her husband drank heavily. She left her husband and took up nursing at Wynberg. Her husband was in the employ of the Naval authorities, by whom he was sent to England. Although he was entitled to a free passage for her, he did not offer to take her with him. She had not heard from him since 1902.

The Court granted a decree of restitution, ordering the defendant to return

to or receive the plaintiff on or before January 20, 1907, failing which, to show cause, on February 4, 1908, why a decree of divorce should not be granted as prayed; affidavit of service to be sworn before a Justice of the Peace, whose signature will have to be certified by the proper authority.

#### PARSONS V. PARSONS.

This was an action for restitution of conjugal rights, failing which, divorce.

Mr. Douglas Buchanan appeared for the plaintiff; the defendant was in default.

William Thomas Birch, officer in charge of the marriage register, Colonial Secretary's Office, put in an office copy of the marriage certificate.

Mary Ellen Parsons, the plaintiff, said that she was married to the defendant at Woodstock on May 29, 1900. Her husband was in the police force, and in June, 1905, on returning home from work one evening, she found that her husband had gone. She subsequently heard that her husband had gone to England. She had received one letter from defendant—from Bath. He had not returned to her. There were two children of the marriage—both boys.

The Court granted a decree of restitution, ordering the defendant to return to or receive the plaintiff on or before January 30, 1908, failing which, to show cause on February 11, 1908, why a decree of divorce should not be granted as prayed, with costs, and why plaintiff should not have the custody of the children of the marriage.

#### GENERAL MOTIONS.

*Ex parte* ABELS. { 1907.  
Nov. 13th.

Mr. Marais moved on behalf of petitioner for leave to sue her husband, Manuel Abels, *in forma pauperis*, for divorce on the ground of adultery.

On Mr. Marais certifying *probabilis causa*, the Court granted a rule nisi returnable November 26, calling on the respondent to show cause why leave should not be granted as prayed.

#### FRIEDLANDER V. VOM DORP AND SCHARFSCHER.

Mr. H. S. van Zyl, on behalf of the applicant, moved for leave to sue the respondents by edictal citation for £23 17s. 9d., and for leave to attach certain property in Cape Town to found jurisdiction.

The Court granted leave to sue respondents by edictal citation, citation returnable January 30, 1908, to be served

together with the interdict and notices; personal service; property attached, but petition to be amended by inserting a description of the property to be attached.

LURY V. LAWRENCE AND CO., LTD.

*Arrest of person ad fundandam jurisdictionem—Incola.*

This was an application calling upon respondents to show cause why a certain order for applicant's arrest *ad fundandam jurisdictionem*, granted by the Chief Justice on the 7th November, should not be set aside, and why they should not pay costs.

From the applicant's affidavit it appeared that he based his application on an allegation that he resided in Constitution-street, Cape Town, and was domiciled in this colony. He had only gone to German South-West Africa periodically on trading expeditions. When arrested he was proceeding to German South-West Africa to adjust business matters.

Respondents said that applicant was indebted to them in the sum of £58 16s. 1d., and that they had reason to believe that applicant was domiciled in German South-West Africa, although he may have resided in Cape Town.

Mr. P. S. T. Jones was for applicant; Mr. Close was for respondents.

Mr. Jones submitted that respondents had clearly taken the wrong procedure in moving to arrest applicant *ad fundandam jurisdictionem*, seeing that he was domiciled and resident in this colony. Counsel quoted Van Zyl's Jud. Prac. (p. 132). Applicant had, he added, been resident in Cape Town for 12 years. He cited *Springle v. Mercantile Association of Swaziland* (1904, T.S.C., 163), *Solomon v. Wood* (15, S.C., 162), and *Schunke v. Taylor and Symonds* (8 S.C., 104).

Mr. Close said that he did not dispute the law as contended for by his learned friend. He submitted, however, that on the facts there was a sufficient *prima facie* case to justify the continuance of the order. No injury would be caused to applicant by allowing the attachment to continue, seeing that security had been furnished by him.

Buchanan, J.: The petitioner states, and it is not denied, that he arrived in this country 12 years ago, and has been residing here ever since, and that he has carried on business in different districts—Ceres, Prince Albert, and afterwards apparently in Namaqualand. About three years ago he changed his residence to Cape Town, where he brought his wife and family, and they now reside in Cape Town, at 108, Constitution-street, and that address has not been changed. The applicant, however, does go on trading expeditions across

the border into German South-West Africa. The original applicants—Brown, Lawrence and Co.—finding him in Cape Town, and fearing that he was about to leave again for German South-West Africa, applied for a writ of attachment against the applicant to found jurisdiction. I am convinced that had the Court known that he was domiciled in the Colony, and had his wife and children residing in Cape Town, the writ of attachment to found jurisdiction never would have been granted. It was not, under these circumstances, a proper course to take. The man being domiciled in this country, it was unnecessary to apply for his personal attachment for the purpose of founding jurisdiction. The liberty of persons must be respected, and if a man is deprived of his liberty without just cause, the Court will set aside the order for his arrest. Of course, it is still open to the respondents, if they fear that defendant will attempt to evade the debt by leaving the Colony, to move to have him arrested by an application under the 8th Rule of Court. The writ of arrest to found jurisdiction must, however, be set aside, with costs.

ESTATE STEPHAN V. ESTATE STEPHAN.

This was an application for leave to purge default in an action brought by respondents against applicants to recover a sum of about £20,000.

Mr. Burton, K.C., was for applicant; Mr. Schreiner, K.C. (with him Mr. Louwrens) was for respondent.

Having heard affidavits read, and counsel's argument,

Buchanan, J.: The late Mr. Henry Stephan died in October last year, and there have been important questions raised as to the administration of his estate. One of these actions has recently been tried, and heard in this Court. After that trial was over the executors of J. C. Stephan, as they were probably entitled to do, wished to force a settlement, and they issued summons on October 24. Appearance was entered on October 30, and the same day the declaration was filed, and on November 11, two days ago, the defendants were barred. The plea would have been filed in time if counsel had not been otherwise engaged, and if the plea had been so filed it would have been impossible to have gone to trial this term. There is a large amount at stake, and, without going into the issues or deciding which side is likely to succeed, I think, under these circumstances, that the bar should be removed; but, of course, upon payment of costs of bar, and on condition that the defendants go to trial before the 7th February, I do not think one can very well order security to be given by defendants now. Applicant must pay costs

of purging default. The only reason why I order him to pay costs is that it is a matter of executors, and there has been a considerable amount of delay, but I do not think judgment should be given against defendant without having a hearing. By consent, it is ordered that the costs of the motion set down for to-morrow be costs in the cause.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

INSOLVENT ESTATE OF WEINBERG V. S. WEINBERG. { 1907.  
INSOLVENT ESTATE OF WEINBERG V. J. WEINBERG. { July 2nd.  
Nov. 13th.

Insolvent Ordinance—Act 38 of 1884—Contemplation of insolvency—Undue preference.

These were actions (consolidated for hearing) based on an alleged undue preference.

Mr. Burton, K.C. (with him Mr. Wallach), was for the plaintiffs; Mr. Close was for the defendants.

Mr. Close said he might state at the outset that he appeared on behalf of the defendants to make a special application. The case was one in which it was alleged there had been an undue preference granted to each of the defendants by their father, Nathan Weinberg, the insolvent. Since these proceedings were begun, criminal proceedings had been instituted against the father for culpable insolvency. The two defendants in the present case were not in a position to fight the case on their own account, but friends were assisting them. Shortly before they were about to come to town for the trial, the two defendants were arrested as witnesses in their father's case, and he (counsel) had no instructions for the defence.

Buchanan, J., said that, as the issue in this case seemed to be the same as in the criminal trial, it would be inadvisable to take the civil case first. The civil trial might prejudice the prisoner in the criminal trial, but the criminal trial, whatever the result, could not affect the issue of the civil trial.

Mr. Burton said the defendants were arrested as witnesses on the 19th June, and were only kept in custody for a few hours. On security being given for their appearance as witnesses at their father's trial, they were released, and they could easily have come to Cape Town for this case.

Buchanan, J., said that that was not so much the question. The point was that the practice had been established not to hear a civil case before a criminal trial in which the issue was identical.

After further argument, the Court ordered that the witnesses for the plaintiff be now examined, that a joint commission *de bene esse* issue to take evidence for the defendants, and any further evidence for the plaintiff, the Resident Magistrate of Prieska to be commissioner, and that the Deputy-Sheriff be authorised to sell the goods now under attachment, in respect of which undue preference was alleged, and to retain the proceeds pending the trial. The question of costs was ordered to stand over.

Mr. Burton briefly stated the circumstances of the case. The position, he said, was that the estate was sequestrated on the 23rd February, 1907, and on the 15th January—five weeks before the sequestration—goods of considerable value were delivered by the elder Weinberg to his two sons, one of whom is a minor. It was in respect of the goods so delivered that the trustee now claimed on the ground of there having been undue preference. The defendants, in their pleas, claimed that they were engaged by their father as assistants, that he owed them certain wages, and that these goods were payment of the wages in the ordinary course of business.

Evidence was then led for the plaintiff.

Joshua Pell, clerk in the Master's Office, was called, and produced certain records in connection with the insolvency of Nathan Weinberg.

Claude Bernard Schultz, attorney, of Prieska, and trustee in the insolvent estate of Nathan Weinberg, produced various documents belonging to the insolvent. The ledger showed an account in the name of Joe Weinberg, showing an amount of £317 10s. due to him by the insolvent in respect of wages. From the debit entry, it appeared that Joe Weinberg obtained goods from his father to the amount of £434 3s. 8d. Nathan Weinberg surrendered voluntarily. The assets (excluding these goods) amounted to £1,032, and the liabilities to £1,938. Joe Weinberg gave a promissory note to his father, dated January 21, 1907, for £121 9s. 5d. All these goods were delivered on the same date. Creditors were pressing the father in December, 1906, and January, 1907, and he gave cheques which were dishonoured. At the end of January—after this delivery—Nathan



offered his creditors 5s. in the £. At the third meeting of creditors, Joe Weinberg proved his claim to £317 10s. for wages. He called himself the manager. The books showed wages due to Simon Weinberg amounting to £75, and on the 27th January insolvent delivered to him a wagon, mules, and harness. These were the things witness claimed by reason of undue preference. Simon had also proved his claim. The entries in the ledger—credits and debits—looked as though they had been made at the same time.

Richard Thomas Hyland, accountant, of Prieska, deposed to having drawn up a statement from the books. This showed that there was a deficiency of £705 a week before the delivery of these goods. The position was worse on the 8th February by £200.

This concluded the evidence for the plaintiff, and the further hearing of the case was postponed until after the sitting of the Circuit Court, the case to be set down after notice given to the defendants. The question of costs was reserved.

*Postea* (November 13th).

Mr. Close, in argument, referred to section 84 of the Insolvent Ordinance and section 8 of Act 38, 1884, and cited *Hugo's Trustee v. Lindenberg* (2 Juta, 186), *Slater's Trustee v. Smith* (5 E.D.C., 9), *Goosen v. Goosen's Trustee* (1 App. Ct., 414), and *Estate Green v. S.A. Mutual* (21 S.C., 54).

Buchanan, J.: Two actions were brought by the trustee in the insolvent estate of Nathan Weinberg against the two sons, Joseph Weinberg and Simon Weinberg, claiming to have certain transactions entered into between the father and sons in January, 1907, set aside as being an undue preference. These two sons were employed by the father in his business, which he was carrying on at Prieska. The elder son, who was about 22 years of age at the time, claimed that his father owed him £317 10s., being 25½ months' salary—the first 12 months at £10 per month, and the second at £15 a month. The plaintiff's second son Simon, who is a lad of 17, claimed salary due from his father amounting to £75. In the books of the insolvent the amount due to each son was brought up and entered in the ledger, evidently on the same day that the transactions challenged in these cases were entered into. As regards the elder son, the father handed over wagons and merchandise in the first place to pay off the £317 due, and then a further amount of goods to the value of £121 for which the son gave his promissory note at 12 months. The reason given for allowing this long credit was that the stock so taken over was returned stock which had been taken on a previous trading expedition, and which

was in consequence not easily and readily disposable. The actions brought are only founded upon the 84th section of the Insolvent Ordinance, which renders liable to be set aside transactions between debtor and creditor which are entered into at a time when the debtor contemplates sequestration of his estate, and with the intention of preferring the creditor. Section 8 of Act 38, 1884, provides that when the assets fairly valued are exceeded by the liabilities fairly calculated, if sequestration takes place within six months after the transaction in question, the onus or burden of proof is upon the defendant to show that the transaction is a *bona fide* one. In this case the transaction was entered into on the 15th of January, 1907, and on the 23rd February the estate of the father was sequestered. Now, with the burden of proof against them, have the defendants satisfied the Court that at the time of the transaction, the father did not contemplate the sequestration of his estate and did not intend to prefer his sons? Great stress has been laid, and very properly, upon the fact that these transactions which are now in question in this civil suit were made the subject of a criminal charge against the father for fraudulent insolvency, and that the father was at the Circuit Court at Prieska acquitted by the jury of having given this undue preference. But, as was remarked in the early part of the hearing of this case, the benefit of the Act 38, 1884 (section 8), could not be taken advantage by the prosecutor in the criminal case, and, therefore, the onus was upon the prosecutor of proving the state of mind of the insolvent, that he was contemplating sequestration, and that he intended to prefer his sons. In this civil case, on the contrary, the burden is upon the defendants to satisfy the Court that there was no such contemplation. The contemplation is presumed. Have the defendants satisfied the Court that there was no such contemplation? It is alleged that the transactions were in the ordinary course of business. But were they? Here we have two persons, one of whom is still a minor, sons of the insolvent, living with him and working with him in his store for a considerable period. Suddenly, on the 15th January he brings up the salaries of these two sons in his books. There is against these salaries, no payments made to them during all this period, and only a debit for the large amount of the movable assets handed over to the sons. This was alleged to be on the 15th January. Apparently some of it took place a little later than that. On the 29th January, the father gave notice in the "Gazette" of his intention to surrender his estate, and in the schedules

which he filed on the 9th February he brought up his debts in round figures at £1,900, and assets at £1,000, leaving a deficiency of something like £900. The father had up to the end of the year been carrying on a business which seemed to be tolerably profitable, and large payments had been made by him to his other creditors. He had been speculating with a man named Smith, whom he sent on trading expeditions into German South-west Africa. Weinberg, being pressed by his creditors left Prieska to go and see about Smith's business, and returned with something like £300 in cash. With this amount he paid off a number of cheques which he had given to sundry creditors, but which had been dishonoured, and he endeavoured to carry on his business. Early in January, Smith sent a heliograph message to the insolvent to the effect that he had got into trouble with the German authorities, and insolvent went up again, and this time all he could bring back from Smith was some goods which were handed over to the sons and a wagon and four mules. In going into the accounts between Smith and Weinberg, the father and son estimated the loss which must be written off for this transaction at £668. Both the father and son said they had received all they expected to be able to recover from Smith. In January, this £670 formed a very large proportion of the deficiency in the estate, and this loss I have no doubt, influenced the mind of the insolvent in his transactions with his sons. It is true that the son Joseph Weinberg, as far back as the previous October, had applied for a licence to go out trading, but he had not gone, and the evidence given by the bank manager states that Weinberg, senior (the father), told him that trade being so bad he intended to send out his son, so as to dispose of his property. When the insolvent came back from Smith he found his estate was hopelessly insolvent, and then not only do we find him settling with his sons, but immediately giving notice in the Gazette, and filing schedules, showing a deficiency of £900, and then on the 29th January we find him offering 5s. in the £ to his creditors. A person who does this must not be surprised if the Court thinks that he entered into these transactions in contemplation of sequestration. I quite agree with Mr. Close in his argument that contemplation of sequestration must be followed with proof of intention to prefer, but at the same time, the Court is at liberty to draw its conclusion as to the intention to prefer not only from the contemplation of sequestration itself, but also from the other circumstances in the case. The impression it makes on my mind is that the insolvent, knowing his position to be one of insolvency,

knowing that he had lost very largely in his transactions with Smith wanted to secure his sons, and fully expected that he would have to surrender his estate very shortly. The action he took almost immediately afterwards shows that he was perfectly aware that he was unable to pay his debts. There were communications between himself and the bank manager as to a bill which the insolvent had discounted in the bank, and he said that if the maker could not meet it, he certainly could not pay it. I think this was about the 16th or 17th January, at the very time these transactions were entered into. No doubt, a person who is insolvent may pay creditors, and such payments cannot be attacked when made in the ordinary course of business, and it is said that these transactions with the sons were made in the ordinary course of business. Now, I think it would be a very wide latitude to say that transactions of this kind, with a boy of 17, for instance, who was in his employ, and to whom he said he owed £75 for wages, were transactions in the ordinary course of business. The other son was older, and apparently the other son hoped to make some money out of the transaction, and, judging from subsequent events he seems to have done very well, for he had promissory notes from purchasers for something like £300 or £400, which were seized by the trustees when this action was commenced. Assuming, and it is not denied, that these two sons were creditors in the estate, one for £75 and the other for £317, the settlement with them immediately before sequestration, and at a time when the father contemplated sequestration of his estate, and with the intention to prefer, must be set aside, under the 84th section. With regard to the further transaction of the sale of £121 worth of goods, for which the son gave his promissory note, I think that transaction cannot be attacked in this case. It is not an undue preference, and there has been no attempt under any other section of the Act to set aside that transaction. As far as these proceedings are concerned, that transaction, the sale of £121 worth of goods to Joseph Weinberg, must stand, and the trustee who has taken this property from Joseph Weinberg must restore it to him. As far as the other amounts are concerned, the settlement must be declared an undue preference, and the goods given up by insolvent to his sons must be handed back to the trustee. As a matter of fact, I understand the trustee is in possession of all the goods. The judgment of the Court will be for plaintiff, declaring the payment of £317 10s. to Joseph Weinberg an undue preference, and £75 to Simon Weinberg an undue preference. The judgment will carry costs. By con-

sent of the parties it will be ordered that the plaintiff deliver up to J. Weinberg his promissory note for £121 on J. Weinberg endorsing the promissory note now in the possession of the trustees given by Weinberg and Susman for goods sold to them.

[Plaintiff's Attorneys: Mostert and Son. Defendant's Attorney: G. Trolip.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

HENNESSY V. FURTER. { 1907.  
Nov. 14th.  
" 20th.  
" 29th.

Brokerage commission—Introduction of purchaser—Remote result.

*The plaintiff and the defendant agreed that, in consideration of the former advertising farms which the defendant had for sale, and introducing to the defendant prospective purchasers, the brokerage commission and fees on any sales accruing from any transactions resulting therefrom shall be shared equally between them. The plaintiff, having issued such advertisements, J. called and asked for details, saying that he wished to purchase a farm for himself. In fact, J. had been sent by P., who was the broker of R., who was anxious to obtain farm property by exchanging his town property for the same. The plaintiff placed J. in direct communication with the defendant, but no sale resulted. It was stated by P. that he was introduced to the defendant by J., but the*

*defendant denied the statement, and the Court found, as a fact, that P. was not so introduced.*

*Held, in an action for a share of the commission received by the defendant in effecting a sale of R.'s town property to one V., and a sale of V.'s farm property to R., that the plaintiff was not entitled to such commission, inasmuch as the sale of such farm by V. to R., was too remote a result of the introduction by the plaintiff of J. to the defendant.*

This was an action brought by Alfred Theodore Hennessy, of Cape Town, against Pieter Louis Furter, also of Cape Town, for division of certain commission upon the sales of certain farm properties, in terms of an agreement.

Mr. Douglas Buchanan was for plaintiff: Mr. H. S. van Zyl was for defendant.

Mr. Buchanan applied for a postponement of the hearing, in consequence of the serious illness of his client's chief witness, Edward Parry, broker, Cape Town. Counsel produced a medical certificate showing that it was impossible for Mr. Parry to attend the court to give evidence.

By consent, the hearing was postponed until Wednesday next, and Dr. Rainsford was appointed commissioner to take the evidence of Mr. Parry meanwhile, costs to be costs in the cause.

*Postea* (November 20th). The case was heard.

The plaintiff's declaration was as follows:

1. Plaintiff is Alfred Theodore Hennessy, an accountant and broker, of Cape Town. Defendant is Pieter Louis Furter, of Church-street, Cape Town.

2. In or about the month of September, 1906, defendant, who then had and was thereafter likely to have a number of farms for sale, contracted and agreed with plaintiff that in consideration of plaintiff advertising such farms for sale, and introducing to the defendant prospective purchasers, the brokerage commission and fees on any sales accruing from any transactions resulting therefrom should be shared equally between plaintiff and defendant.

3. Thereafter, in accordance with the said agreement, plaintiff offered for several weeks, by public advertisement, farms for sale in the districts in which the said farms were situated.

4. As a result, a number of applications were made to plaintiff by intending purchasers, or by persons on their behalf, in respect of the said farms,

which said applications the plaintiff submitted to the defendant, and thereafter, and in consequence thereof, the defendant effected certain sales, among others of certain farms and properties to one Rayner and one Russouw, upon which sales the defendant has received certain sums as commission and fees, one-half of which amount thereupon became due and payable to the plaintiff under and by virtue of the aforesaid contract and agreement between the plaintiff and the defendant.

5. The particulars of these said transactions and the amount of brokerage commission and fees received by the defendant thereunder are not within the knowledge of the plaintiff. The defendant, though frequently requested so to do, refuses to disclose the said particulars or to pay to the plaintiff the amount due to him thereupon.

6. All times have elapsed and all conditions have been fulfilled to entitle plaintiff to payment, but defendant wrongfully, unlawfully, and in breach of his said agreement, refuses to account to plaintiff for brokerage commission and fees received from such sales, or to pay to plaintiff his share thereof or any portion of the same, though frequently requested so to do.

Wherefore plaintiff claims: (a) A just and true account, supported by all proper and necessary vouchers, of all sums had and received and paid to defendant as brokerage commission or fees on aforesaid sales. (b) On debate of the account, payment of the sum or sums of money which may be found owing to plaintiff thereon. (c) Alternative relief. (d) Costs of suit.

The defendant's plea was as follows:

1. Defendant admits paragraphs 1, 2, and 3 of plaintiff's declaration, save that he says that the agreement mentioned in paragraph 2 was a verbal agreement, and also provided that all out-of-pocket expenses incurred by defendant in the conveyance of intending purchasers introduced by plaintiff to the said farms for the purpose of inspecting them, as well as all advertising expenses incurred by plaintiff in accordance with the agreement, should, in case a sale resulted from such introduction, be deducted from the brokerage commission and fees before dividing the same equally between plaintiff and defendant.

2. With regard to paragraph 4, defendant admits that plaintiff from time to time submitted to him the names of intending purchasers, to wit one Dix, one Cosky-White, one Darvell, one Visser, one Van Niekerk, one Dreyer, one Eakin, and one Joel, with all of whom defendant entered into negotiations, and conveyed some of them to the said farms, but in no case was any sale effected.

3. Defendant further admits that he sold two farms to one Rayner, but says

that they were farms which did not fall within the scope of the said agreement, inasmuch as the said Rayner was never introduced to him by plaintiff or through the instrumentality of plaintiff, and plaintiff is not entitled to a share in the brokerage commission and fees in respect of the sale of the said two farms. Save as above, defendant denies all the allegations contained in paragraph 4, and denies specifically that he sold any farm or other property to one Russouw, or that he sold any farm or other property whatsoever in consequence of plaintiff's introduction, and in respect of which plaintiff is entitled to a share in the brokerage commission and fees.

4. Defendant says there are no particulars to disclose to plaintiff, and there are no brokerage commission and fees whatsoever in respect of which plaintiff is entitled to demand an account from defendant. Save as above defendant denies paragraphs 5 and 6.

Wherefore defendant claims that plaintiff's claim may be dismissed with costs.

For replication to defendant's plea plaintiff admits paragraph 1 of the plea. As to paragraphs 2 and 3, plaintiff says that sales did result from the introduction to defendant of the persons named in the plea, and in particular from the introduction of the said Joel, and further, that the sales to the said Rayner resulted from introductions made by plaintiff to defendant. Save as above, and save for the admissions in the said plea contained, plaintiff denies all the other allegations of fact in the said plea contained, and joins issue thereon, and again prays judgment as in his declaration set forth.

The plaintiff stated he was approached by the defendant, who said he had several farms in the Malmesbury, Wellington, and other districts, and that if witness could find him purchasers for them, they would share the commission. Witness sent several people to defendant, amongst whom was Mr. Joel. About that time witness had other dealings with defendant with regard to loans, and shared commission with him. Witness heard that through the instrumentality of Mr. Joel certain sales were effected, and out of which witness claimed half the commission. He wrote to defendant and interviewed him with regard to his share of the commission, and defendant said the sale had not been negotiated through his (plaintiff's) office, but that he would make witness a present of half. Witness replied that he did not want a present. The sales that witness claimed commission on were between Rayner and Russouw. Witness wanted a statement of account. In cross-examination, witness said that when approached by Mr. Joel he did not raise the question as to whether he was a purchaser or a middleman. Witness



knew there was some difference between Parry (the man who told him about Rayner's sale) and defendant about some commission. Witness introduced Joel to Truter, and Joel introduced Parry to Furter. Witness claimed a commission on the town sales.

[De Villiers, C.J.: How can you when the agreement was for farm property?—The farm property would not have been purchased but for the sale of the town property. The one sale cannot be separated from the other.

Witness (continuing) said that he only claimed what he considered he was justly entitled to. If Furter did not get commission on the town properties, witness did not claim commission.

To the Court: Witness contended that if Furter sold a farm to anybody on an introduction from his office, he was entitled to commission.

The evidence of Mr. Parry, taken on commission, was then read and put in.

James Rayner stated that Parry used to be his broker. Last year Parry told witness he had a gentleman, who would exchange a farm property for a town property, and introduced witness to Joel. Witness sold his town property for £6,250, and the farm property was sold for £5,000. Witness paid £156 in commission. Subsequently, Furter approached witness, and told him that he knew of a farm that would just suit him, and that if he did not tell Parry he would introduce it to him. Witness sold a town property for £6,000, and bought the other property for £3,750. He paid £100 commission.

[De Villiers, C.J.: Where are these town properties?—In Cape Town.

[But what do farmers want with town properties?—I suppose they bought them for investment.

[But do they live here?—No.

Witness (continuing) said that Furter eventually gave Parry £50, half of the commission out of the last sale.

To the Court: Mr. Parry introduced witness to Furter. He never had any direct communication with Hennessy.

Mr. W. H. Walshe, broker, gave evidence as to the custom adopted in the sale of property, and considered that plaintiff was entitled to commission, as he had been the means of introducing the parties.

Mr. Buchanan closed his case.

The defendant, Pieter Louis Furter, stated that in August last year he made an agreement with plaintiff that plaintiff should advertise certain farms for sale, and forward him the applications, and he would go further with them. That was done, and several people were sent from time to time and considerable correspondence passed between him and them, but nothing came of it. The plaintiff sent witness to see Joel, and explained the purport of his visit. Joel never mentioned Parry, and witness did

not again see him. Joel never introduced Parry to witness, but the latter introduced himself, and asked him to do business. Witness wrote to certain probable sellers, and then he saw Rayner for the first time. Witness went on to deny that plaintiff had any interest in certain specified transactions.

Cross-examined, witness denied that he told Rayner not to let Parry know of the deal about the second farm. Parry went to witness exactly as a broker would. Witness was to have been introduced to Parry.

[De Villiers, C.J.: But Parry says that he was introduced to you by Joel?—That is absolutely an untruth.

Daniel C. Boonzaier, handwriting expert, considered that the signatures alleged to have been made by Mr. Parry were the same.

Marthinus Johannes Dreyer, a baker, stated he gave Parry Mr. Furter's address, when the former asked him if he knew of any farms for sale.

In cross-examination, witness admitted he did not introduce the parties.

Daniel Gerhardus Russouw stated he acted on behalf of his son in exchanging the Malmesbury property for town property. He approached Furter about the matter, but was introduced to Rayner by Parry.

Counsel were then heard in argument on the facts.

*Cur. Adr. Vult.*

*Postea* (November 29th).

De Villiers, C.J.: The declaration states that in September, 1906, the defendant, who then had, and thereafter was likely to have, a number of farms for sale, agreed with the plaintiff that, in consideration of the plaintiff advertising such farms for sale and introducing to the defendant prospective purchasers, the brokerage commission and fees on any sales accruing from any transactions resulting therefrom should be shared equally between the plaintiff and the defendant. This statement is admitted by the defendant in his plea. A copy of the "Cape Times" of October 12, 1906, has been produced, in which appears an advertisement to the effect that the plaintiff had farms for sale in the Wellington, Paarl, Stellenbosch, and Malmesbury districts. Similar advertisements were from time to time published, and among the persons who inquired from the plaintiff about those farms was one Joel, who asked for details. The plaintiff said that he would put Joel in direct communication with the person for whom he was acting, namely, defendant. The plaintiff then informed the defendant about the matter, upon which the defendant went to see Joel. If in consequence of this introduction the defendant had sold one of the farms he had for sale to

Joel, there can be no doubt that the plaintiff would have been entitled to a share of any commission received by the defendant from Joel. None of the farms, however, was sold to Joel. According to Parry's evidence, it was he who had sent Joel to make inquiries from the plaintiff. Parry was the broker of one Rayner, who had some town property for sale, and was willing to exchange it for a good farm. Parry states that he (Parry) was introduced to the defendant by Joel, and that upon such introduction the defendant gave him the particulars of a farm which he had for sale called Modderkloof. These particulars were communicated by Parry to Rayner, with the result that Rossouw, the owner of Modderkloof, sold that farm to Rayner, who on his own part sold some town property to Rossouw. The defendant in his evidence denied that he was ever introduced by Joel to Parry, and his denial is strengthened by a document signed by Parry himself, in which he withdrew the statement that he had introduced Joel to the defendant. In his evidence, he denied his signature to the document, but I am quite satisfied that the signature is his. His evidence is in every way unsatisfactory, and I am not prepared to accept his statement that he introduced Joel to the defendant. In the face of the defendant's absolute denial of the statement. But assuming that Parry was introduced to the defendant by Joel, it does not follow that because Parry ultimately negotiated a purchase of the farm with the defendant a commission became payable under the contract. The plaintiff never introduced a prospective purchaser of the farm to the defendant. He introduced Joel, who admittedly was not a prospective purchaser. Joel introduced Parry, who was acting as the broker of a prospective purchaser, but the introduction by Joel of Parry did not amount to an introduction by the plaintiff of Parry to the defendant. Joel was not the agent of a prospective purchaser, and he seems to have represented himself to the plaintiff as being a purchaser on his own behalf. When the plaintiff introduced Joel to the defendant, it was certainly as a purchaser on his own behalf. If Joel was really acting as a go-between on behalf of Parry, and deceived the plaintiff, the defendant was no party to the deception. It may have been an indirect result of the introduction of Joel by the plaintiff to the defendant that the defendant ultimately found a purchaser in Parry as the agent of Rayner, but it is the direct, and not the ultimate result of the introduction that must be looked at. The plaintiff goes so far as to say that, although only farms were mentioned in his agreement with the defendant, yet as the sale of Rayner's town property was one of

the ultimate results of his introduction of Joel to the defendant, he would also be entitled to a share of any commission the defendant may have received (which he did not) for the sale of such property. Nay, he goes still further, and contends that because after the sale of the one farm the defendant induced the owner of a neighbouring farm to sell it to Rayner, a commission became payable to the plaintiff in respect of such neighbouring farm also. If such a contention were allowed, it would be difficult to know where and when the plaintiff's rights are to cease in respect of transactions effected by the defendant. The contract was that the plaintiff is to share in commissions accruing from transactions resulting from the introduction of prospective purchasers to the defendant. The plaintiff would read this as meaning that he is to have the benefit of transactions which are the indirect as well as the direct result of his introductions. The more reasonable construction appears to me to be that he is to take the benefit only of the direct results of his introductions. "It were infinite," said Lord Bacon, "for the law to consider the causes of causes and their impursions one of another: therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." Even if it be true, a point on which I am not satisfied, that Joel introduced Parry to the defendant, then it might fairly be held that Joel was the immediate cause of the transactions going through, but it would be a misuse of words to say that the previous introduction of Joel to the defendant was also such an immediate cause. I am of opinion, therefore, that the plaintiff has not made out his right to a share of the commission, and that there should be absolution from the instance, with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Michau and De Villiers.]

#### *In re* INSOLVENT ESTATE COOPER.

Mr. Douglas Buchanan moved, as a matter of urgency for the appointment of Marthinus C. Fourie, secretary of the Malmesbury Board of Executors, as provisional trustee in the estate of John W. Cooper, chemist and druggist, Malmesbury with power to carry on the mesbury, with power to carry on the tee. The petitioners were creditors to the amount of £727 17s. 3d.

Order granted as prayed.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GARCIA AND OTHERS V. ( 1907.  
CARR. ( Nov. 14th.

This was an action in which Celestino Garcia, Manuel Fernandez, Archangelo Gregorini, and Jose Barcala claimed certain sums of money due for work done under a certain contract entered into between the plaintiffs and defendant, who is a quarry owner at the Paarl, and also for an amount due for work done at the special request of the defendant, not strictly under the contract, and for an amount of £50 as and for damages for breach of contract by reason of the defendant refusing to allow the plaintiffs to carry out their share of the contract.

The total amounts claimed were £72, due for work done, and £50, damages for breach of contract.

The plaintiffs' declaration was as follows:

1. The plaintiffs are Celestino Garcia, of Brackenfell, in the Cape Division, Manuel Fernandez, of Simon's Town, Archangelo Gregorini, of Simon's Town, and Jose Barcala, of Paarl. The defendant is Andrew Carr, a contractor, of Paarl.

2. On or about the 18th October, 1906, the plaintiffs of the one part entered into an agreement with the defendant of the other part, whereby it was agreed that the plaintiffs should quarry all granite for the defendant on his quarry at Paarl for a period of 11 months at the rate of 6½d. per cubic foot, in such sizes and quantities as the defendant might from time to time require, and that in the event of quarrying becoming dull, the plaintiffs should have the right to dress the granite required by the defendant for all such contracts as he might enter into from and after the 18th October, 1906, with any other person or persons, for kerbing or guttering, at the current rates of wages, with the exception of a certain contract between the defendant and the Cape Town Municipality, in which case the dressing of the granite was required to be done at the old prices.

3. Plaintiffs duly proceeded to carry out the terms of the said agreement, and continued in such performance and execution until the 16th April, 1907, at which date there was due to them for work done in terms of the agreement the sum of £122 2s. 6½d., as will more fully appear from the account hereunto annexed marked "A."

4. During the course of the execution of the said agreement the plaintiffs did certain work for and on behalf of the defendant at his special instance and request, in and about the preparation of

the quarry pit, and the removal and erection of a certain crane, for which said work the defendant is indebted to them in the sum of £43 5s. 4d., as will more fully appear from the account hereunto annexed marked "B."

5. In part liquidation of the indebtedness aforesaid, the defendant has, since the 16th April, 1907, paid to the plaintiffs moneys amounting in all to the sum of £37 12s. 4d., and on or about the 14th and 20th June, 1907, respectively, gave them two postdated cheques for £22 13s. 6d. and £15 15s. 8d., payable respectively on the 10th August and 27th August, 1907, for which sums the plaintiffs have given the defendant credit on account, leaving a balance due to them of £72 10s. 4½d.

6. On or about the 16th April, 1907, the defendant, in breach of the terms of the aforesaid agreement to employ the plaintiffs to do all quarrying and dressing of granite for a period of 11 months from the 18th October, 1906, gave notice to the plaintiffs to cease work, and, notwithstanding the fact that the plaintiffs have at all times material been ready and willing to continue in the employment of the defendant, in terms of the agreement, employed other persons to quarry and dress granite and to do work in the said quarry which the plaintiffs were entitled to do, thereby causing damage to the plaintiffs in the sum of £50.

7. Notwithstanding demand for the aforesaid sums of £72 10s. 4½d. and £50, the defendant has failed and neglected to pay the said sums or any part thereof.

Wherefore the plaintiffs claim: (a) Judgment for the sum of £72 10s. 4½d., as aforesaid; (b) interest *a tempore morae* on the said sum; (c) judgment for the sum of £50 as and for damages; (d) alternative relief; (e) costs of suit.

For a plea to the declaration, defendant says:

1. Paragraph 1 is admitted.

2. Defendant admits that on or about the 18th October, 1906, he entered into a contract with plaintiff Garcia in the terms in paragraph 2 of the declaration, with the reservation of a right to employ extra labour if necessary, but says that the other three plaintiffs were then no parties to the contract. The other plaintiffs for a time worked for Garcia under an arrangement with him, and ultimately, after disputes had arisen among themselves, were accepted by defendant at their and Garcia's request as parties to the contract, and then affixed their signatures thereto.

3. Prior to the acceptance of all the plaintiffs as parties to the contract, defendant made certain payments to Garcia on account of work done by him, or on his behalf, under the contract. Subsequently to the acceptance of all the plaintiffs as parties to the contract, it was arranged between plaintiffs and

defendant that all orders for work should be given by defendant to Garcia, and that all payments should be made by defendant to Garcia for and on behalf of all the plaintiffs.

4. Thereafter plaintiffs continued to perform work for defendant under the contract, and from time to time defendant made payments on account of such work to Garcia for and on behalf of all the plaintiffs.

5. In or about the month of April, 1907, plaintiff Garcia asked to be released from the contract, as he wished to proceed to South America, and defendant agreed to such release, provided that plaintiffs agreed to cancellation of the contract between themselves and defendant. Plaintiffs did so agree, and the contract was thereafter deemed by the parties thereto to be, and in fact was, cancelled. Garcia thereupon left the Paarl, and thereafter plaintiffs Fernandez and Gregorini also departed, leaving no address. Barcala alone remained at the Paarl.

6. Thereafter defendant, having promised to offer work to the three plaintiffs, other than Garcia, if work improved, offered employment to Barcala, an order having been given to him (defendant). Barcala agreed to commence work on a certain day, but failed to do so, and defendant thereupon engaged other workmen. Shortly after Barcala and Garcia (who had not gone to South America) appeared, and asked for work, and agreed with defendant to commence work on a certain day. Garcia did not appear, but Barcala worked for four days, when defendant was compelled to discharge him, as he lawfully might, in consequence of incompetency and inefficiency in respect of the work performed by him. Defendant paid Barcala 8s. per diem for the four days' work performed by him.

7. Thereafter Garcia came, with Barcala, to defendant to ask for work, but defendant, as he lawfully might, refused further to employ them, and arranged with them to make a settlement with them on behalf of plaintiffs for all work performed by plaintiffs and not paid for.

8. Defendant thereupon measured up the work performed by plaintiffs, and in settlement therefor paid to Barcala, for and on behalf of plaintiffs, the sum of £42 13s. 6d. The payment was for work done, but by agreement between the parties, in accordance with the custom of the trade, not to be paid for, save as to certain advances from time to time, until the sale of the stones.

9. Disputes arose as to the measurements of the work, and thereupon the work was again measured by two impartial persons, and on such measurement and a revision of account a further sum of £15 15s. 8d. was found due to plaintiffs, which was duly paid.

10. Plaintiffs in all did work for defendant in terms of the contract to the value of £172 15s. 7½d., and have been paid in excess therefor, viz., in the sum in all of £176 18s. 9d. The account of work and payments in the declaration referred to is incomplete.

11. With reference to paragraph 4, defendant denies that plaintiffs did any work other than that provided and paid for in terms of the contract. Any work in paragraph 4 referred to was work done in the ordinary course of preparation for quarrying, was incidental thereto, and cannot be charged for against defendant. Defendant is in no way indebted to plaintiffs in respect thereof.

12. By reason of the premises defendant says that he was and is under no obligation further to employ plaintiffs or any of them, and is not liable to them in any sum in damages by reason of such non-employment.

13. He further denies that he is indebted to them in any sum. He admits that he refuses to pay the sums referred to in paragraph 7, says he is justified in such refusal, and, save as above, denies the allegations in the declaration contained.

Wherefore he prays that plaintiffs' claims may be dismissed with costs.

Mr. P. S. T. Jones for plaintiff; Mr. Bisset for defendant.

The plaintiffs then went over the principal features of the declaration. At the outset the defendant's attorney remarked that plaintiff was able to speak excellent English, whereupon his Lordship said, "Proceed in English." Plaintiff, however, was unable, or affected to be unable, to comprehend, and maintained a stony silence. Thereupon the interpreter in Italian was sworn.

There was almost immediately a deadlock by reason of confusion in the accounts. His Lordship said that all these things should have been arranged beforehand. He refused to sit there whilst counsel fixed up things that should have previously been decided.

Counsel thereupon proceeded to direct the evidence of the plaintiff as to who put an end to the contract.

Witness stated that on April 16 work was stopped on the quarry. Witness denied that he agreed to cancel the contract. The signature on the cancellation was not in witness's handwriting. Work ceased on April 16, because Carr said he had no orders for stone. He told them to stop working for a few weeks. Witness replied that he could not stay without working. Witness wanted Carr to measure the stone, so they could settle accounts, and he could return to Brackenfell to work. Witness was married, and had a family, and could not do without work, as he had to support them. Witness told Carr that he was going to Brackenfell, whilst the



other plaintiffs remained behind to await Carr's orders. Two of them subsequently left, because Carr had no orders for work. Witness only went to Brackenfell as a temporary measure. He returned to the quarry on June 13, having been recalled by Barcala. Witness went to see Carr, and Carr said he did not want Barcala back. He said he had no work, and would measure the stone and pay witness off. Witness asked Carr for payment, and Carr told him he would pay him, and that he had no more work, yet three days after he put other men into work. On the following day he paid two post-dated cheques, one for 15 guineas and the other for £20. Witness did not accept this amount as being sufficient.

In cross-examination, witness said that Barcala was dismissed on June 15. Barcala said he had been dismissed because he was prying into Carr's business and not because of inefficiency.

Witness was not present when the stone was measured after June 15. The cheques on June 15 were not in settlement of account. Witness thought the cheques were only on account. When witness received the cheque he told Mr. Carr that the special work he had done was not included in it.

Archangelo Gregorini gave corroborative evidence. He was now making 11s. per day, but if the work with Carr had continued he would have made 30s. per day.

Evidence of a like nature was given by the other plaintiffs.

The witness Garcia, recalled by his lordship, stated he measured the stone lying in the quarry on 16th April, with the exception of the rough blocks, which they thought of working again; the page contained all the stone in the quarry. When he came back in June, all the stuff which he left lying at the quarry in April was not there.

Andrew Carr, defendant, stated that on 18th October, 1906, he entered into the contract with Garcia. The other plaintiffs afterwards joined in the contract as partners. Witness explained the work of the plaintiffs on the contract. On 17th December, the work was suspended, and about the New Year the work was re-started. Garcia asked to be allowed to restart the work, saying that a little money could be paid by defendant on account. In February, the work was suspended again owing to slackness, and a week later the plaintiffs started work again. About a week after they had measured up. Garcia, with the others, came to see witness, and Garcia said that he intended leaving for South America. He wished to be relieved of the contract. Garcia was the head man, and received all orders and payments. Witness did not agree to Garcia leaving, or another man taking his place. Witness said he would employ the other three if they were com-

petent. Witness understood that the contract between him and the four was cancelled on that day, as he promised to employ the other three. From 16th April to 18th May, 1,166 cubic feet had gone out of the quarry, representing about £31. There was a settlement to the extent of £32 for 1,166 feet of gutting, plus 90 feet of dressing, between them. Barcala told witness that Garcia had not gone to South America, but was working in the Brackenfell Quarry. On the 5th or 6th June, Barcala and Garcia came to see witness, and asked witness if they might resume work. Witness agreed to this, and both men were to be at work on the following Monday. Garcia did not come as promised, and Barcala and an Austrian were started on the job. On a visit to the quarry, witness found that the cutting was not properly done. It was evident that Barcala did not understand the work at all. Witness then dismissed Barcala. Then Garcia came out, and witness showed him the rock, and he said concrete could be made of it. Witness said he would measure up, and pay them for everything they had done. When Barcala measured up, he made out 450 feet more in his favour. Witness suggested a joint measurement, which Barcala agreed to, and he raised no objection to it.

Cross-examined by Mr. Jones: The day-book he used was a wages-book and an order-book. Three pages were torn out because he spilled an ink bottle on the book. Between April and May, kerb and gutting went out of the quarry to the extent of 1,166 ft. and 63 ft. In the first or second week of April the quarry was upside down. The contract was cancelled on 10th April. Witness did not refuse to take Garcia back; he came back to assist Barcala for a few days. The contract was never mentioned then. He maintained that the plaintiffs had been paid in full. He had nothing to advance against the correctness of the measurements of the plaintiff. If there had been no complaint when he paid them on 15th June the matter would have been settled. As a matter of fact, the amount was wrong, and if the plaintiffs had not pointed out the error they would have been worse off.

Further evidence having been called for the defendant, and counsel for the plaintiffs heard in argument on the facts,

Maasdorp, J.: From the view I take of the evidence given in Court, I do not think it is necessary to hear Mr. Bisset. The issue raised by the parties as to the cancellation of the contract in the case will throw a great deal of light upon the value of the evidence of the witnesses. The plaintiff has put in a claim for damages on the ground that he was prevented by a wrongful act of

the defendant from earning certain remuneration. The defendant states, on the other hand, that at the time that the work ceased it ceased in consequence of an agreement between the parties for the cancellation of the contract. The Court has now to decide whether the contract was cancelled, or whether it was improperly put an end to. Now, it appears at the time when the work ceased a measurement took place of stone lying in the quarry, and this measurement took place for the purpose of coming to a final settlement. It became necessary, because there seemed to be an arrangement between the partners in this concern to arrive at some arrangement for settlement amongst themselves. And that settlement was necessary, I am satisfied upon the evidence, because Garcia was on the point of leaving the country. I come to that conclusion upon the evidence of Innes, Dunstan, and Gregorini. It was stated at the time that Garcia was not certain of going, but expected he might go. That was the evidence given by one of the plaintiffs. Now, this statement is corroborated by Innes that Garcia actually came to them and said "Good-bye," and Dunstan says that he added he would never come back to the Pearl. If that was so, it was absolutely necessary for him to see Mr. Carr and see that his part of the contract was cancelled, and his part could not have been cancelled without involving the cancellation of the contract with the other three partners, because Garcia seems to have been the man of skill and experience in this matter, and I am satisfied from Mr. Carr's evidence that he could not have possibly gone on with the three less experienced men left after Garcia's leaving. Immediately after this Barcala was the man dealt with by Mr. Carr in the matter, and he says Garcia did tell him that he and Barcala had come to a settlement, and in future Barcala would be entitled to receive the money. I accept that as perfectly true. I need not go further into the question by comparison of the evidence as to cancellation of the contract, and I will say that upon that point I do not accept the evidence of Garcia or that of Barcala. That will seriously affect the further branch of the case. Garcia says that he never intended to leave. I come to the conclusion that he did, and intended to cancel the contract. Barcala says that he never heard anything about Garcia leaving. I come to the conclusion that the contract was cancelled by mutual consent. Now, the question arises whether there are certain other items of work for which the plaintiffs are entitled to be paid. That is not a question which is free from doubt. We have it stated by the plaintiffs that they made a certain measurement of the work in April and they did that in the

absence of Mr. Carr, and consequently that cannot be accepted as conclusive, because it was made in the absence of Mr. Carr. The question remains: Is the measurement correct? If their evidence had been of such a character that I could rely upon their statements, I could accept their statements made in the account without requiring any further corroboration, but under the circumstances I find that Mr. Carr himself has supplied the Court with a basis for measurement of the work in the quarry. He has entered in these books everything he has tendered, and given a statement of everything removed, and here again Barcala comes in direct conflict with the witnesses in such a manner that I must characterise his evidence as untruthful. It appears on the 15th there had been a settlement arrived at with which Garcia was not satisfied. Thereupon Mr. Carr said: "Very well. We will go into the measurement again, and if there is anything wrong we will have a further statement." Then Barcala takes part in the measurements, which were to constitute the final arrangement between the parties. The account finally arrived at was of the total figure of £15 15s. 8d. Whatever Garcia may say as to this being payment on account, it clearly was not intended to be payment on account as far as Mr. Carr was concerned. All the items in this account are given in the closest detail, and after a balance has been struck and former errors rectified, a cheque is given to Barcala for £15 15s. 8d. Garcia is satisfied with this cheque. Barcala's attorney makes a demand on his behalf in the sum of £166. The correspondence proceeds, Barcala insisting upon this claim. Well, it is explained that Mr. Carr never had any dealings with Barcala, but that there was a man called Garcia whom he chiefly dealt with, and that cheques had been paid to Barcala, owing to Garcia having stated that Barcala had advanced him money. Here is a statement, then, for the first time, that the attorney seems to be told that the whole case had altered, Barcala not claiming money on his own behalf, and that he had other partners. The conclusion I come to, therefore, is that there was a final settlement which there is now no clear evidence to upset. The judgment will be for the defendant, with costs.

[Plaintiff's Attorney: J. Bernard.  
Defendant's Attorneys: Moore and Son.]

### THIRD DIVISION.

Before the Hon. Sir JOHN BUCHANAN.]

#### PROVISIONAL ROLL.

LEBOUX AND GARLAKE V. { 1907.  
BAILIE. { Nov. 14th.

Mr. Watermeyer moved for the final adjudication of the defendant's estate as insolvent.  
Granted.

VAN RIET V. NICHOLSON.

Mr. Ingram moved for provisional sentence on a mortgage bond for £1,831 17s. 6d., with interest, and that the property be declared executable. The bond became due by reason of non-payment of interest.  
Granted.

#### MATRIMONIAL CAUSES.

GARDINER V. GARDINER.

This was an action brought by Charles Alfred Percy Gardiner against his wife, Edith Amelia Gardiner, for restitution of conjugal rights, failing which a decree of divorce. Mr. Gutsche was for the plaintiff, and the defendant was in default.

Charles Gardiner, plaintiff, stated he was married to the defendant in Sydney, New South Wales, and had been in the Colony since 1901. He lived with the defendant until 1903, when the defendant went to Australia, and plaintiff went to England on a business trip. When he was leaving on board the *Runic* some friends came to see him off. One of the young ladies—a girl of some sixteen or seventeen years of age—refused to go ashore. When the ship got to sea witness put the girl in charge of a Dean and his wife, and paid for her passage. He had no hand in her taking this step. When he got to England he was arrested, and charged with abduction. He was tried at Bow-street, and honourably acquitted. He returned back to South Africa on July 23 of the same year, and the defendant refused to come back at all. She did not exactly give a reason, but put it down to the girl who left on the *Runic*.

Decree of restitution granted, the defendant to return or receive the plaintiff on or about December 31 next, failing which, the usual rule nisi returnable January 30.

BIRCH V. BIRCH.

Mr. Watermeyer, for the plaintiff, Emilia F. L. Birch, moved for a decree

of restitution of conjugal rights, failing which a decree of divorce. The parties were married about July 27, 1905. There was one child of the marriage. In July, 1905, the defendant unlawfully deserted the plaintiff, and since then had not returned to her. She claimed custody of the child of the marriage, restitution of conjugal rights, failing which a decree of divorce.

The plaintiff, Amelia Francisca Birch, in the course of her evidence, said that she married the defendant on July 27, 1905. On the same day as the marriage he left her, and never came back again. After the marriage he went to Rhodesia. He had written a letter stating *inter alia* that he had broken off all connection with witness and her family.

Decree of restitution of conjugal rights granted, the defendant to return to the plaintiff on or about December 31, failing which the usual rule nisi returnable January 30.

BRANDON V. BRANDON.

Mr. Wallach moved to make absolute a decree of divorce, the defendant, Charles Edward Brandon, having failed to restore conjugal rights to the plaintiff.

Rule absolute.

WOODMAN V. WOODMAN.

Mr. J. E. R. de Villiers moved for a decree of divorce, with costs.  
Granted.

SCHMITT V. SCHMITT.

Mr. J. E. R. de Villiers moved for a decree of divorce, with forfeiture of the benefits and custody of the children, and costs.

Granted.

GOUWS V. GOUWS.

Mr. Howes moved to make absolute a rule calling on the defendant to restore or receive the plaintiff.

Rule absolute.

#### REHABILITATION.

*Ex parte* BOTHA.

Mr. Louwrens moved for the rehabilitation of Coenraad Josephus Strydom Botha.

Granted.

## GENERAL MOTIONS.

*Ex parte* MAHLER. } 1907.  
Nov. 14th.

Mr. Douglas Buchanan moved to make absolute a rule granted under the Derelict Lands Act.

Rule absolute.

## PEILE V. PEILE.

Mr. Inchbold said this was the return day when the defendant should show cause why the plaintiff should not sue him for restitution of conjugal rights *in forma pauperis*.

Rule absolute, Mr. Inchbold to act as counsel and Mr. Buinski as attorney.

*Ex parte* FERREIRA.

Mr. Burton, K.C., moved for an extension of the return day until 26th November.

Granted.

*Ex parte* ESTATE VAN DER BYL.

Mr. Gutsche moved for leave to the petitioner to attach a portion of a farm.

Granted.

## FOURIE V. BRAND.

Dr. Greer was for the applicant, and Mr. Upington was for the defendant. Counsel for the applicant moved to make absolute an interdict and ejectment granted by his lordship the Chief Justice.

Counsel having been heard in argument on the facts,

Buchanan, J.: The applicant bought and the respondent sold certain landed property upon certain written conditions of sale. The parties went to a man who considered himself a legal adviser, and he drew up this document. This legal gentleman comes forward and says there were a number of other conditions which were agreed to at the time. Whatever these conditions are, as long as a contract stands, the document must be taken in preference. By this document certain landed property was sold for a certain price. The first interference complained of is that he prevented the respondent from cutting wood. Then it is also said that the respondent refuses to give up possession of a house. The applicant applies for a rule nisi calling on the respondent to show cause why the seller should not be restrained from interfering with the purchaser in his lawful use and enjoyment of the property, and also that the seller be forthwith ejected from the premises. If the written conditions of sale did not re-

present the contract, the proper course for the respondent to take was to take steps to rectify the conditions of sale. I think the purchaser is entitled to have an interdict restraining the seller from interfering with the property. The Court will order the interim interdict to be continued until 7th February next, the question of costs to stand over. The purchaser must be prepared forthwith to carry out his part of the contract, and pay the purchase price.

## GREEVE V. KEAL.

This was an action brought by Magdalena Greeve against Herbert Sydney Keal for damages for seduction. Mr. Roux was for the plaintiff and Mr. Payne was for the *curator ad litem*.

Evidence taken on commission having been read,

Buchanan, J., said that, under the circumstances, and as the defendant was only fifteen or sixteen years of age, and the plaintiff about four years older, he could not give anything for seduction. For other expenses, including maintenance, he allowed the plaintiff £20, with costs. The Master authorised to pay this amount out of the funds in his hands belonging to the minor.

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

JACOBS V. CLOSE.

} 1907.  
{ Nov. 15th.

## Pleading—Exception.

This was an argument on an exception taken by the defendant (John Edwin Paul Close) to the declaration of the plaintiff (Alfred Ernest Jacob).

Plaintiff's declaration was as follows:

1. The plaintiff resides at Cape Town and, until the matters hereinafter complained of, carried on the business there of a glass merchant. The defendant is an accountant practising at Cape Town.

2. On or about the 27th day of August, 1906, the plaintiff of the one part, the defendant of the second part, and cer-



tain creditors of the plaintiff by themselves or their duly authorised agents of the third part, signed and executed a certain deed of assignment, copy whereof is hereunto annexed marked "A."

3. By the said deed, the plaintiff ceded and assigned to the defendant, his executors, administrators, and assigns the whole of his estate and property, movable and immovable, for the benefit of the creditors of the plaintiff, and the defendant agreed, for remuneration, to realise and distribute the same in legal order of preference for the benefit of the said creditors, and to pay over to the plaintiff any surplus (if any) which might remain after such distribution. The parties of the third part agreed in consideration of the foregoing to release the plaintiff from all claims which they or any of them had or might thereafter have against him or his estate for or in respect of any debt, transaction, matter, or thing up to the date of the said deed.

4. It was further provided that the defendant should with all convenient speed collect, get in, sell and dispose of, and convert into money all the said landed property, goods, estate, and effects so assigned, and every part thereof in such manner as shall seem to him most expedient, and shall stand possessed of the same and of the monies to be received by virtue of the provisions of the said deed after paying thereout all expenses and charges connected with the execution of the said deed, and of carrying out the trusts under the said deed and incidental thereto, upon trust in the first place to pay all mortgage and preferent debts due by the plaintiff, and thereafter to pay and divide the balance of the said estate among the concurrent creditors of the said Jacob pro rata. The plaintiff craves leave to refer to the terms of the said deed.

5. The plaintiff duly assigned the whole of his estate and property as aforesaid, and duly carried out all his obligations under the said deed.

6. At the date of the said assignment there was lawfully due and owing to the Corporation of the city of Cape Town the sum of £36 1s. 11d., being for rates due upon certain of the immovable property so assigned of which the defendant had due legal notice and knowledge at all times material, and it became and was the duty of the defendant under the said deed to pay the said sum out of the proceeds of the said estate with all convenient speed.

7. The defendant did not pay the said sum as aforesaid, and the said Corporation instituted legal proceedings for the recovery thereof against the plaintiff, and on or about the 30th day of October, 1906, obtained judgment against him for the said amount, with costs in the Court of Resident Magistrate for Cape Town, and thereafter large quan-

ties of glass, the property of the plaintiff, acquired subsequent to the said assignment, were attached and sold in execution of the said judgment on or about the 4th December, 1906, of all which the defendant had full legal notice and knowledge.

8. The value of the said glass so attached and sold was the sum of £531 15s. 4d., and the plaintiff has in addition suffered loss by having to close his said business, and has in all sustained loss and damage in the sum of £1,000.

Wherefore the plaintiff claims: (a) £1,000 damages; (b) alternative relief; (c) costs of suit.

The defendant excepted to the declaration as follows:

1. That defendant is sued in his personal capacity, whereas he should have been sued in his capacity as assignee under the deed of assignment annexed to the declaration.

2. That the declaration is vague, embarrassing, and bad in law, in that the deed of assignment specially provides that preferent creditors shall be paid before concurrent creditors, whereas plaintiff's declaration does not allege that the debt for rates (for non-payment of which by defendant the plaintiff claims damages) was a preferent one, or that the preferent debts in the estate had been paid prior to judgment and execution for such rates; or that there were sufficient funds in the estate wherewith to pay the said debt for rates. Wherefore the defendant prays that the declaration may be quashed and set aside, with costs.

Mr. Close was for the excipient (defendant in the action); Mr. Upington was for the respondent (plaintiff in the action).

Mr. Close submitted that the exception was a thoroughly sound one, and one upon which the defendant was entitled to rely, following the ordinary rules of pleading. The first exception was that he was sued in his personal capacity, whereas he should have been sued in his capacity as assignee. That objection, he submitted, was fatal to the declaration. Then an even more material objection was that it was not alleged that the debt was preferent. The Town Council was not a party to the deed. The defendant was put upon trust to pay all preferent debts. There was no allegation in the declaration that this was either a mortgage or a preferent debt. Counsel cited *Municipality of Green Point v. Powell's Trustees* (2 Menzies, 380), *Smuts v. Divisional Council of Cathcart* (6 C.T.R., 384), *Divisional Council v. Marais* (16 C.T.R., 704), and *Krackmal's Trustees v. Epstein* (10 C.T.R., 421), and referred to Act 26, 1893 (sections 102 and 178) and Act 25, 1897 (section 3).

Mr. Upington said that as to the first objection, the defendant was sued as a party to an agreement, and it did not

seem that under that agreement as assignee he had got any special capacity in which he was to be sued. Defendant acted under an agreement of this kind at his own peril. As to the second and substantial objection, as it was called, he contended that the important point in the case was not whether this was a preferent debt, but whether it was a charge attaching to the property. Counsel submitted that the charge in question was a charge incidental to the trust. As to the other ground of exception, he could not conceive how the plaintiff could be expected to state a fact of which he had had no knowledge. It was a point for the defence as to whether there were funds in the estate to meet the payment.

Mr. Close having been heard in reply.

De Villiers, C.J.: There were three parties to the deed of assignment, viz., the plaintiff (the assignor), the defendant (the assignee), and the third parties were the creditors, who consented to the deed of assignment. The declaration alleges that in this deed of assignment, it is provided that the defendant should collect in all the assets, and shall stand possessed of same, "after paying thereout all expenses and charges connected with the execution of these presents and carrying into effect the trusts hereby created and incidental thereto, upon trust in the first place to pay all mortgage and preferent debts due by the said Alfred Ernest Jacob, and thereafter to pay and divide the balance of the said estate to and among all and singular the several concurrent creditors of the said Alfred Ernest Jacob ratable according to the amount of their several debts." In the declaration it is alleged that there was a breach on the part of the defendant, the assignee under this deed, in that he did not pay a certain sum of money alleged to have been due to the Corporation of the City of Cape Town for rates, viz., £36 1s. 11d., although he had legal knowledge and the notice that these rates were due. Now, the question arises whether these allegations are sufficient to prove that there has been a breach of contract on the part of the defendant (the assignee) for which he is liable in damages. Now, I take it to be perfectly clear that what the defendant had to do was to pay mortgage and preferent debts due by the plaintiff. I am by no means satisfied that creditors who were not parties to the deed would have any claim thereunder. The Town Council was not a party to the deed, and, therefore, on that ground alone, I am inclined to think that the plaintiff has not shown that there has been a breach of contract, but, quite independently of this technical objection, my own view is that the exception taken to the declaration is a good one. Mr. Upington has relied upon the portion of

the deed which refers to incidental expenses. But incidental expenses which the defendant was bound to pay, were expenses incidental to the carrying out of the trusts under the deed. The payment of the rates due to the Corporation, which were already due at the date of the assignment, cannot be regarded as incidental to the carrying out of the trusts under the deed. So that, unless the plaintiff could show that under the rest of that clause referring to the payment of mortgage or preferent debts, due by the plaintiff, there has been a breach of contract on the part of defendant, his declaration fails to show any cause of action. Now, there is no allegation in the declaration that the debt which the defendant failed to pay was a mortgage or preferent debt, and, therefore, plaintiff has failed to show that the defendant has failed to perform his part of the contract in paying the particular debt, which forms the subject of the action. For these reasons, I am of opinion that the exception should be sustained, with costs. I think, moreover, I may add that in a declaration of this kind, I consider it necessary that there should have been an allegation that the defendant had assets to pay these debts. I do not think there is much in the exception that the defendant is sued in his individual capacity, instead of being sued as assignee, but I do consider this to be clear that the defendant cannot be held liable for not paying particular debts unless it is shown that he had collected assets for the purpose of paying the debts. So that seems to me also a very material statement, which has been omitted from the declaration, but, upon other grounds stated, I am of opinion that the exception is a good one, and must be allowed with costs.

[Exceptor's Attorneys: Sauer and Standen. Respondent's Attorneys: Van Zyl and Buissinné.]

ENGELBRECHT AND OTHERS } 1907.  
V. BOTHA AND OTHERS. { Nov. 15th.  
{ Dec. 5th.

Will — *Jus accrendi* — Death of legatee—Specific bequest.

*The testators, being husband and wife, bequeathed a farm to four of their children by name. One of the children died before both the testators, leaving children.*

*Held, that the remaining legatees were entitled, after the death of the testators, to the whole farm, and that the children of the deceased legatee*

were not entitled to share in the legacy.

This was a special case for the interpretation of certain clauses in the will of the late Johannes Cornelis Marthinus Engelbrecht and the late Anna Jacomina Engelbrecht.

The special case was set out in the following terms:

1. The first and second plaintiffs and the wife of the third plaintiff married to him in community of property, are children of the late Johannes Cornelis Marthinus Engelbrecht, hereinafter called the testator.

2. The first defendant is sued in his capacity as father and natural guardian of the seven minor children of himself and his deceased wife, Annie Jacomina Barbara Botha (born Engelbrecht), a daughter of the testator.

3. The second and third defendants are sued in their capacity as executors testamentary in the estates of the testator and his wife, Anna Jacomina Engelbrecht (born De Lange), hereinafter called the testatrix; and likewise in their capacity as tutors testamentary of Egla Jemina Engelbrecht, a minor child of the testator and testatrix.

4. The parties reside on divers farms in the districts of Cathcart, Queen's Town, and Stockenstrom within this colony.

5. Before his marriage with the testatrix the testator was married to Aletta Maria Engelbrecht (born Botha), by whom he had three children, to wit: the first two plaintiffs, and a daughter, Isabella Johanna. By his marriage with the testatrix the testator had eleven children, amongst them the aforesaid Annie Jacomina Barbara Botha, Davidina Petronella de Wit, and Egla Jemima Engelbrecht.

6. All the aforesaid children of the testator of both marriages are still surviving, save only the said Annie Jacomina Barbara Botha, who died before the testator and before the testatrix, on or about the 6th June, 1904, leaving issue the seven minor children who are in this action represented by the first defendant.

7. On or about the 26th September, 1903, the testator and the testatrix being married in community of property, executed a joint and mutual will. A copy thereof, together with a true translation, is hereunto annexed marked "A," and the parties crave leave to have it regarded as inserted herein. They wish to refer particularly to that part of the will containing the institution of heirs, and to that part relating to the legacy of the farm Deepdale, and to that part containing the conditions under which the bequests therein contained were expressed to be made.

8. In the joint estate at the death of the survivor there was certain landed

property (viz., a certain farm Brakkloof) not specially bequeathed nor in any way specifically referred to in the said will.

9. The testator died on the 17th January, 1907, and the testatrix on the 8th July, 1907, and the said will is now of full force and effect as the last will of both the testator and the testatrix.

10. The plaintiffs contend: (a) That the sole heirs to the general or residuary estates of the testator and the testatrix under the said mutual will are the aforesaid surviving children of the testator by both his said marriages, to the exclusion of the issue of the said predeceased child, Annie Jacomina Barbara Botha. (b) That the plaintiffs jointly are entitled to claim the whole legacy of the farm Deepdale under the said will, by virtue of the *jus accrescendi*, to the exclusion of the general heirs of the testator and testatrix, and to the exclusion of the issue of the predeceased co-legatee, the said Annie Jacomina Barbara Botha. (c) That if this Honourable Court holds that the share of the farm Deepdale which would have fallen to the said Annie Jacomina Barbara Botha devolves on her said children or lapses into the general estate, then such share remains subject to the conditions in the will affecting the bequests of landed property therein, and may not be sold free from the said conditions by the second and third defendants.

11. The first defendant contends: (d) That the minor children aforesaid of himself and his late wife Anna Jacomina Barbara Botha (born Engelbrecht) are entitled in the distribution of the general or residuary estates of the testators, under the said mutual will, to receive the share which their deceased mother would have received had she survived the said testators. The said minor children are so entitled according to the true construction of the will and intention of the testators, as being included among the kinderen who by the will are appointed heirs. Alternatively, the defendant says that they are so entitled by representation. (e) That the minor children in the preceding paragraph referred to are in regard to the farm Deepdale similarly entitled, upon the grounds in such paragraph set forth, to succeed to the share which their deceased mother would have received had she survived the testators. (f) That the said minor children are entitled to receive their share of the farm Deepdale free from the restrictions imposed by the testators in connection with the said farm.

12. The second and third defendants contend: (g) That the contention of the plaintiffs in their contention (a) is correct. (h) That the share of the farm Deepdale, which under the will would have fallen to the child Annie Jacomina Barbara (but for her aforesaid pre-

decease) now, by reason of such predecease, falls into, and has to be administered as part of the general or residuary estates of the testator and testatrix; the heirs thereto being the persons specified in plaintiffs' contention (a). (i) That the landed property in the estate not specially bequeathed (to wit, the farm Brakkloof) is, and has to be, administered as part of the general or residuary estates of the testator and testatrix; the heirs thereto also being the persons specified in plaintiffs' contention (a). (j) That the children of the said Annie Jacomina Barbara Botha are not entitled as heirs to or to participate in any of the aforesaid estates or properties. (k) That the lapsed share of the farm Deepdale (more fully described in the second and third defendants' contention (h) and the unbequeathed landed property Brakkloof are not affected by any of the conditions in the will affecting the bequests of landed property therein, and the second and third defendants are entitled to sell the same free from any of the said conditions, if such sale be deemed advisable or necessary. The proceeds in the event of a sale being then distributed in lieu of the landed property.

Wherefore the parties pray for judgment upon their respective contentions, and that the costs of this suit may come out of the estates of the testator and testatrix in equal shares.

Mr. De Villiers for plaintiffs. Mr. Close for the first defendant (Reynier Botha, in his capacity as guardian of his minor children). Mr. McGregor, K.C., for the second and third defendants.

Mr. De Villiers, in argument, cited *Gulliers v. Ryecroft* (17 S.C., 569), where it was laid down that the rule was that "kinderen" had *prima facie* to be taken to refer to children of the first degree. The intention to benefit remoter descendants must be clear. This rule was followed in the case of *Vermaak v. Vermaak* (21 S.C., 463). In the will under consideration there was no indication of any intention that the word "kinderen" should mean anything else but children of the first degree. By the *jus accrescendi* the fourth of the farm Deepdale bequeathed to Annie J. B. Botha could be claimed by the plaintiffs. He also referred to *Steenkamp v. De Villiers* (10 S.C., 61), *Potgieter v. Executors of Van der Heer* (11 S.C., 40), *Watson v. Burchell* (9 S.C., 2), *Mijiet's Executors v. Ara* (14 S.C., 511); Voet (Bk. 30, sections 60 and 61), and Van der Kessel (Thesis 326).

Mr. McGregor cited Voet (36, 1, 22); Groenewegen (ad. Dig. 50, 16, 201 and 220); *In re Pretorius* (2 J., 293); *Michau's case* (11 S.C., 362); Pothier on Legacies (Van der Linden's Transl.,

pp. 108 and 125). *De Jager's case* (5 Buch. 86) showed, he said, that the Court would presume that the testators wished to have equality. This would not happen if the *jus accrescendi* were to prevail. In *Watson v. Burchell* there were no other people to come in as in this case.

Mr. Close said that the presumption was in favour of "grand-children" being included in the word "children." He referred to *De Smidt v. Martin* (14 C.T., 200), *Van Leeuwen* (C.F. 3, 5, 10, and R.D.L., vol. I.); *Wentzell v. Brink's Executors*. The will itself supported this view. He also cited *Maasdorp* (Inst. vol. I., p. 191).

De Villiers, C.J.: At this stage I shall simply state that as to the contention of the plaintiffs in regard to the farm Deepdale, it must be supported. The terms in which that legacy is given are as follows: "After the death of the survivor we declare to bequeath, subject to conditions to be detailed later on in this, our will, the following farms to the following children, namely: The farm Deepdale, situate in the district of Cathcart, to the children Pieter Willem Adrian Engelbrecht, Johannes Marthinus Cornelis Engelbrecht, Davidina Petronella Engelbrecht (married to Cornelis de Wet), and Anna Jacomina Engelbrecht (married to Renier Botha)." It seems that Anna is dead, leaving children. She died before the testators. No difficulty can arise in this case, because it is a specific bequest. It is not a bequest to a class, but a specific bequest to individuals, and they are joined *re et verbis*. The *jus accrescendi* therefore applies in the case of the share of one of the legatees lapsing and the remaining legatees are entitled to the legacy. Judgment will be reserved upon the other questions. I hope the parties will come to some agreement, because if the decision should be against the first defendant it will be rather hard upon the minor children.

*Postea* (December 5).

De Villiers, C.J., asked counsel whether an arrangement had been come to with regard to the question still outstanding in this case, in which the construction of the will of the late Johannes C. M. Engelbrecht was involved.

Mr. De Villiers said he appeared for four of the children. It had been found impossible to obtain the consent of the other 13 children. Some had consented, but others wished to insist upon their strict legal rights. They did not wish to consent to make any allowance in favour of the minors. Some were willing to waive their rights in favour of the minors, and he understood would do so whatever the decision of the Court.

Mr. Close and Mr. McGregor, K.C., said that, as far as they were aware, no



arrangement had been come to, as suggested by the Court.

De Villiers, C.J.: I was in hopes that the parties would come to some settlement. The terms of the will under consideration are as follows: "We declare to nominate and appoint the children of the testator begot in wedlock with his predeceased spouse Aletta Maria Engelbrecht (born Botha), together with the children which have already or may still be begotten by us, during our union, to be the only and universal heirs of all our goods and effects, inheritances and legacies, chattels and goods, credits, and of everything of whatever nature and wherever the same might be, which might be left at the death of the first dying of us, and at the death of the survivor." Now, of these children, one, Annie Jacomina, died before both the testators, and the question now to be decided is whether her children are entitled to share in this inheritance. The only ground upon which they could possibly be held to be entitled to share would be that, being grandchildren of the testators, they would be included under the general term "children." The question has been authoritatively decided in the Privy Council in the case of *Galliers v. Rycroft* (17 S.C.), and there the conclusion arrived at was that the word "kinderen," which is the Dutch equivalent for "children," must *prima facie* be taken to refer to descendants of the first degree, but if it can be gathered from the context of the will or from other circumstances that the testator had regard to descendants of a remoter degree, the word should be construed in its wider signification. It was added also that in the case of a bequest to the testator's own children, the Court of Holland required much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of another person. In the present case, it was the testator's own children, and, therefore, very slight evidence of a desire to benefit further descendants would have been sufficient. But I have carefully read the will, and I am unable to find any trace of an intention to benefit further descendants. Counsel has relied upon one clause of the will in which there is a bequest of land to the sons, and in which the eldest son of certain sons is to be held entitled to that bequest. Well, the fact that regarding a particular bequest, the testator intended to benefit the eldest son of certain sons, does not show that in regard to the residue there was any desire to benefit the children of any of the children, who are made the heirs under the clause now in question. I was in hopes, as I said, that the parties might come to some terms in the matter, because it does seem somewhat hard that these children of the deces-

ed mother, who possibly might require the money just as much as their uncles and aunts, should not be entitled to share in the bequest, but the rule of law is clear. *Prima facie*, the word "children" does not include grandchildren, and it is only in case the Court can find some other evidence, however slight, that the testators intended to benefit the grandchildren, that the Court can give the wider meaning to the word "children" which is now insisted upon. Under these circumstances, I am bound to hold in terms of contention "a" of the plaintiffs, but that won't affect the question of costs. Costs will come out of the estate.

Contention "a" of the plaintiffs was as follows: "That the sole heirs to the general or residuary estates of the testator and the testatrix under the said mutual will are the aforesaid surviving children of the testator by both his said marriages, to the exclusion of the issue of the said predeceased child, Annie Jacomina Barbara Botha."

[Plaintiffs' Attorneys: Walker and Jacobsohn. First Defendant's Attorney: H. G. Wilmot. Second and Third Defendants' Attorney: P. De Villiers.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

COLONIAL ORPHAN CHAMBER. 1907.  
BER V. SPIRO AND COLL. (Nov. 15th.

Mr. M. Bisset moved for the provisional order of sequestration as against the second defendant to be made final. Granted.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

	1907.
	Nov. 18th.
CUNNINGHAM AND GEARING	" 19th.
V. MILNERTON ESTATES,	" 20th.
LTD.	" 21st.
	" 28th.
	" 29th.
	Dec. 11th.

Dredger — Specifications — Sale and purchase.

This was an action brought by Sydney Charles Gearing, carrying on business

in Cape Town, under the style of Cunningham and Gearing, engineers, sought against the Milnerton Estates, Ltd., to recover the sum of £1,413 6s. 8d., balance of purchase price of certain dredger, and £28 9s. 2d. for material pumped and delivered.

Plaintiff's declaration was as follows:

1. The plaintiff is Sydney Charles Gearing, who carries on business in Cape Town, under the style of Cunningham and Gearing. Defendant is a company duly registered and carrying on business in this colony.

2. In or about September, 1905, the plaintiff at defendant's request agreed to supply and thereafter did supply a suction sand dredger for the purposes of dredging operations in the river on the defendant's property at Milnerton.

3. The terms of the contract relative thereto were on or about the 7th day of March, 1906, set forth in a certain signed written contract called a memorandum of agreement.

4. The parties hereto agreed that the purchase price of the dredger, together with certain spare parts, should be £2,120. Prior to the 12th February, 1907, the dredger had after being set up and inspected in plaintiff's workshops, been transported to Milnerton and launched there: and the defendant had duly paid the first instalment, being one-third of the purchase price.

5. Thereafter the dredger was put in order, and was worked by plaintiff throughout the trial period necessary under clause 2 of the contract, which period expired prior to March 5 last. Thereafter plaintiff allowed a further extended probationary trial period of three weeks for experimental working under clause 3 and duly carried out such working, and at the request of the defendant company's engineer (Mr. W. Farrant) continued such extended period and working up to June 14 last.

6. During the period from the 12th February to 14th June last, the plaintiff executed all such alterations to the dredger as were found to be needed, and as were required by the said engineer to make the dredger work satisfactorily. On the said 14th June, a final test took place in the presence of plaintiff's representative Harry Gearing, and of Messrs. Fraser, jun., and Hunter, the duly authorised representatives of the engineer then absent from Milnerton.

7. At the test on the 14th June, the dredger was complete and worked well and satisfactorily in terms of the contract, and to the satisfaction of the engineer's representatives; and thereafter the defendant company, acting under clause 3 of the contract, took control of the working of the dredger plant, and the plaintiff's control which had continued to such date thereupon ceased.

8. The guarantee period under clause 4 of the contract began on the 14th

June, and ended on the 14th September, 1907. The conditions of the clause have been duly, properly, and reasonably fulfilled.

9. On the 14th June and 14th September respectively, the plaintiff became entitled to claim from defendant the remaining two instalments, each of one-third of the purchase price amounting in all to £1,413 6s. 8d.

10. The plaintiff during the probationary trial period set forth in paragraph 5, pumped and delivered material for which in terms of clauses 3 and 6 of the contract he is entitled to payment of £28 9s. 2d.

11. The plaintiff has tendered and hereby again tenders delivery of the spare parts referred to in paragraph 4 and otherwise has duly and properly performed his part of the contract; and all things have happened, all conditions have been fulfilled and all times have elapsed necessary to enable plaintiff to claim payment of the said sums of £1,413 6s. 8d. and £28 9s. 2d., but the defendant wrongfully and unlawfully fails and refuses to pay any part thereof though requested so to do.

Wherefore plaintiff claims: (a) Payment of £1,413 6s. 8d. balance due of the purchase price of the dredger aforesaid. (b) Payment of £28 9s. 2d. for material pumped and delivered as aforesaid. (c) Interest *a tempore morae*. (d) Alternative relief; (e) Costs of suit.

The defendant's plea admitted that on or about the 7th of March, 1906, a written contract was executed, and craved leave to refer to the original documents at the trial. The plaintiff erected a certain suction and sand dredger, but had failed to work the same in complete order. The defendant admitted that the plaintiff did attempt to work the dredger for the period provided in the contract, but on account of the unsatisfactory way the work was done it was found necessary to extend the period as provided for in the contract. He admitted that the plaintiff had made certain alterations, but the engineer was dissatisfied with the dredger, and the defendant refused to accept it. Save as above, the defendant denied paragraphs 5, 6, 7, 8, and 9. The defendant admitted paragraph 10, and tendered to set off the same "pro tanto" against the sum claimed by it in the claim in reconvention. The defendant was willing to accept the dredger and to pay the sum of £1,413 6s. 8d. upon the plaintiff fulfilling the contract to the satisfaction of the defendant's engineer within a reasonable time, to be fixed by the Court.

In reconvention, the defendant (now plaintiff) claimed the return of the first instalment (£706 13s. 4d.), as the contract was cancelled. The plaintiff (now defendant) was indebted to the defendant (now plaintiff) in the sum of £134 4s. 4d. for work and labour and material

done and supplied by the latter, for and on behalf of the former, and at his special interest and request, between the months of January and August, 1907.

Wherefore the defendant (now plaintiff) claimed that the plaintiff (now defendant) be ordered to duly perform his contract to the satisfaction of the defendant's engineer, or, failing compliance with that order, cancellation of the contract and repayment of the sum of £706 13s. 4d., and judgment for the sum of £134 4s. 4d., with interest.

Mr. Close (with him Mr. Bisset) was for the plaintiff; Mr. W. P. Schreiner, K.C. (with him Mr. Upington) was for the defendants.

Mr. Close, at some length, detailed the principles of the machine.

The first witness examined was Ernest Peters, photographer, who proved certain photographs of the dredger, taken at Milnerton on the 5th and 7th of the present month.

Harry Charles Gearing, of the plaintiff firm, said that he had had 15 years' experience of general engineering work. He gave evidence as to the negotiations which led up to the execution of the contract in question. The original dredger was, he was informed by Mr. Farrant (defendants' engineer), doing 7 to 10 cubic yards. The machine was rated at a higher capacity, but it was unable to effect its full capacity because of the hardness of the sand and clay seams to be operated upon. When entering into the contract, witness was not aware of the existence of stone in any quantity in the river bed. He undertook in the contract to supply a sand-sucker. A sand-sucker was not intended to deal with large stones. The dredger supplied was rated to do 30 to 35 cubic yards per hour. It was guaranteed to do 31.5 cubic yards per hour. The machine was fitted up in the plaintiffs' workshops. Mr. Farrant saw the machine from time to time as it was being fitted up, and he expressed himself as satisfied with it. The machine was put on the water. On the 12th February, 1907, a letter was received by plaintiffs from Mr. Farrant drawing attention to certain parts of the machine, which he thought should be altered, and which were explained to Court by witness from a model of the dredger. Witness went on to explain the device adopted in order to deal with clay, viz., a kind of revolving harrow. This, he said, was introduced with the consent of Mr. Farrant. Alterations were made, and Mr. Farrant then appeared to be satisfied with the construction of the machine. Proceeding, he showed that it was of the utmost importance that the machine should be moved carefully so as to keep the delivery pipe in efficient working order. Later Mr. Farrant wrote a letter on the 28th February, in which mention was made of the need of keeping the mouthpiece free

from stones and weeds. The various objections raised by Mr. Farrant were rectified or not sustained. Between the 10th and the 28th March tests were made on eleven occasions, the results of which were entered in a log by an employee named Fraser and tabulated. Witness was present at several of the tests, and found that the machine was seriously hampered with stones.

Mr. Close: Two per cent.?

Witness: I wish it was only 2 per cent. Continuing, he said that an occasional stone, if small enough, would pass through the pump, and would not have any material effect on the work of the dredger. A lot of stones or large stones would cause the suction pipe to become partially blocked, and work half or part bore, and, as a consequence, the output was materially reduced. The dredger worked very well with the clay. Witness then described the trouble occasioned by a mishap during March, more especially owing to the effect of stones upon the cutting gear. Besides the difficulty with stones, they had, he said, difficulty with the delivery pipes owing to the leather break bands between the sections of the pipe giving way. On the 28th March witness had a discussion with Mr. Farrant, when the latter suggested that a different clutch should be put in the engine shaft, and that a safety device should be put in the cutting gear. No further testing took place until fresh devices were fitted. Mr. Farrant wrote approving of the blue prints of the devices, which had been submitted to him. The devices were installed. Witness was then examined with regard to the correspondence that took place between the plaintiffs and Mr. Farrant. He stated that the position the plaintiffs took up was that if the machinery was defective, they would like to know where. With regard to the claim in reconvention for £134 4s. 4d., witness said that the plaintiffs had not requested the defendants to expend moneys on the dredger to make test trials in August. Plaintiffs left the machine in the river on the 14th June. It was then in good condition, and everything was in proper working order. The output of the machine varied a good deal, according to conditions; for instance, as to whether the cutting blades were off, whether they had stones to deal with, and who was the dredging master. The principal trouble they had to contend with was the stones. The quantity of stones that they had to deal with affected the output of the dredger from 20 to 30 per cent., when the tests were made. Witness produced samples of stones taken from the bed of the river. Proceeding, he said that stones would go through the pump, but the effect would be to diminish the suction. If the machine were employed on right conditions, it would be equal to the output

required. On the afternoon of the 12th June they had right conditions, and the dredger did the work required of it. There were stones on that afternoon. When the dredger came on a bed of stones the pump only brought up water, and as a consequence the dredger was shifted off the stones.

Cross-examined by Mr. Schreiner: Witness was a member of the plaintiff firm, but not a partner. He was paid a salary by his father. He was not financially interested in the result of this case. He was a member of the Institute of Mechanical Engineers. They had always been prepared to undertake that the dredger would do the work claimed for it. Of course, they did not think they would have to pump stones. Such a contingency was never contemplated. There was no mention of stones in any letter sent by the plaintiffs before the 12th June. Witness spoke to Mr. Farrant in the course of the tests about the presence of stones. That would be, he thought, during the first few weeks of the tests. Grating was put in the machines to prevent larger solids from going through. In speaking of "solids" they had roots, etc., in their mind. He should not deny that stones were "solids." The Gwynn Sergeant Tubular Disc was not designed specially to separate large stones and other solids.

Cross-examination continued: You said that a sand sucker had nothing to do with anything but sand?—It would not deal with anything that would not be held in suspension.

Your contention is that it will not deal with stones?—That is so.

Do you know the Basingstoke sand pump in use in Holland that deals with sand, gravel, and stone?—But it will not deal with stone in quantities.

Now we get that pretty little word in quantities, what do you mean by that?—Well, in quantities found at Milnerton.

Continuing, witness admitted that he suggested the omission of the grating, which was part of a swinging harrow. If the grating had been there it would have kept out the stones, and the bars were inserted.

Why did you suggest the omission of the grating?—The grating is an integral part of the swinging harrow, and when the swinging harrow was abandoned the grating was also abandoned.

Witness admitted that he had not submitted drawings of the swinging harrow. The plaintiffs did not say anything about the machine bringing up stones, although the defendants wrote about it. Frazer was on board the dredger as a representative of the company.

Did you borrow his services?—We borrowed them, but not with the idea of paying for them.

Don't bother about "ideas." Did you borrow them or not?—No.

You suggested that somebody of experience should be recommended by the company to work the dredger; they recommended Frazer, and you wrote thanking them; and do you now say that he was there to learn to work the dredger, and be paid by the company, although he was a man of experience?—Yes.

Witness could not give any idea of the estimate of stones brought up. The friction clutch was designed by witness. There was difficulty in connection with the delivery pipes bursting.

Did you ever refer to that in any of your letters?—No.

Just an afterthought?—Oh, no.

Witness admitted that they offered to have a seven hours' trial, but denied that he refused to be responsible for the results.

Did you send a telephonic message on March 13, stating you would arrange a nine hours' test as soon as the cutting gear was on?—I may have said a nine hours' test, but not a continuous test. On March 11, with two hours' pumping, the output was 28.6 cubic yards of solids per hour, whilst on a subsequent occasion, with 6½ hours' pumping, the output per hour was only 17.1 cubic yards. On one occasion (March 12), it reached 31.3 per hour. Witness denied that he asked Mr. Farrant what could be done, and also denied that Farrant told him it was his business to put the machine in proper working order. Farrant said he was quite satisfied with the machine.

Although it was not working up to the specification?—He was pleased with his work. Continuing, Mr. Farrant said nothing about the company being agreeable to extend the test period. Witness endeavoured to show Farrant that the machine was working satisfactorily. While witness was away, Frazer, sen., had control of the dredger, and had charge of the dredger. Plaintiffs supplied Frazer with oil whenever it was necessary. He did not apply for oil during May to carry out experiments.

When Frazer did not apply to you for oil, did it not strike you that he must be getting it from the company?—Yes. He told me Farrant put the oil on the dredger as he wished to try it. Continuing, Frazer kept no log of the workings. Witness considered that after they had carried out a couple of tests they were entitled to their second instalment. Witness denied that he borrowed any men. The men on the dredger were there to learn the working of the dredger. Farrant told witness to tell Frazer, jun., when he intended making tests. On the occasion of June 12 (the last test), witness denied that he did only superficial work so as to get up a good average.



Arthur Gearing stated he remembered the test on June 12. He went down with his brother to Milnerton. He considered the dredger was in good working order. He also remembered two or three trials after the clutch had been fixed. He did not take down any data at the tests.

William John Frazer, sen., stated he had been employed by the plaintiff firm for 16 years, and had during that period been in charge of several large contracts. He was connected with the Milnerton dredger from the beginning. Farrant was present nearly every day. Witness was present when the tests were made, and took down the data. He also kept the times for which the tests were made. He was in the engine-room, and kept a watch before him. On March 4 the engines worked from 7 in the morning until after 9 in the evening. They had to stop from 9.20 to 9.45 owing to stones in the pump, and again from 11.25 to 11.45. After March 22 witness took no note of the output or the times. This was left to Mr. Farrant. On June 12 witness again took up the charge, Mr. Harry Gearing having come out. The engines were going all the time, but the pump had to be taken out occasionally. Witness considered it would be impossible to get a seven hours' run in a day with a dredger. On August 22 witness saw the engines at work, and they were thumping badly owing to no water being injected. This must have been due to somebody tampering with it. This interfered with the power of the engine. Witness drew Mr. Farrant's attention to this, and suggested that if the engines were stopped for an hour he would set it right. Farrant said somebody must have been tampering with it, and walked away. The engine-driver, when spoken to on the matter, said he had instructions not to take orders from witness. At the dinner hour witness attended to what was wrong, and the engine worked all right until five o'clock, when the water ran short.

Hugh McColl said he was a consulting engineer, and had been employed as an engineer by the British Admiralty. He had had experience of dredgers in connection with the construction of Milford Docks and elsewhere. At Milford they had a ladder or bucket-dredger. He described the different types of dredgers and their functions and duties. Witness went on to say that he had heard the evidence given in this case, and had read the specification, and had heard of the difficulties encountered in working the machine on the Diep River, Milnerton. He had seen the reference in the specification to a device for breaking up clay seams, and he had seen the device now actually incorporated in the machine. The latter was, to his mind, much better than the one described in the specification. He had

seen the dredger under working conditions. He considered that the pipeline going ashore was a cumbrous and unwieldy device, which would hamper the free action of the machine to a great extent. He had heard the evidence to the effect that on one occasion 34.2 cubic yards per hour was the result obtained by Mr. Farrant in one hour and 58 minutes, and that Mr. Farrant had suggested that the dredger dodged about to make that. He should say that with the machine as it was constructed, "dodging" would be rather difficult. Witness was familiar with sand dredgers, but he had not worked with them. In the case of a machine of this kind, he would put the various parts of the machine to work so as to see whether they were in proper order before he went to the test. When he found the machine was all right, he would tell the purchasers that he was ready for the test.

Mr. Close: How long would you consider such a test should be made?

Witness: I should be quite satisfied with a couple of hours.

Cross-examined by Mr. Uppington: Witness was formerly engineer at Ohlsson's Cape Breweries, but he was now a consulting engineer, practising on his own account. He claimed to have a practical knowledge of dredgers.

Mr. Uppington: Are not all sand dredgers so constructed as to be able to deal with solids of more or less size?

Witness: That is so.

Including stones?—Yes.

Various devices are used for the purpose of limiting the size of the stones and other solids that can enter the pipe?—Yes.

Cross-examination continued: If he were a supervising engineer he should want to be present at the test of the machine. That test would have to go on until he was satisfied that the machine was capable of doing the work that it was contracted to do. It might occupy two hours or a longer period.

Mr. Close: If you had been observing the machine for weeks before, would you want to be there yourself?

Witness: At the final test?

Yes?—Either myself or a trusted representative.

Re-examination continued: It was possible to get a certain output where the machine was working among sand and stones, but not the output to be expected from sand.

Maasdorp, J.: There is no positive evidence yet that we have got as to the nature of the river there, but take it that there is a variety, boulders, mixed stuff, and sand in different parts, you have contracted to work this machine, a sand sucker, supposing you are an engineer on the plaintiffs' side, where would you reasonably expect to be called upon to work?

Witness: I should expect it to be put on the sand and the mud slimes, as set forth in the specifications, no mention being made of stones.

[You are now with the machine to do the work, and there is the river; where would you go and work? Not in the big boulders?]-Not if I could help it. One might come across them accidentally.

[Supposing you are the engineer on the other side to take over the machine, what would you do when you go and test as to locality and area?]-We should agree as to a place for testing the machine, and place the machine there and start working.

[Not merely sand, but a proportion of stones?]-Yes.

[You would go together and select the locality?]-Yes.

Mr. Close closed his case.

Wm. Farrant, A.M.I.C.E., said he had had seventeen years' experience of engineering. He had been employed as engineer by the defendant company almost four years. He negotiated with Mr. Miller, on behalf of the plaintiffs, in regard to this dredger. Witness still thought that the output of the dredger would have been better if cutters had been fitted instead of, as the plaintiffs specified, the harrow and grating. Witness went on to give evidence as to the experiments carried on on the river with the dredger, and said that when he was not present, the record was taken by an employee named Hunter. After the 15th March, witness took a number of the times. As far as he could, he took the times accurately, deducting stoppages fully and fairly. The return put in was, as far as he knew, accurately copied from his schedule. Witness always took the computations as to the stuff delivered ashore.

[Maasdorp, J.: What are the differences in the times?]

Mr. Schreiner said that, with one exception, the times taken on behalf of the defendants were in favour of the plaintiffs.

Witness (continuing) said that at the end of the test period, viz., on the 25th March, the complete account had not been found by him to work satisfactorily. He had an interview with Mr. Harry Gearing on the 28th March, as a result of which it was agreed that an extended test period should be allowed. Mr. Gearing was at that time at his wits' ends what to do, and witness told him that he did not think the company would be too stringent with them. Before and after that date witness did all he could to assist the plaintiffs to put the machine into good working condition. The experiments were not resumed until the 10th May. Witness had never yet seen the machine work right, and in conversation with Mr. Sydney Gearing, he had told him that he would be glad

if he could see the machine do its work properly once. Mr. Harry Gearing came down on the 12th June. Witness was not informed that any particular test was going to be made on that date. He was engaged in superintending the work at the racecourse on the 12th June. He had not authorised anybody to represent him during the test that Mr. Harry Gearing made. Fraser, sen., was looking after the dredger, Hunter was engaged ashore at the delivery pipe, and Moore was employed at the winch, and in the engine-room. Witness measured the output, and found that 34.2 cubic yards per hour had been done. This was the first time on which the 35 cubic yards per hour, less 10 per cent., was passed. Witness did not actually see how the machine was working on the day in question. He went on to speak as to a four-arm device which he designed with a view of facilitating suction, and said that this arm must have been on when the short tests were made on the 11th and 12th June. On the 22nd August he detached the device so as to give the machine as supplied by the plaintiffs its test. He should not say that that device made a difference of 9 cubic yards per hour. He would not like to say what difference it would make in the output, because the experiments had not been conducted long enough. He thought it would have made some difference, but he did not think the improvement would have had the effect of bringing up the output to 31.5 cubic yards per hour. On the night of the 12th June, the dredger went aground. In the course of the trials the dredger went aground a few times, and there was a good deal of trouble in manœuvring her. Witness called upon the plaintiffs to carry out seven hours' continuous pumping.

Mr. Schreiner: Did you mean in that continuous run of seven hours' pumping that they must actually be dredging in one channel the whole of the seven hours?

Witness: No. I did not mean that, although it is quite possible to work in one channel for seven hours.

Mr. Close: The knowledge you had of the bed of the river was the knowledge which you had in connection with the working of No. 1 dredger?

Witness was understood to acquiesce.

Cross-examination continued: No. 1 dredger was of smaller power, and had smaller pipes than the dredger at present on the river.

Mr. Close: Under those circumstances of the power and pipes, No. 1 dredger would dredge a different class of material to what this one is doing?

Witness: Just the same material.

A great deal more sand and a great deal less stone?—No, much the same.

About the same proportions of stones?—Yes.

And about the same size of stones?— It is true that some large stones come through the new dredger.

Further cross-examined: No. 1 dredger was not suitable for the river. He did not think there would have been much trouble if the dredger had been made suitable for the river. He was aware that in the specification in the present case a dredger "to dredge sand and mud slimes" was referred to. Reference was also made to a cutter to deal with clay.

Mr. Close: If you knew that stones were met with in some degree as they are being met with now, are you not surprised that no mention of stones is made in that specification?

Witness: I am not surprised.

[Maasdorp, J.: How do you explain that?]

Witness: The percentage of stones compared with the bulk is so small that, in drawing up a specification of that sort, one would throw them in, bulk by bulk, because in any river you must meet with stones.

Further cross-examined: Witness believed that in the specification solids were mentioned, and the Gwynn-Sergeant disc was also mentioned. He should certainly say that contemplated an ordinary proportion of stones. He relied partly upon that, and also upon the knowledge that Mr. H. W. Miller (who signed the specification for plaintiffs) had of the bed of the river from observations and soundings. To his mind, the tests which had been made did not convey much, because they were too short. He did not think a quarter of a day or less than that was a fair test of the working conditions. Defects were more likely to develop in a longer period than in the space of one hour or two hours. A seven hours' run with a full output per hour would be a proof to witness that the company were getting value for their money. He believed that the plaintiffs had not come to finality in experimenting, and that it was not beyond their powers to construct a machine to deal with the material in the river. This machine appeared to be improperly constructed to deal with the stones. He wanted a machine to deal with the river as it was, stones included. He did not think that "dodging" was quite the right word to use in reference to the tests.

Further cross-examined: In the course of his further evidence, Mr. Farrant said that there were no really big stones in the river.

Henry Payne, professor of civil engineering, South African College, said that he was an A.M.I.C.E. He had lectured on engineering at several colleges, and had had actual experience of hydraulic engineering. He had attended certain dredger trials on the river at Milnerton. He assumed that

a sand suction dredger should be able to deal with stones. In ordinary sand suction dredgers provision was made to deal with stones. The test at which he was present was carried out in a careful and satisfactory manner. During part of the time he was on the dredger and part of the time he spent at the delivery pipe. He noticed the way in which the engines were working and observed no difference before lunch and after lunch. He measured the output separately. He took seven hours and thirty-five minutes, giving an average of 22 cubic yards per hour. He examined the deposit along the bank, and also on the old dredger. He found the character of the deposits to be about the same. The pipe line was not uncoupled during the test.

Cross-examined by Mr. Close: The manufacturers of the pump in the dredger in question stated that they could deal with boulders of the size of the one produced. A small percentage of stones would make no difference to the output. A considerable quantity of stones at one instant would make a difference, but not if distributed over a time. He had not observed a hard foundation in the river. He claimed to have a practical knowledge of dredgers. He had had experience of dredgers on the Thames. He was not a dredging master. He had had experience of a different kind of dredger and of the dredger at Milnerton.

Robert H. Fraser, who was employed as engine driver on the dredger by the defendants, said that to the best of his ability he had tried to get the requisite work out of the dredger. He had always taken his instructions from Mr. Gearing when Mr. Gearing was present. Mr. Farrant had told him to follow Mr. Gearing's instructions.

Joseph Hunter, a carpenter, employed by the defendant company, stated he had made a lot of test pits for the dredger. He had to keep the time at the delivery pipe. The moment she began to run half bore he gave the signal, and the necessary arrangements were made. There might be a little difference on account of this in his computation. The results of the time he produced were correct. On June 12 witness took the time.

In cross-examination witness said he had instructions from Mr. Farrant to take the times, when he was absent.

Malcolm R. Burwash, a bookkeeper, in the employment of the defendant company, submitted the books and the time sheets, which were kept under the direction of the engineer.

After further evidence,

Counsel were heard in argument.

Mr. Close said that the whole and sole difficulty in connection with this case was caused by the presence of stones in the bed of the river at Milnerton. What the plaintiffs undertook to

do) was to supply a machine to deal with sand and mud slimes. Stones were a factor which the dredger was not intended to cope with, and for the purpose of dealing with which the plaintiffs were not obliged to supply a machine. They undertook to supply a certain specified article to do a certain specified thing, and the difficulty was caused by the presence of a class of material which the dredger was not intended to dredge. Mr. Farrant (the defendants' engineer) had taken up the position that this machine must pump 31.5 cubic yards per hour for a period of seven hours. That was where the fallacy in the case arose. All that the contract specified was that the rate of capacity was to be so much, to be determined for such and such period. It did not say that the machine should pump 31.5 cubic yards. It said that the rate of capacity was to be determined. How was it to be determined? If the machine were put on sand and mud slimes, and its capacity were then tested, he submitted that that would be a fair and reasonable test. Counsel contended that the dredger had been tested, and had fulfilled the requirements laid down in the contract. He quoted Voet (19, 2, 36), *Larson v. Wullsey* (47 L.T., 628), and *Roberts v. Bury Commissioners* (L.R., 5 C.P., 310).

Mr. Schreiner submitted that the plaintiffs had not shown that this machine had answered the conditions laid down in the contract and specification. The contract spoke of "solids," and said that the machine must dredge 30 to 35 cubic yards of solids. Surely that did not mean simply sand and mud slimes. Mr. Gearing had said it would include roots as well, but not stones. His learned friend would also include clay, but not stones. It was an inconceivably foolish contention that stone was not a "solid," and that stones were not included in the "solids" to be measured. The defendants did not guarantee that there would be no stones in the bottom of the river. The specification said that the machine was to deal with 30 to 35 cubic yards of solids. It was a remarkable fact, as showing what was contemplated, that the Gwynne Sergeant tubular disc was to form part of the machine, and the specification said that it would permit of the passing of solids. Clearly, then, the intention was to permit of the passing of large stones, *inter alia*. As to the proportion of stones that occurred, the best evidence was that there was 2 per cent. of stones or thereabouts at the outside.

Mr. Schreiner having been further heard on the facts, and Mr. Close having been heard in reply:

*Cur. Adr. Vult.*

*Postea* (December 11th).

Maasdorp, J.: The Milnerton Estates, Limited, the defendants in this case, is a company possessing land upon which a blind river, cut off from the sea by a sand bar, is situated. In order to improve the condition of this river, both as a waterway and an ornamental water, the defendants set about deepening the middle of its course. This was done by means of a dredger, which pumped the material from the bed of the river on to its banks. It was found that the work done in this way was of very slow progress, and the defendants desired to obtain a dredger of larger capacity for the work. With this object they entered into communication with the plaintiffs' firm. These circumstances would be irrelevant to the present case if it did not appear that it was directly in contemplation of both the parties in their negotiations, and I mention it because it throws considerable light upon several phases of the case. It will appear upon reference to the description given of the proposed new dredger by the defendants, which in their subsequent contract was embodied as the specification of the required machine, that the defendants wrote: "The actual results achieved with the machine supplied by Gwynne's, which, by the way, are beyond anticipation, I am afforded corroborative dates on which the present specification is based, and all calculations as to output and working costs are based upon the figures of the working of the present machine. It was hoped that when the project was first mooted, the present line of nine inch pipes would have proved of sufficient capacity to deal with the large quantity of materials discharged by the new machine, but the difference in level due to rise and fall of tide, length of pipe-line when the dredger is operating on the farthest bank, and the sinuous course taken by the line of pipes, due to the run of the current and set of tide, indicates that a great loss by friction in the pipes would result if this size of pipe be used for the new machine. It appears to us that it looks as if there were sufficient work for the two machines, acting conjointly, for some time to come; it will be necessary to procure more pipes for fluming, in which case, of course, larger pipes to suit the new and bigger machine would be obtained." And further on, they say: "By this means the material in the bed of the river will be rendered more suitable to be influenced by the vortex created by the pump, and a larger portion of solids will be pumped than is now the case." Harry Gearing says in his evidence: "In 1905 the Diep River, Milnerton, was being dredged by No. 1 dredger, supplied by Gwynne's. I was informed by Mr. Farrant that the dredger was only turning out 7 to 10 cubic yards per



hour. Defendants wanted a new dredger, and correspondence took place, and I made investigations at this site." I do not lose sight of the evidence which immediately follows, with reference to the condition of things that he says he actually discovered when making investigations on the spot, but that will come up in another part of the case. I merely now point out that when the contract was entered into, the defendants were, or should have been, aware of all that was required of them, from knowledge obtained after personal investigation. Whether the knowledge then acquired differed from what was afterwards discovered, is a disputed question of fact. And whether this difference in any way alters the legal position of the plaintiffs, is a question of law which will have to be dealt with. It was under these circumstances, and others which will be referred to in due course, that the contract in question was entered into by the parties. In their agreement, the sellers agree to supply, erect, and work in complete order a suction sand dredger, more particularly described in the accompanying specification, marked "A." In the specification, the dredger is described as a centrifugal pump sand dredger, to dredge mud and stones from the bottom of the Diep River, and to deliver the material by means of pipes on to the banks, and then follows a full description of the machine. For this machine the defendants engaged to pay the sum of £2,120, payment of one-third of the price to be made when the machine is set up in the sellers' workshop, ready for inspection, prior to being taken apart for transport to Milnerton. About the 2nd of November, 1906, the dredger was completed, and set up in the workshops of the plaintiffs, and the defendants' engineer wrote the following letter to the defendant company: "I have to state that Messrs. Cunningham and Gearing have applied for the first instalment of the payment for the new dredger. I have inspected the complete machine put together in the workshops, and have to report that the work has been carried out in a thoroughly satisfactory manner. I have therefore to certify, in accordance with the provisions of the contract, that the sum of £706 13s. 4d. may be paid to Messrs. Cunningham and Gearing." Payment was duly made, the machine was taken to pieces, transported to Milnerton, and launched on the Diep River. Then came into operation the further condition of the agreement, which provides that the sellers shall work the complete plant in connection with the floating pipe line for a trial period of one week, for the purpose of getting all machinery into good working order, the costs of this work being included in the price mutually agreed to be paid for the plants, should it be found necessary to extend

this period of probationary trials, an extension up to three weeks shall be allowed for the purpose of experimental working by the sellers, they paying all expenses, but the material pumped and delivered to proper levels behind the new banks during the period of experimental working, shall be paid for by the purchasers at the rate mentioned in clause 6 of the agreement. At the end of this period the purchasers shall take control of the working of the plant, and the sellers' control shall cease. Upon the due performance of that part of the agreement, there would fall due the second instalment of the purchase price, which became payable when the dredger was launched and the complete machine found to work satisfactorily by the purchasers' engineer. The plaintiffs allege in their declaration that this part of their agreement was performed by them on the 12th of June, 1907. They say that the dredger was put in order and worked by the plaintiffs throughout the trial period, which expired prior to the 5th March. But they allowed the further probationary period at the request of the engineer. The true signification of this part of the plaintiffs' case was not quite clear until it was explained by counsel at the trial to amount to a claim on their part that by the 5th of March they had already succeeded in getting the machinery into good working order, and were entitled then to call upon the engineer to issue the necessary certificate, and upon the defendants to take control. But, as a matter of grace, they did not insist upon their rights, but allowed the further extended probationary period to be utilised. Now, in my opinion, the extended probationary period was not intended for that purpose, but rather to give the sellers a further opportunity to prove that the machine was fit for its work, in case they should not succeed in doing so within one week. However that may be, they proceed to say that at the end of the extended period, their part of the work was completed to the satisfaction of the duly-authorised representative of the defendants' engineer. It would appear that on the occasion when such satisfaction is alleged to have been expressed, the engineer was not himself present at the works, but that a man named Hunter, described as the defendants' carpenter, took part in the tests that were made. This man Hunter is the duly-authorised representative referred to in the declaration. It is not necessary to consider whether in law the engineer had the right under the contract to act by deputy in deciding when the machine answered its purpose, because there is no evidence that Hunter was appointed by the engineer as his representative for the purpose mentioned, nor is there any evidence that Hunter ever expressed himself satisfied

that the machine worked satisfactorily. The supposed authority given to Hunter is contained in the letter of the 4th of March, where Farrant writes: "In my absence from the river, please instruct your foreman to let either the younger Fraser, or the carpenter, Hunter, know when he is about to start pumping." This is certainly quite insufficient to establish the plaintiffs' position that Hunter was appointed to decide whether the dredger worked satisfactorily, and the object Farrant had in view would appear from his letter of the 28th of February, in which he writes: "And with regard to any pumping tests you may be starting, please arrange to give me reasonable notice of the starting of the pumping tests, so that I may make the necessary measurement particulars." Even if Hunter were intended to take Farrant's place at the tests, it was merely to take the necessary measurements, and nothing more, and these tests were merely a series of trials, none of which was in itself expected to decide the matter finally. No attempt was made to show that Farrant himself even declared that he had found the machine to work satisfactorily. As a matter of fact, I find that there is no proof that the machine was found to work satisfactorily by the purchasers' engineer. Nor is there any evidence to support the allegation that after the 12th of June the defendants took control of the dredger. At the trial the plaintiffs' counsel attempted to take up the wholly untenable position that the defendants had virtually taken control of the dredger at the end of the joint test period of one week, but in my opinion the attempt entirely failed, and the contention was wholly defeated by the plaintiffs' own letters. The absence of the engineer's certificate upon the allowance of which the second instalment would become due, is, in my opinion, sufficient to dispose of the plaintiffs' claim, there being no evidence that the defendants are responsible for his wrongfully withholding his certificate. In fact, to say that the certificate is wrongfully withheld would be entirely inconsistent with the plaintiffs' case as set up in their declaration. I shall, nevertheless, proceed now to give my findings upon the further contentions raised by the plaintiffs at the trial. One was that the plaintiffs became entitled to the payment of the second instalment upon their getting the machinery during the test period into good working order, and that that condition was fulfilled when they set up the complete machine, and made its parts work smoothly together, without any obligation on their part to show that the dredger was capable of pumping up a given quantity of material. According to the specification, the dredger was

designed with the object of dealing with from thirty to thirty-five cubic yards of solids per hour, in addition to the water necessarily raised by the pump at the same time from a depth of from six to eight feet below the water line and deposit the same on the bank, which is approximately the same height above the water. One of the conditions of the contract is "that the sellers agree that the rated capacity of the dredger when operating in the orthodox manner, and in accordance with the plan of operations of the purchasers' engineer, and when dredging a uniform channel midway between the new river banks, shall be 35 cubic yards of solids per hour, to be determined over an extended period of not less than one month's operations, dated from the end of the trial period mentioned in clauses 2 and 3 of this agreement, and in the actual time during which the pump works. This period shall not be more than three calendar months, and shall be termed the guarantee period." And in clause 7 it is provided, with respect to the capacity of the dredger, that a margin of 10 per cent. in each direction shall be allowed in determining the amount of material dredged by the machine. It is quite clear from all this, and the references in the specification to the old dredger, that the main object of the parties was to get a dredger of a certain capacity, and not merely a well-built machine with good parts; but the plaintiffs contend that the defendants were, under the contract, obliged to accept the machine at the end of the test period, and to pay the second instalment before its capacity had been ascertained upon the plaintiff guaranteeing that during the guarantee period the defendants would, upon working it themselves, find that it pumped up the given quantity of material. In my opinion, the words, "in good working order," used in the second clause of the contract, signifies that the machine was to work in good order, and to perform the amount of work it was designed to perform, and the words, "work satisfactorily," in the sixth clause, mean that it should satisfactorily do the work required of it, which is to pump up a given quantity of material per hour. That such was the intention is made abundantly clear by the third clause, which shows that it was intended that the actual work of pumping material should be undertaken to test the machine—that is, in my opinion, to test its capacity for performing the required work. It was proved that during the numerous trials made from March to June the dredger utterly failed to perform the required work, except for a short period on two different occasions. Nor was it enough on one or two occasions for a brief period to pump up sufficient material, but it was

to do the work in such a manner as to satisfy the engineer. The engineer was not satisfied, and, in my opinion, he had good reason to be dissatisfied, seeing that the spasmodic effort which succeeded on June 12 to raise the necessary material was not such as to prove that similar results could be relied upon in the long run. Especially when we bear in mind the many previous failures. The proposal made by the engineer that a test of some duration should be made was very reasonable, and the plaintiffs would have been wise to adopt it, instead of hurrying off and attempting to leave the machine upon the defendants' hands the moment they succeeded, by a supreme effort, to bring the dredger up to the required standard. The construction of the contract does not depend upon what the parties either did or said after it was completed; still, it is satisfactory to find that in what they both said and did, the plaintiffs showed that they well understood that it was required of them during the test period to bring the dredger up to its full working strength. We next come to a question between the parties which bulked very largely in the case, although it is not easy to discover where it is raised in the pleadings. Up to this point, it would seem the case for the plaintiffs is that they constructed a dredger according to the terms of their contract, which was found by the engineer's representative to work satisfactorily, and was taken by the defendants under their control. That the defendants have had control for three calendar months, and if they have allowed the guarantee period to elapse without ascertaining if the machine satisfied the guarantee, it is no concern of the plaintiffs, who at the end of the three months became entitled to the final instalment. But gradually a different colour comes upon the plaintiffs' case as it proceeds; and the change of attitude is not adopted by way of an alternative position, which, while open to the charge of inconsistency, may yet be quite legitimate, but it is taken as in some way growing out of the case first set up by them. This is their contention. Under their contract they constructed a sand dredger, to dredge sand and mud slimes, which they launched on the Diep River to do the required work, and it was then discovered that the Diep River was not a spot suitable for the operation of such a dredger. The plaintiffs say they have constructed the dredger according to specification, and the reason why it does not pump upwards of 31 cubic yards of solid material is because the river bed does not consist mainly of such material, but contains an undue proportion of stones of some magnitude. In the correspondence, the presence of stones is referred to as a serious diffi-

culty, but as one in spite of which the work was satisfactorily accomplished. At the trial, however, the nature of the difficulty became more serious, until it came to be set up as a reason why the dredger could not be expected to pump up the stipulated quantity of material per hour. On the 14th of June, 1907, Cunningham and Gearing, referring to the output of 34.2 cubic yards on the 12th of June, write: "As the dredger has now shown itself capable of performing the guarantee, we presume you are making arrangements to start regular working. We are accordingly withdrawing our foreman and assistant. We are pleased that this difficult problem has been successfully solved, and feel confident that you will be gratified at the result obtained." Farrant promptly repudiated this position, and on the 19th of June Cunningham and Gearing, in explaining the previous failures of the dredger, say that accidents occurred solely through the presence of large stones in the bed of the river; that the delays were due not to any defect in the machinery, but to the presence of layers of stones of various sizes, these layers resembling a hand-packed road foundation; and that there were frequent stoppages depending on the beds of stones encountered during pumping, but they were stoppages of a few minutes only. But, in spite of all this, they say: "We would state that we have contracted to supply a suction dredger to a specification approved of by your company, and to perform a stated duty, in terms of our specification, all details were assembled in the works, and were inspected and passed by you. The guaranteed output has been exceeded, and we claim that we have in every way fulfilled our contract obligations." The plaintiffs claim success, and at the trial it was attempted to excuse their failure. I do not think this is putting the matter too broadly, although the contention was now and again modified and qualified. In its modified form it amounts to this, that where suitable material is met with in the river the dredger operates successfully, where unsuitable material is encountered it cannot be expected to do the work. Unsuitable material, the plaintiffs say, is constantly encountered, and for the want of success in consequence they are not responsible. A great deal of evidence was directed to the question whether the river was one upon which a sand dredger could successfully operate, but I cannot find any evidence to prove that there existed beds of stone at the bottom of the river. The best way of discovering the nature of the bed of the river is to examine the material thrown up by the old dredger. That was done by Professor

Payne, who was present at the dredging on the 22nd of August. He examined the soil from the old dredger, and compared it with that of the new dredger, and found it similar. The old dredger has successfully pumped up this material, and continues to do so, and, in my opinion, the new dredger should do the same. What is required of the new dredger is not to pump up a different kind of material, but to pump up similar material in larger quantities, and so perform the work more rapidly. Professor Payne stated that, in his opinion, the proportion of stone was not more than two per cent., and I accept the evidence of the witnesses, who say that a sand dredger is expected to deal with stone in such quantities and of the size found in the river. That would appear to be so from the specification itself, where provision is made for the presence of stones. I may say again that the plaintiffs contracted to construct a machine to deal with a condition of things which Harry Gearing found to exist after personal investigation, and in my opinion the condition of things as found by him is that described by the witnesses for the defence. I come to the conclusion that the plaintiffs have failed to carry out their contract, and must fail in their claim. And the plaintiffs, having refused to complete their contract, the plaintiffs in reconvention are entitled to judgment in terms of their prayer (b). The Court must leave it to the parties to make any reasonable settlement they may be able to arrive at, and cannot now undertake to see that the plaintiffs fulfil their contract within a reasonable time. It would seem that the dredger, although it falls short of the contract requirements, may yet be of great service to the defendants, and it would be a great pity if it should be left as useless lumber upon the hands of the plaintiffs. As to the further claim in reconvention, it appears to me the defendants are not entitled to recover for the services rendered by their servants to the plaintiff. It is quite clear that Hunter and Fraser, jun., were at the works in the interests of the defendants, and there was no arrangements made as to the services of the other servants. Farrant was very anxious to assist the plaintiffs in every way to get on with the work, and it was quite natural that when, during the time he, Hunter, and Fraser worked with the plaintiffs' men, the dredger got on the sands, he should send for his men to assist to get it off without meaning to charge the plaintiffs. Nor do I think that the assistance rendered by Farrant in making the new parts, with which he and plaintiffs seem to have made experiments, were intended to be charged against the plaintiffs. He certainly never intimated that he

intended to charge them, and the entries in the books prove little, because in any case, even if it was not intended to charge the plaintiffs, the work would necessarily be entered there as work on the dredger in account with the servants. But I do not think the plaintiffs could have imagined that the oil supplied was a gift, and that item must be allowed, amounting to £8 5s. Judgment will therefore be entered for the plaintiffs in reconvention for £706 13s. 4d. and £8 5s., less £28 9s. 2d. for material pumped by the plaintiffs, for which the plaintiffs in reconvention admitted their liability, and this judgment will carry costs.

Ordered that execution of judgment in respect of the cancellation of the contract and the payment of £706 13s. 4d. be suspended for three months, to enable the plaintiffs to perform their contract in the meanwhile to the satisfaction of the defendant's engineer.

[Plaintiffs' Attorney: R. Simpson.  
Defendants' Attorneys: Berrangé and Son.]

## SUPREME COURT

### THIRD DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. } 1907.  
( Nov. 19th.

Mr. Toms moved for the admission of John Douglas Luyt as an attorney and notary.

Application granted and oaths administered.

Mr. Alexander moved for the admission of Hendrik Jacobus Cornelius de Jager as an attorney and notary.

Application granted, oaths to be taken before the Registrar of the High Court, Kimberley.

### PROVISIONAL ROLL.

#### DRAKE V. MEYER AND ANOTHER.

Mr. P. T. Lewis moved for the final adjudication of the defendants' estate as insolvent.

Order granted.



WIENER AND CO. V. KHANGOOL.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BURNARD V. GREYLING.

Mr. Marais moved for provisional sentence on a mortgage bond for £165, with interest at 8 per cent. from December, 1906; counsel also applied for the property hypothecated to be declared executable.

Order granted.

BOARD OF EXECUTORS V. FOCK.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £1,200, with interest from the 1st January, 1906, less £4 9s. 2d. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached.

Order granted.

ARCHIBALD AND BROWN V. BAILEY.

Mr. Coenradie moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court at Port Elizabeth for £32 2s., and costs, and for certain property mentioned in the summons and rents accruing to be declared executable.

Order granted.

BROWN V. BROWN.

Mr. Payne moved for provisional sentence on a promissory note for £700, with interest from the 1st April, 1906, and costs.

Order granted.

ILLIQUID ROLL.

CLAREMONT MUNICIPALITY ( 1907.  
V. COWLING. ( Nov. 19th.

Mr. Coenradie moved for judgment, under Rule 329d, for £122, less 15s. 5d. paid on account, being for rates for 1907, with interest and costs.

Order granted.

SIERADZKI V. MICHELL.

Mr. Coenradie moved for judgment, under Rule 329d, for £140, less £115 paid, since issue of summons, with interest *a tempore morae* and costs.

Order granted.

MANTELL BROS. V. ZUID AFRIKAANSCHER  
RYTUIG EN BOUW MAATSCHAPPY, LTD.

Mr. H. G. Lewis moved for judgment, under Rule 329d, for £17 19s. 5d., balance of account for work and labour done and materials supplied.

Order granted.

REHABILITATIONS.

Mr. Douglas Buchanan applied for the rehabilitation of Herman Touyz.

Granted.

Mr. Watermeyer applied, under section 117 of the Insolvent Ordinance, for the rehabilitation of Abe Wistaff.

Granted.

GENERAL MOTIONS.

LINDSAY V. LINDSAY. { 1907.  
{ Nov. 19th.

Mr. Howes moved for a decree of divorce in default of compliance by the defendant in reconvention (Mrs. Lindsay), with an order of restitution of conjugal rights.

De Villiers, C.J., said that there appeared to be an informality in the service, inasmuch as the defendant in reconvention was not served with the rule until the very day on which she was directed to restore conjugal rights, but, on the other hand, she did not appear to show cause, and, under the special circumstances, the rule would be made absolute.

*Ex parte* DUMBLETON.

Mr. H. G. Lewis again mentioned this matter, in which petitioner, a general dealer, of the Bredasdorp district, sought leave to sue his wife by edictal citation for restitution of conjugal rights, and to have a certain deed of separation set aside. (17 C.T.R., 912.) Counsel produced a further affidavit as to the domicile of the petitioner, who, it appeared, came to this colony from New Zealand for the benefit of his health, and had now been residing here some years. Petitioner's position in relation to the deed of separation was that he entered into it in complete ignorance of its meaning and contents. He had repeatedly asked his wife, who was in New Zealand, to join him, but she declined.

It transpired that there had been previous proceedings, but that these were dropped for the time being.

De Villiers, C.J.: As far as I can see, it will be a hopeless case if she comes here to defend it. If she did not appear before, that would seem to show that she does not intend to appear to set up this defence. Leave will be granted to sue respondent by edictal

citation, returnable on the last day of next term, personal service to be effected.

#### INSOLVENT ESTATE REIDEL V. DUKE.

This was an application upon notice to respondent (Wm. Duke) to show cause why he should not be ordered to forthwith vacate and give up possession to applicants (the trustees in the insolvent estate of C. F. H. Reidel) of the farm Rompe Valley, Wynberg.

Mr. H. S. van Zyl was for applicants; Mr. Alexander was for respondent.

Respondent's position shewed that he had been granted a five years' lease of the farm by Mrs. Atkins, a relative of the insolvent (by whom, he claimed, she was authorised to act), that he had made considerable improvements, and that no offer had been made by applicants to compensate him.

Applicants denied that respondent had any right to remain on the farm.

Mr. Van Zyl submitted that respondent was not a *bona fide* possessor of the farm. If a *mala fide* possessor, the applicants were entitled to eject him, and the respondent, if he had any claim for improvements, could then proceed to sue the applicants.

Mr. Alexander submitted that the respondent was a *bona fide* possessor. It was clear that he had made some improvements. Counsel contended that it was impossible to decide the matter on motion. On the question of compensation, he quoted Maasdorp's Institutes (vol. 3, p.p. 2 and 225), *De Beers Consolidated Mines v. London and South African Exploration Co.* (12 S.C., 107), *Billingham v. Bloometje* (1874, Buch., 36), *Lind and Others v. Calitz and Others* (9 S.C., 268), *South African Association v. Van Staden* (9 S.C., 99), and *Barnard v. Colonial Government* (5 Juta, 122).

De Villiers, C.J.: It is clear that the respondent has no right whatever to be upon this property. He alleges that he got permission to be upon the property from Mrs. Atkins. He does not produce Mrs. Atkins to support him in any way, and the only person who was the agent of the owner of this property was Mr. Wolf, and he denies that he at any time was a party to any lease or agreement of lease being effected in favour of the respondent. There are several allegations made by the respondent in his affidavits which are wholly misleading. Amongst the statements which he makes is one to the effect that he has derived no profit whatever from the farm save and except a few shillings which he mentions, and there are affidavits now to the effect that he has actually been receiving some of the rents accruing in respect of properties on the farm. No statement whatever

is made about this in his affidavits. It seems to me that the respondent has greatly exaggerated the amount of the improvements which he has made upon this property, and I am by no means satisfied that those improvements are more than the benefits which he has derived from the property. It is quite possible that he may be able to prove at some future stage that they are improvements which have permanently benefited the property, and are of a tangible nature in respect of which he is entitled to recover. For the present I am not satisfied that he has expended more than he has received. But that matter I shall leave open for any future action, but for the present, not being satisfied that improvements have been made in respect of which the defendant will be entitled to compensation, I think that an order should be made that the defendant should vacate the premises. The Court will order that the respondent vacate and give up possession of the property in question on or before the 15th January, 1908, and that in the meantime he be interdicted from receiving any rents or allowing the cattle of others to graze on the property, or disposing of or removing from the said property any articles affixed thereto or forming part thereof, save and except any plants or trees sown or planted by himself, or the produce of any plants or trees sown or planted by himself on the said property. This order to be without prejudice to any action the respondent may be advised to bring for improvements made by him by which the value of the land has been increased, the applicant to be entitled in the meantime to occupation of so much of the property as is not in the personal occupation of the respondent, or does not form part of the gardens planted by the respondent, the costs of the motion to abide the result of such action, if such action be not brought to trial before the last day of next term, the costs of this application to be paid by the respondent.

#### Ex parte INSOLVENT ESTATE TESSENDORF.

Mr. Payne moved, on behalf of the trustee in the insolvent estate of Herman Friedrich Tessendorf, for an amendment of the records in insolvency, in which insolvent is described as "Herman Tessendorf."

Order granted as prayed.

#### Ex parte HELLAND.

Mr. Roux moved, on petition of Alice Helland, a widow, of Steynsburg, for leave to sue *in forma pauperis* the Town Council of Cape Town for £500 damages for shock sustained by her during

the explosion in Adderley-street on the 13th June, 1905. Petitioner stated that she had arrived by the mail steamer on the morning of the occurrence, and that she was in the street when her companion was killed by the explosion, and she (petitioner) sustained a terrible shock. Petitioner was at the time en route from England to take up a situation as a housekeeper at Steynsburg. Counsel said that there was some little difficulty in this matter, because notice in writing was not served upon respondents within 14 days of the accident, as required by Act 26 of 1894 (section 2). The delay appeared to be due to the fact that Mrs. Helland at first consulted Messrs. Fairbridge, Arderne and Lawton, and that they informed her that they did not know whether they would be acting as the Council's attorneys in the matters arising out of the explosion. They found that they would be so acting, and informed Mrs. Helland, and she proceeded to instruct other attorneys, but it was a few days beyond the period of 14 days when notice was given to the respondents of the claim. The applicant was in this difficulty, that she had no money to make application to the Court, for leave to sue, notwithstanding that written notice had not been given within 14 days. Counsel added that he had certified *probabilis causa*.

The Court granted a rule, returnable on the 12th December, calling upon respondents to show cause why leave should not be granted to petitioner to sue, notwithstanding that no written notice was given in terms of section 2 of Act 26 of 1894, and why she should not be admitted to sue *in forma pauperis*, any further affidavits which petitioner intends to use to be served together with the rule.

#### REX V. SEYMOUR.

This was an appeal from a judgment of the A.R.M. of Wynberg, who had convicted the appellant of receiving stolen property, knowing the same to have been stolen, and sentenced him to undergo a term of imprisonment.

Appellant appeared in person; Mr. Howel Jones, K.C., was for the Crown.

Appellant stated that he was not guilty of the charge. The other man (Russell) who was a discharged soldier, had brought the goods to the room which they occupied together. He (Seymour) had received a shirt and a pair of drawers from Russell about a fortnight before his arrest, and the other goods which he was charged with stealing he had not seen until twenty minutes before he was apprehended.

De Villiers, C.J.: I am afraid it is impossible to allow this appeal. The two prisoners, Russell and Seymour, were charged together with the theft of

these articles, which had been stolen from a washerwoman, who was washing soldiers' clothes, and also from the hospital. The two prisoners were living together. Russell pleaded guilty. Seymour pleaded not guilty. The Magistrate found that he was guilty of receiving stolen goods, knowing them to have been stolen, which he is entitled to do by law if he is satisfied that Seymour knew the goods were stolen. Some of these articles were found in the possession of the accused, who was actually wearing them. Many of the articles were found under the bed on which Seymour generally slept. He and Russell had been living together for three weeks. All of a sudden he finds Russell coming there with all these articles, stolen articles, and he finds Russell hiding these articles under the bed. The Magistrate comes to the conclusion that Seymour must have known, under all the circumstances, that Russell had stolen these goods. I consider that the Magistrate was quite justified in arriving at that conclusion, and, therefore, upon the evidence as it stands, quite independently of the previous convictions against Seymour, even if there had been no previous convictions, I should have held that the judgment was perfectly correct. Seymour is an old offender, he is a man who has been repeatedly convicted of petty thefts, and, therefore, that strengthens the view that he would have had no compunction in receiving goods, knowing them to have been stolen, from his comrade. The appeal must be dismissed, and the conviction confirmed.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### TEMPORARY INTERDICT.

LEWIN AND ADAMSTEIN V. { 1907.  
BURGER AND INSOLVENT } Nov. 20th.  
ESTATE BURGER.

Mr. Close (with him Mr. Louwrens) moved, as a matter of urgency, for a certain temporary interdict in the matter of Lewin and Adamstein v. (1) Jacobus Francois Burger and (2) A. G. H. Teubes

and W. S. van Niekerk as joint trustees in the insolvent estate of Gideon Johannes Burger. Applicants prayed for a rule or order restraining the second-named respondents from selling the farm Kraalboschvlakte, district Robertson, on the 21st inst., or at any time previously to the hearing of the action, pending between applicant and the first named respondent, or until this Court had heard and adjudicated upon the applicant's motion to be instituted for the expunging of the first named respondent's proof of bond for £3,200, and the admission of the applicants' proof of the same unless for a price or upon terms to be approved by the applicants and, if the property be sold upon these conditions, restraining second named respondents for paying over to the first named respondents, or otherwise dealing with the proceeds of the sale, pending the result of the action or the motion for expunging the first named respondent's proof. From counsel's statement, it appeared that applicants claimed to have a registered cession of the bond for which the first named respondent had proved against the estate.

The Registrar handed in a letter which he had received from the trustees, in anticipation of the present application.

Mr. Justice Maasdorp (after perusing the letter) said that the trustees apparently wanted to be heard, and the sale would, therefore, have to be postponed.

Rule nisi granted, to operate as an interim interdict, calling upon respondents to show cause why the sale should not be interdicted pending the action, rule returnable on the 26th November.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SOEKER V. COLONIAL GOVERNMENT. { 1907.  
Nov. 22nd.  
" 29th.

This was an action brought by Lalie Soeker, a livery stable keeper, of Cape Town, against the Hon. Victor Sampson, K.C., in his capacity as Attorney-General, and as such representing the Colonial Government, for £200 damages for alleged breach of contract.

Plaintiff's declaration was as follows:

1. Plaintiff is Lalie Soeker, a livery stable keeper, residing and carrying on business in Cape Town. Defendant is the Hon. Victor Sampson, K.C., and is sued in his capacity as Attorney-General, and as such representing the Government of the Colony.

2. On or about 17th November, 1906, defendant issued a notice, with a schedule attached, calling for "tenders for Western Circuit." Thereafter, and in consequence thereof, plaintiff tendered for the same. For greater certainty plaintiff craves leave to refer to the said notice and tender when produced at the trial.

3. On or about February 22, 1907, and in pursuance of the above, the parties entered into a formal contract for the conveyance of His Majesty's Judges on the Western Circuit during the year 1907, which said contract plaintiff prays may be read as if inserted herein.

4. With regard to the second Western Circuit of 1907, defendant, on or about June 14, 1907, wrongfully, unlawfully, and in breach of the said contract, dispensed with plaintiff's services etc., and refused to allow him to complete the said contract, though able, ready, and willing to do so. Thereby defendant caused plaintiff to suffer heavy loss and damage both by reason of labour and expenses spent and incurred by plaintiff in and about fulfilling his said duties under the said contract, and on account of loss of profit.

5. All things have happened, all conditions have been fulfilled, and all times have elapsed necessary to entitle plaintiff to claim damages from defendant for such breach as aforesaid, but defendant has not paid the same or any part thereof, though frequently requested so to do.

Wherefore plaintiff claims: (a) £200 damages; (b) further or other relief; (c) costs of suit.

Defendant's plea was as follows:

1. The defendant admits paragraphs 1 and 2 of the declaration.

2. He admits that on the 22nd February, 1907, the parties entered into an agreement in writing, a copy of which he attaches hereto marked "A" and prays may be read as part hereof.

3. In the month of March, 1907, the plaintiff was, in terms of the said agreement, required to provide certain horses, harness, drivers, and necessary appliances for the use of the Judge proceeding upon the Western Circuit from a date of departure notified to him by the said Judge; he thereupon carried out his contract, and was paid for his services in accordance therewith.

4. The defendant says that owing to the extension of the railway through the Western Districts of the Colony there has not since the date aforesaid



been any further necessity to use the Judge's wagon or spider, or for requiring the plaintiff to provide the said horses, harness, drivers, and appliances, and no notification has been given to the plaintiff by the Circuit Judge to leave Cape Town, as provided by clause 5 of the said agreement.

5. On or about the 14th June, 1907, the defendant was notified that the Judge proceeding upon the Western Circuit would not require the Circuit equipment referred to in the preceding paragraphs, and thereupon in order to prevent disappointment to the plaintiff and obviate any unnecessary preparations which he might otherwise make for a second Circuit, notified to him that he would not be called upon to supply the said equipment therefor. Save as aforesaid the defendant denies paragraphs 3, 4, and 5 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Mr. Upington (with him Mr. Douglas Buchanan) was for plaintiff; Mr. Howel Jones, K.C. (with him Mr. Morgan Evans), was for the defendant Government.

Lalie Soeker, the plaintiff, said that for many years past he had, with a short interval, carried the Judges on the Western Circuit. He had carried on business for 35 years. The horses that he used for the Circuit were horses specially kept for that purpose. He had harness that he procured specially for the purpose. He had a driver, Esau Stemmet, whom he had specially kept to drive the Circuit Judge. Esau had been in his employ for 35 years, and had also been employed by his father previously. Esau had driven the Circuit Judges during a period of 46 years. In March last he received notice as usual to provide horses for the conveyance of the judge for the first Circuit Court. On the 14th June he received a letter from Sir John Graham, Secretary of the Law Department, informing him that he would not be called upon to supply horses, etc., for the conveyance of the judge on the Second Western Circuit this year, as the Circuit journey would be performed almost entirely by railway. Mr. Thomas, who conducted business on his behalf, wrote to the Attorney-General's Department, pointing out that he (plaintiff) was bound to provide horses, etc., in readiness for two Circuit journeys in the year, and correspondence ensued. In the course of July, witness had an interview with Sir John Graham, who said that the Government wanted to know what his actual loss was. In consequence, Mr. Thomas wrote a letter indicating the losses which he (plaintiff) had sustained, and witness, later on, had a further interview with Sir John Graham. Later, his attorney wrote a letter to Sir John

Graham stating that he was not prepared to accept the sum of £50 offered by the Government in settlement of his claim for damages, and demanding £200 as compensation. An estimate had been framed, showing the amount which he would have received had he been employed to carry the Circuit Judge from George to Oudtshoorn and back.

Cross-examined by Mr. Jones: Witness expected that he should send his horses to every town where the Circuit Judge went. He had contracted on the basis that he was to make two trips in the year.

De Villiers, C.J., said it was apparent that the plaintiff, through his counsel, did not claim damages except as to the journey between George and Oudtshoorn.

Cross-examination continued: In the old days the contract used to be very profitable, and even this year it had been a good thing for him.

Mr. Jones: You seem to have forgotten about the advance of the "iron horse." The circumstances had never before been as they were then. The mistake you made was in keeping your men and horses.

Witness: I could not dismiss my servants, because I had entered into a contract for a year. I did not know when the Government would call upon me.

Mr. Jones: You know there is no Circuit Court between March and September?

Witness: Yes, but I should have had to sell my horses at a great loss then.

In further cross-examination, witness said that he had used imported horses occasionally on the circuit journeys, but as a rule he used Cape horses. He had one imported horse which cost him £25, and when it came back from circuit he had to exchange it and give £25 to boot.

[De Villiers, C.J.: So that you found the Colonial article was the best?]

Witness: Yes, that is so.

E. F. Kilpin, clerk of the House of Assembly, produced a copy of the Supplementary Estimates submitted to Parliament last session, on which appeared an item of £50, Superior Courts, compensation to the circuit transport contractor in connection with the cancellation of contract.

Francis Clark, clerk to the Hon. Sir John Buchanan, gave evidence as to the employment of a livery stable proprietor to carry the Circuit Judge from George to Oudtshoorn and back to George at the last sitting of the Western Circuit.

By the Court: The amount paid to the contractor, Van Rooyen, was £27.

Esau Stemmet, foreman driver, employed by plaintiff, said that he had driven the Judge's wagon on the Western Circuit for the past 46 years. In

former days he used to drive the judges over the whole of the circuit.

A. W. Steer, attorney, and Mr. Thomas also gave evidence.

Mr. Upington closed his case.

Sir John Graham, secretary of the Law Department, said that the Circuit Courts were held in March and September of each year. The itinerary was fixed by the Judges. Six weeks' notice was usually given by proclamation of the dates of the Circuit Courts. In connection with the circuits, the Judges used the railway as far as possible. The circuit towns were constantly changing with the progression of the railway. On the first circuit this year Soeker was paid £271 for 26 days. Consultations had taken place between the Judges and the Attorney-General with a view of the reduction of circuit expenses as far as possible. In view of the opening of the George railway, it was agreed between the Attorney-General and the Judges that the Western Circuit should be, as far as possible, an all-rail circuit.

Mr. Jones proposed to put in a letter received by the Attorney-General from the Chief Justice in regard to the circuit arrangements.

Mr. Upington objected that the letter must be proved in the usual way.

Mr. Jones (at the request of the Court) marked the passage which he wished to be put in.

The Chief Justice (after perusing the letter) ruled that the letter was admissible, but said that he should direct the jury that anything in the letter could not affect the contract. The fact that it was suggested in the letter that the circuit road equipage should not be used would not affect the plaintiff's rights under the contract.

Mr. Jones read the letter.

Witness (continuing) said that in consequence of the letter he wrote to plaintiff on the 14th June on the instructions of the Attorney-General informing him that his horses, etc., would not be required for the second Circuit. On the 18th September witness was interviewed by Mr. Steer, on behalf of Attorney MacCallum, in reference to the position. Witness said that they did not admit any liability in law to Soeker, but that if Soeker could show that he had sustained any loss, the Attorney-General would pay reasonable compensation. He could not get any definite information out of Soeker, and he said that £50 had been put down on the Supplementary Estimates, which they would be prepared to pay if Parliament passed the item, and if Soeker could show that he had actually suffered loss. The £50 was not voted by Parliament, because the Appropriation Bill was not passed. The item was put on the Estimates as a matter of grace.

Cross-examined by Mr. Upington: He had never regarded the £50 as a de-

finite offer. He thought the work on the second Circuit would have had disastrous results for plaintiff.

Mr. Jones closed his case.

Mr. Upington was about to address the jury, when

Mr. Jones said that his contention was, in the first place, that there was no breach of contract in law, and he would ask for a ruling on that before the case went to the jury.

De Villiers, C.J., said that the letter from the Judges to the Attorney-General was written independently of Soeker, and, if it were a breach of contract to employ somebody else between George and Oudtshoorn, the letter from the Judges could not affect that.

Mr. Jones said his contention was that there was no case to go to the jury at all.

De Villiers, C.J., said that he would hear Mr. Jones on the point, but that he would not be able to address the jury on it also afterwards.

Mr. Jones, upon the legal point, submitted that there had actually been no breach of the contract. The duty of the plaintiff was merely to provide horses for the Judge's wagon when required by the Judge going on Circuit, and defendant's obligation was merely to pay the plaintiff for the number of days he was actually required to convey the Judges. There was no obligation at all to employ him. When it came to defendant's knowledge that they would not require him to go on Circuit, he could not insist on being employed. He referred to section six of the notice calling for tenders, and was perfectly clear that plaintiff only undertook to supply horses if required. He also referred to clause 3 of the contract. This was really a unilateral contract, and on that he cited *Burton v. Great Northern Railway Company* (23 L.J. Exch., D., 184). He also cited *Witham v. Great Northern Railway Company* (9 L.R., C.P., 16), referred to Pollock (Conts., ed. 5, p. 174). There was no contract between Soeker and the Government in this case until he was actually ordered to supply horses. He referred to the Privy Council Appeal from Quebec of *Queen v. Deemers* (1900, Appeal Court, p. 103).

Mr. Upington said this was not a unilateral contract at all, but a bilateral contract between the plaintiff and the defendant. Plaintiff undertook to provide at any time when the horses became necessary for the use of the Judge to proceed on Circuit. The contract did not specifically say that plaintiff had the sole right to supply these things, but it was a necessary inference from the contract that he should have that right. It was an entirely different case from that of *Deemer* or *Witham*, which were cases of continuing offers. He read from the judgment of Mr.

Justice Brett in Witham's case, on the side of the Government there was an obligation not only to pay, but to supply a spider and wagon for the use of the plaintiff. It was a fair inference from the contract that when Soeker agreed to supply whenever required the Government agreed to pay whenever required.

De Villiers, C.J., asked if plaintiff should not have alleged that horses were required?

Mr. Upington said that that matter was in issue between the parties, as would appear from the pleadings. He distinguished Burton's case cited by Mr. Jones.

Mr. Jones having replied,

De Villiers, C.J., said that the legal question raised was whether the contract between the parties imposed upon the defendant the obligation to utilise the horses of the plaintiff under the circumstances, which arose before the last Circuit. It was clear that it was intimated to the Government that so far as the judges were concerned they could dispense with the horses, and the question was whether the Government was still bound to employ the plaintiff. No obligation was imposed on the Government except by clauses five and two. By clause five the Government agreed that it would pay the plaintiff at the rate of £8 10s. per diem, reckoned from the date of his departure, and until his arrival back in Cape Town. In the second clause the Government agreed to provide a large travelling wagon and a spider. By the first clause the plaintiff covenanted and agreed to provide, at his own cost and charge, the number of horses thereafter mentioned, together with the necessary harness and appliances, required for the use of the Judges to proceed on Circuit in the Western districts of the Colony whenever required during the year 1907. Now, it was quite clear that when those horses were not required there could be no possible obligation on the Government to employ the plaintiff, and, in the absence of such obligation, he (the Chief Justice) failed to see what case the plaintiff had made out. It was, however, possible that the Court of Appeal might take a different view, and to save expense the jury had better assess the amount of damages suffered by plaintiff now.

Mr. Upington suggested that the question of fact whether these vehicles were needed by the Judge, between George and Oudtshoorn, should also go to the jury.

De Villiers, C.J., said that they were not needed, because neither the spider nor wagon was required. However, the question could be put to the jury.

Counsel then addressed the jury on the questions of whether the horses were needed by or only for the use of the

Judge between George and Oudtshoorn and on the question of damages.

De Villiers, C.J., in summing up the evidence, pointed out that the contract was for one year only. In the notice calling for tenders it was stated that any such of the horses, etc., would have to be provided as would be required. It was not necessary to go to all the towns in the circuit. Some of the towns could be excluded, and if the whole journey could be done by railway, then it would not be necessary to employ the plaintiff. It was probably more convenient for Soeker to tender than for other people, as Soeker always had a number of horses. In June the Government found that it would not be necessary to employ the plaintiff on the Western Circuit, because it would be practically an all-rail circuit, and Soeker was informed of this. If there were a breach of contract, it was a breach in June, and plaintiff could reduce his loss. It was a question if plaintiff could have made any profit under the circumstances. The jury would be quite justified in bearing in mind that notice was given in June. Mr. Upington had asked him to leave to the jury the question whether the horses were required for the circuit. He (the Chief Justice) was quite willing to leave it to the jury, but it would be difficult for the jury to say that they were required when the people who had to use them said that they were not required.

The jury then retired.

During their absence his lordship heard counsel in argument on the question whether the vehicles were required by the Judge between George and Oudtshoorn should have been left to jury.

De Villiers, C.J., then sent for the jury, and on their return said that the only question the jury had to answer was: "In case it should be found by a full Court that there was a breach of contract, what was the amount of damages suffered by the plaintiff?"

The foreman said the jury found that the plaintiff had suffered £128 damages.

Mr. Jones moved for judgment on his lordship's ruling.

*Postea* (November 29).

De Villiers, C.J.: After the evidence had been given in this case, but before verdict, the plaintiff's counsel asked for the ruling of the Court upon the question whether there was any evidence to submit to the jury of breach of contract on the defendants' part. I intimated that, in my opinion, there was no such evidence, and the further consideration which I have given to the case has confirmed me in that opinion. The action is for damages for the defendants' breach of contract in not employing the plaintiff's services for the conveyance of the judge on the second Western Circuit of this year. The declaration does not set out the

terms of the contract, but relies generally upon a tender which was sent by the plaintiff to the defendant for the conveyance of judges on the Western Circuit during the year 1907, and upon a formal contract consequent on such accepted tender. The tender was upon the face of a written notice calling for tenders. The 6th clause of this notice stated that it must be understood that only such of the vehicles, horses, etc., will be engaged as may be required by the judges for the respective Circuits, and the 8th clause specified the towns to be visited, including Oudtshoorn, adding, however, that any of these towns may be excluded from the itinerary and others added, and that the service will include the conveyance of the judge from and to the line of railway where necessary. The contract which was entered into imposed on the Government no other obligation than to provide one large travelling wagon or one spider, or both the vehicles, and, upon performance by the plaintiff of the covenants in the contract contained, to pay him at the rate of £8 10s. per diem, if both vehicles with fourteen horses were used, £6 10s. if the wagon with ten horses were used, and £5 if only the spider with six horses were used. On the other hand, the plaintiff undertook to provide at his own cost and charge the number of horses required, together with the necessary harness and drivers required for the use of the judges to proceed on the Western Circuit whenever required during the year 1907. It appears from the evidence that the plaintiff's services were employed for the first Western Circuit of 1907, but that on the 14th June, 1907, the secretary of the Law Department informed him that he would not be called upon to supply horses, etc., for the conveyance of the Judge on the second Western Circuit as the circuit journey would be performed almost entirely by railway. A correspondence, as well as personal communications, between the parties ensued, but they are not of any assistance upon the question whether there was any legal obligation on the defendant to employ the plaintiff's services on the second Western Circuit. At the trial the Supplementary Estimates for 1907, passed by the House of Assembly, but not by the Legislative Council, were produced, upon which appeared the item of £50, "Superior Courts, compensation to the Circuit transport contractor, in connection with the cancellation of contract." It was urged on behalf of the plaintiff that this was an acknowledgment of liability by the Government, but it is of no assistance in the determination of the strictly legal question whether before such alleged acknowledgment there had been a breach of contract. The Government may have been willing to compensate the plaintiff for the undoubted hard-

ship, that, in consequence of the extension of the railway system, his services would no longer be required, but there never was a formal tender of the amount, and even if there had been a tender, the plaintiff did not accept the tender, nor does he in his declaration rely upon any promise made by Government after the alleged breach of contract. The alleged breach in this, that, although by far the greater part of the journey was to be performed by railway, yet, as some portion of the journey was to be performed by road, the defendant did not, as he ought to have done, utilise the plaintiff's services for the performance of that portion. The present terminus of the railway destined to be constructed to Oudtshoorn, is George, and it accordingly became necessary to convey the Judge by road from George to Oudtshoorn, and back to the railway terminus. Although neither the Circuit wagon nor the Circuit spider specified in the contract was used, the plaintiff's counsel contended that the defendant was bound under the contract to employ the plaintiff's services for that journey. This contention, if correct, would have necessitated the employment of the plaintiff's services, wherever it became necessary to employ vehicles by road from the nearest railway station to any Circuit town, as, for instance, was the case before a railway was constructed from Hutchinson Station to Victoria West. It would probably be a dead loss for the plaintiff to have to send his horses by rail for the purpose of conveying the Judge such a short distance, but, of course, if he has the legal right to insist upon it the Court must give effect to it. The question is, does such a right exist under the contract? I have again carefully read the contract, and have been unable to find any provision which imposes the obligation on the Government to utilise the services of the plaintiff under the circumstances which admittedly exist in the present case. In the absence of such an obligation, it is clear that there was no breach of contract. In the case of the *Queen v. Ccmers* (A.C. for 1900, p. 103), it appeared that the plaintiff had contracted with the Government of Quebec to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give the plaintiff all or any of the said work. It was held by the Privy Council on appeal from the Queen's Bench of Quebec, that an obligation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld. Lord Macnaghten, in delivering the judgment of the Board, said: "The respondent undertakes to print certain public documents at certain specified rates. For all work given to him in the



footing of the contract, the Government was undoubtedly bound to pay according to the agreed tariff. But the contract imposes no obligation on the Crown to pay the respondent for work not given to him for execution. There is nothing in the contract binding the Government to give to the respondent all or any of the printing work referred to in the contract, nor is there anything in it to prevent the Government from giving the whole of the work or such part as they may think fit, to any other printer." In the present case the contract leaves it to the Government to decide whether the plaintiff's horses would be required for the use of the Judges in any particular Circuit during 1907, and if the Government did not require the plaintiff's horses for the conveyance of the Judge between the George terminus and Oudtshoorn there could be no breach of contract in the Government employing a local contractor for the purpose. If it be said that the decision as to whether the plaintiff's horses were required by the Government, there would not then be this fatal objection to the plaintiff's claim, that he has neither alleged nor proved that the Circuit Judge did require his horses. The case may therefore be decided without reference to the defendant's evidence, in regard to which very few remarks are required. The letter written to the Attorney-General on behalf of the Judge, who was to proceed on the second Western Circuit of 1907, intimated that there would be no necessity for using the Circuit road equipage. That letter cannot be used for the purpose of construing the contract or relieving the Government from any of its obligations thereunder. It is clear that the letter was written with the sole object of facilitating the Circuit arrangements, and assisting to reduce the Circuit expenditure, and there is nothing to show that any of the Judges was aware of the terms of the then existing contract between the plaintiff and the Government. The only possible use, therefore, that can be made of the letter is to prove that as a matter of fact, the Circuit Judge did not require the Circuit road equipage on any part of the second Western Circuit. Quite independently, however, of the evidence given for the defendant, I am of opinion that there was no evidence to go to the jury of any breach of contract on the defendant's part, and that there should be absolution from the instance. Seeing, however, that the expenses of a trial by jury had been incurred, and that, in case of an application under the 35th or 39th section of Act 23 of 1891, the full Court might hold a different view from mine on the legal question, I requested the jury to assess the damage, which, assuming a breach of contract, the plaintiff has sus-

tained. The jury, by their verdict, adopted the principle contended for on behalf of the plaintiff, namely, that he should receive the sum of £8 10s. per diem, as if the full equipage and number of horses had been required, and that the number of days should be computed by taking three days as the time for proceeding by train from Cape Town to George, and three days back, one day by road from George to Oudtshoorn, and one day back, and eight days being time spent by the Judge at Oudtshoorn. In this manner the sum of £136 would be arrived at, but from this amount was deducted the sum of £8, which, according to the plaintiff would have been the expenditure of his men at the rate of ten shillings per diem. There was no deduction from the feeding of the horses, apparently on the ground that they would have required feeding in Cape Town. At this stage it is unnecessary for me to say whether this mode of computation is justified by the evidence.

In regard to the costs of this action, I am bound to say that I would have been glad to relieve the plaintiff from the payment of the defendant's costs. He has always admittedly done his work to the satisfaction of the Judges and of the Government, and it was an undoubted hardship on him that the need for retrenchment and the progress of the railway induced the Government to dispense with his services. I cannot, however, be swayed by my personal feelings in the matter, and, in granting absolution from the instance, the Court must follow the ordinary practice, and give the defendant his costs.

[Plaintiff's Attorney: A. J. McCallum. Defendant's Attorneys: Reid and Nephew.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

BEAMS V. COLONIAL GOV- { 1907.  
ERNMENT. { Nov. 25th.  
{ Dec. 3rd.

Civil service — Fixed establishment — Fixity of tenure —

### Reduction of salary or emolument — Artizans on fixed establishment.

*The plaintiff, after ten years efficient service as an artisan in the Railway Locomotive Department, was placed on the "fixed establishment." At the time of his being so placed, he was paid at a certain rate per hour for 54 hours per week, part of the wages being paid at the end of each week, and the balance at the end of each month. In the following year he petitioned for a reduction of the number of working hours to 48 per week, with a corresponding increase in the rate of wages per hour, and the request was granted. Subsequently the rate of wages per hour was increased, but the number of working hours remained at 48 per week. At the end of 1906, in consequence of the falling off of traffic, the Government reduced the number of working hours per week to 43½, but made no corresponding increase in the rate of wages per hour. It was admitted that no fault was to be found with the work done by the plaintiff.*

*Held, that as the plaintiff's monthly wages or emoluments were fixed and definite, and as a Civil Servant's salary cannot be reduced by Government save for misconduct, the Government was not entitled to reduce the number of working hours per week without a corresponding increase in the rate of wages per hour.*

In this case the plaintiff, John Beams, an employee at the Salt River Works, sued the Colonial Government for a declaration that the defendants had no power or authority by law to reduce his salary or wage in the circumstances set forth in his declaration, and for £10 17s., salary unlawfully withheld, or in the alternative by way of damages.

Plaintiff's declaration was as follows:

1. The plaintiff is John Beams, a turner on the fixed establishment of the Civil Service of this colony.

2. The defendant is the Honourable Thomas William Smartt, and is sued in his capacity as Commissioner of Public Works, and as such representing the Government of the Colony.

3. The plaintiff was duly placed on the fixed establishment aforesaid on the 29th February, 1888, pursuant to the provisions of the law then in force, and on the 6th August, 1895, he was a person in the public service of the Colony, and already placed on the fixed establishment, and the provisions of section 3, sub-section (c) of Act No. 32 of 1895 apply to the plaintiff, who has since the 6th August, 1895, continued to be and is on the fixed establishment.

4. Before and up to the 5th January 1907, the hours worked by the plaintiff amounted to 48 hours per week, taken on an average throughout the year, as will more fully appear from the bye-laws duly framed by the Colonial Government as rules for workmen, and to which the plaintiff craves leave to refer when produced at the trial; and, in accordance with an agreement between the parties, the manner in which wages were paid by the defendant to the plaintiff was as follows: At the end of any particular week a certain advance against his wages, termed a "sub," was, for the convenience of the plaintiff and at his request, made to the plaintiff by the defendant, and thereafter, once in each month, the balance of total wages, calculated at the rate of 1s. 6d. per hour and 48 hours per week for four or five weeks, was paid to the plaintiff, less certain monthly stoppages, in which was included the sum total of the aforesaid weekly advances or "subs" since the payment of the last balance; and the plaintiff had undertaken and was obliged in consideration of such wages to work for 48 hours per week as aforesaid, and to submit to a deduction from his wages in case he should leave his work without permission of his foreman, or be absent even with such leave for more than 15 minutes, such deduction to be calculated at the rate of 1s. 6d. per hour.

5. The balance aforesaid was arrived at and stated monthly upon a printed ticket, provided by the defendant, whereof a true copy is hereunto annexed and marked "A," the total wages being filled in for a period of either four or five weeks, and reductions for the month for pension fund, sick fund, house rent (if any), school fees (if any) being included in the stoppages, as well as any sums falling under other heads indicated upon the ticket.

6. On and after the 5th January, 1907, the defendant, without the consent of the plaintiff pursuant to a notice whereof a copy is hereunto annexed and marked "B," reduced the plaintiff's number of hours of work per week by 4 2-3rd hours on Saturdays, and also refused to pay the plaintiff the salary

or wage which before the said date he was drawing as aforesaid, but reduced the said salary or wage by seven shillings weekly, being 4 2-3rd hours at 1s. 6d. per hour.

7. The plaintiff has at all times performed his duties pursuant to the said Act and the rules lawfully made thereunder, to wit, under section 88 of the said Act, and he has at no time been guilty of a breach of discipline or been disgraced or incurred any of the penalties lawfully provided for the punishment of offences against the said rules.

8. The reductions made from the plaintiff's salary since the 5th January, 1907, and down to the issue of summons, amount to £10 17s.

9. The plaintiff has always, on and since that date, been and is ready and willing to work for and during the said 4 2-3rd hours per week, by which the 48 weekly hours of work have been reduced as aforesaid, and he has always protested against the reduction from his salary or wage, of 7s. per week, as aforesaid.

Wherefore the plaintiff prays generally a declaration of his rights, and more particularly the following declaration and orders: (a) That there was no power or authority vested by law in the defendant or the Colonial Government to reduce his salary or wage in the circumstances aforesaid; (b) that he is entitled either by way of salary unlawfully withheld, or, in the alternative, by way of damages, to the payment of the said sum of £10 17s.; (c) that he is entitled to an order declaring that while he remains upon the fixed establishment, and is ready and willing to perform his duties, the defendant or the Colonial Government is not justified in reducing his salary or wage, save in so far as such reduction is authorised by any provision of the said Act or lawful rules made thereunder providing such reduction for absence from work or by way of penalty for such breach of any lawful rule; (d) that he is entitled to have his costs of suit as against the defendant in his capacity.

Defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, and 3 of the declaration.

2. At and after the date upon which the plaintiff was placed upon the fixed establishment, viz., the 9th February, 1886, he was in receipt of wages at the rate of nine and one-third pence per hour for each hour worked up to and inclusive of the number of 54 hours in each week, hereinafter termed the workshop hours, with an increase of 25 per centum upon the hourly wage for each hour worked overtime or beyond the said workshop hours.

3. Thereafter the plaintiff's wages were increased from time to time, to wit: Upon the 1st June, 1888, to 10½d. per hour; upon the 1st May, 1889, to 11½d. per hour; upon the 1st July, 1890, to 1s.

1½d. per hour; upon the 1st November, 1895, to 1s. 3d. per hour; upon the 1st December, 1900, to 1s. 4½d. per hour; upon the 1st July, 1906, to 1s. 6d. per hour; and he was paid at the said rate of 1s. 6d. per hour up to the 5th January, 1907, and has been so paid ever since.

4. Between the said 9th February, 1886, and the 5th January, 1907, the workshop hours were altered by the defendant upon the dates and in the manner following, to wit: Upon the 3rd April, 1886, from 54 to 47½; upon the 13th November, 1886, from 47½ to 54; upon the 15th January, 1887, from 54 to 47½; upon the 22nd April, 1887, from 47½ to 54; upon the 1st May, 1889, from 54 to 50; upon the 1st July, 1890, from 50 to 48.

5. The manner in which the plaintiff's wages were customarily paid to him by the defendant was as follows: At the end of each week a certain portion, termed a "sub." of the wages actually earned during the said week was paid, and thereafter once in each month, the balance of the total wages earned after deductions of the nature indicated in annexure A to the declaration. Save as aforesaid, the defendant denies paragraph 4 of the declaration.

6. The defendant admits paragraphs 5, 7, and 9 of the declaration.

7. As to paragraph 6, he admits the issue of the notice referred to, and that he has refused to employ the plaintiff or to pay him for more than forty-three and one-third hours in each week since the 5th January, 1907, as he was lawfully entitled to do, but otherwise denies the said paragraph.

8. He denies paragraph 8.

Wherefore the defendant says that the plaintiff is not entitled to the declaration and orders set out in his prayer, and prays that the same may be refused with costs.

The notice annexed to the declaration read:

Salt River, December 17, 1906.

Notice No. 615.

#### NOTICE TO WORKMEN.

Retrenchment: Closing of Workshops on Saturdays.—Owing to the persistent falling-off in traffic, and as there appears to be no immediate prospect of improvement, the Government have decided that the workshops are to be closed on Friday evening, 4.30, until 6.30 Monday morning each week, to take effect from the 4th January, 1907. This course has been adopted in preference to discharging men, as it is felt to be the fairest course to take, and the one which will entail less individual hardship.—(Signed) G. McGrath, Locomotive Superintendent.

Mr. Schreiner, K.C. (with him Mr. Douglas Buchanan) was for plaintiff;

Mr. Howel Jones, K.C. (with him Mr. Benjamin, K.C.) was for defendants.

Mr. Schreiner, in opening the case, said that this was a test case of considerable interest to the Civil Service. He believed there were 200 workmen on the fixed establishment. The plaintiff's position was that no man who was on the fixed establishment should have his salary reduced at the will of the Government without his consent, as long as he had not subjected himself to penalties.

Plaintiff was called. He stated that he was now 57½ years of age, within 2½ years of the retiring age. He came out to the Colony under contract in 1873, and in 1888, in consideration of the fact that he had been 10 years in the Service, he was placed on the fixed establishment. Plaintiff went on to give evidence as to the changes in his hours and rates of pay, and the deductions made for the Pension Fund. The pension, he said, was fixed on the basis of salary in the three years previous to retirement. Witness was still contributing to the Pension Fund at the same rate as prior to January last. Witness gave evidence as to what was done by consent of the men to meet the position of affairs during the depression of 1886. He had heard recently that it was intended to introduce a Bill to protect the position of men whose salaries had been reduced in regard to the question of pension, but no legislation had been actually brought forward. The hours of labour were reduced from 9 to 8 per day in 1899.

Mr. Schreiner was proposing to examine the witness in reference to a conversation which Sir Charles (then Mr.) Elliott had with the men in 1888, when

Mr. Jones objected to evidence of this kind being admitted on the ground that it did not touch the contract between the plaintiff and the Government.

De Villiers, C.J. (with the consent of Mr. Jones) allowed the evidence to be admitted on the understanding that, if necessary, the Government could take Sir Charles Elliott's evidence on the point.

Plaintiff said that at the meeting in 1888, Mr. Elliott informed the men who were not on the fixed establishment of the advantages of being on the fixed establishment. Mr. Elliott said that a man who had served ten years, and who was on the fixed establishment, and belonged to the Pension Fund, would not, in case of retrenchment, shortness of work, suffer in wages. At that time there were 12 to 18 men on the fixed establishment. His wages had hitherto always had an upward movement; this was his first experience of a fall in wages.

Cross-examined: When he was originally employed his pay was 5s. a day. He worked nine hours a day. He was a Civil Servant under chapter "b" of the regulations.

Mr. Jones: A competent authority could alter your hours from time to time?

Witness: Yes, but not my pay.

Supposing they increased your hours to 52, what would you say to that?—I should say nothing about it: I should be very glad of it.

[De Villiers, C.J. (to Mr. Jones): But suppose they reduce his hours to two per week.]

Mr. Jones: My argument is that the Government could not do anything unreasonable, but that they are entitled to act within reason.

De Villiers, C.J., asked whether, as a matter of fact, retrenchment had not actually taken place in the salaries of Civil Servants.

Mr. Schreiner: If a man has got so much a year the Government are not entitled to take away a portion without the consent of Parliament.

[De Villiers, C.J.: But was there not an all-round reduction?]

Mr. Jones: As far as I can gather, it was not an actual reduction, but their increases were not allowed.

In further cross-examination, Mr. Jones asked witness if his position was that the Government could work him any number of hours without giving him any increased pay per hour?

Witness: They could work me nine hours a day, but I must get my 12s.—8 hours a day at 1s. 6d. per hour.

Mr. Jones: What is your complaint about the Pension Fund?

Witness: I am contributing to the Pension Fund at 1s. 6d. per hour for 48 hours per week, and I am not getting that.

In reply to the Court, witness said that he was now receiving 45s. a week, and he claimed to be entitled as a member of the fixed establishment to 72s. a week.

[De Villiers, C.J.: suppose they give you ten hours a day, would you be satisfied with £3 12s. a week.]

Witness: If they put up a note to work ten hours I should expect to receive £3 12s. I cannot say about the hours, such a thing has not happened.

Would you be satisfied to work ten hours a day instead of 8?—According to my rate, I should have to get my 12s. a day.

I suppose you would say that the additional hours should be paid for?—I have been paid for them when I have been asked to work before.

If a competent officer said you must work ten hours a day would you think you were entitled to more than £3 12s.?—I should have £3 12s., and try to get the other.

If you didn't get it?—I should have to do without.

Probably go to law for that?—Yes.

David Allan Pattison, a turner at Salt River Works, said that he had been on the fixed establishment since 1893. In



1888 Mr. Elliott had an interview with the men, and, in reply to a question, he told the men that when once a man was on the fixed establishment he could not be retrenched. It was in consequence of that reply that witness joined as a contributor.

By the Court: Witness thought that the Government, if a man's hours were increased, would reduce his rate per hour. The idea was that a man should receive so much per week, not so much per hour.

[De Villiers, C.J.: If the plaintiff is right in his contention, and the men could be kept employed at increased hours without increased wages, the result would be that many would be dismissed?]

Witness: Yes. We look upon it like this, as members of the fixed establishment, we were not asked whether we would agree to this or not. Had we been consulted I have not the slightest doubt that 90 per cent. on the Fixed Establishment would have agreed, in fact, every man I have spoken to on the matter would have agreed to that. But we want the principle.

[That is really your objection—that you have not been consulted?—We were not consulted. We consider that the Government is asking us for a subscription towards the depression, and they are not asking for it, but they are taking it out of our pockets.

[There is not sufficient work for all the men if they work 48 hours a week?—That is so.

[If they continue to work 48 hours some will have to go?—That is so.

[Is it not really in the interests of the body of the workmen that this should be done rather than that some should be dismissed altogether?—Yes, my lord, that is all right, but supposing we continue on the same hours as at present, unless things alter there are some men who will have to go, or else we shall have to work less hours than 43½. Where are we then? Supposing the Government say "we are going to knock off 20 hours"?

[Well, that is a very strong argument.]

Edward Hopper, foreman at Salt River Works, also gave evidence.

Mr. Jones: The circumstances were no worse in 1886 than they are now?

Witness: I should say they were not so acute. There was no actual agreement on behalf of the men to work short time.

John Wm. Clemitson, a turner, said that he would be retired on pension at the end of the present month after 23 years' service. He corroborated the previous witnesses on various points. He naturally wondered what effect the reduction would have upon his salary. He had been paid at the rate of 1s. 8d. per hour.

Geo. Jones also gave evidence, and Mr. Schreiner then closed his case.

George McGrath, Locomotive Superintendent (called by Mr. Jones), said that there had been a great falling-off of traffic on the railways, and they were faced with the question of either retrenching men or reducing the hours. The working hours were reduced because it was considered the more merciful course to the men.

Hazlett M. Beatty, Chief Locomotive Superintendent, said that in 1886 there was severe depression, and he sent for the charge-men, and after a conference, it was decided to follow the same course as had been adopted recently. A great deal of overtime had been worked in the Government workshops, by which the men had benefited greatly. As to the question of pension, the men were allowed to contribute to the Pension Fund at the old rate after the hours per week had been reduced. This was done at the request of the men for their benefit.

By the Court: There were 140 men on the fixed establishment. The number of contributors to the Pension Fund was 450.

Mr. Jones closed his case.

Mr. Schreiner quoted Acts 42 of 1885, 26 of 1886, 31 of 1888, and 32 of 1895 (sections 3, 25, 34, 35, 88, and 93). He contended that the plaintiff was a monthly servant, though for convenience' sake he received a "sub" of his wage every week. The position of every Civil Servant was involved in the Court's decision upon this case, because here they had a reduction of the emoluments of a person who was on the fixed establishment. Counsel quoted from the Regulations of the Service, as published in "Kilpin."

Mr. Jones said that the real question to be decided in this case was whether the Government was entitled to reduce the hours. The plaintiff was really receiving more to-day than he was receiving when he was first placed on the fixed establishment. He still received the same rate of pay as he did prior to January last, viz., 1s. 6d. per hour. Counsel quoted chap. "b," regulation I. of the Civil Service. He submitted that the Court would uphold any regulation which was not unreasonable. Plaintiff went on to the fixed establishment subject to all regulations made by the Government. The whole question was whether the number of hours directed to be worked under this regulation was reasonable or unreasonable? He submitted that on the admission of the witnesses for the plaintiff, it was a reasonable regulation, although fault was found because the men were not consulted by the Government. In 1886, when the conditions were less acute than they were to-day, the hours were, with

the consent of the men, reduced by 6½ per week. Plaintiff's claim was that, whatever was done, he was to receive £3 12s. a week.

Mr. Schreiner, in his reply, said that the plaintiff as a Civil Servant was not entitled to stipulate what the hours should be that he worked, but he was entitled to get his £3 12s. a week, or say, about £18 a month on the average. He was entitled to say that that was his fixity. He looked upon that as his establishment. These men were entitled to just as much protection as any other branch of the Service.

*Cur. Adr. Vult.*

*Postea* (December 3rd).

De Villiers, C.J.: The plaintiff is a turner employed by the Government in the Railway Locomotive Department, and was in 1888 placed on the fixed establishment of the Civil Service as from 9th February, 1886. His wages from 1886 to June 1, 1888, were 9 1-3 pence per hour for each hour he worked up to 54 hours a week, with an increase of 25 per cent. for overtime. From that time onwards there was a gradual increase of his wages per hour until the 1st July, 1906, when they were raised to 1s. 6d. per hour, at which they still stand. The working hours also varied from time to time. On 3rd April, 1886, they were reduced from 54 to 47½ per week, on 13th November, 1886, they were raised to 54, and on 15th January, 1887, again reduced to 47½, and on 27th April, 1887, again raised to 54. On the 5th of March, 1889, the plaintiff and other employees of the carriage department petitioned the General Manager of Railways for a reduction of the working hours to 48 per week, with an increase of wages, so that there might be no diminution of the weekly wages, and the request was in part agreed to. From the 1st July, 1890, the weekly hours were reduced to 48, but the weekly wages remained what they were. On the 17th of December, 1906, the following notice was given to the workmen by the Locomotive Superintendent: "Retrenchment.—Closing of workshops on Saturdays.—Owing to the persistent falling-off in traffic, and as there appears to be no immediate prospect of improvement, the Government have decided that the workshops are to be closed on Friday evening, 4.30, until 8.50, Monday morning each week. This course has been adopted in preference to discharging men, as it is felt to be the fairest course to take, and the one which will entail less individual hardship." The result was a reduction of the plaintiff's working hours from 48 hours per week to 43½ hours, and a consequent reduction of his wages from £3 12s. to £3 5s. per week. Even with this reduction, the wages of the plaintiff were considerably higher than what he

received when first admitted to the fixed establishment, which were only £2 2s. per week. The plaintiff, however, objects to the reduction of the number of working hours and consequent reduction of weekly wages as being an infringement of his rights as an employee on the fixed establishment of the Civil Service, and the question to be decided is whether the Government could lawfully reduce his hours of work without a corresponding increase of the rate of wages which he was receiving per hour at the time of such reduction. Although the plaintiff and other artisans on the fixed establishment are paid by the hour and not by the month, there is no indication in Act 23 of 1895, or in the regulations framed thereunder, of any intention to confer on them a lesser degree of fixity of tenure than on other Civil Servants. The only disability that I can find is that they are not eligible, by reason merely of their appointment in one department, after ten years' service therein to hold office in any other department. When once, however, they have been placed on the fixed establishment they enjoy all the other advantages conferred on ordinary Civil Servants. According to the 31st paragraph of Government Notice No. 924 of 1895, the advantage of being placed on the fixed establishment is greater fixity of tenure, for the services of an officer not on the fixed establishment may be dispensed with at any time, while the services of an officer on the fixed establishment can be dispensed with only in certain contingencies. One of those contingencies is misconduct on the part of such officer. The 52nd of the Civil Service Regulations, framed under the Act, makes provision for a scale of punishments which the Governor may award according to the degree of such misconduct. Before the punishment can be inflicted, the Minister of the department must make a full inquiry and submit the matter to the Governor with his report thereon. The Governor may then either acquit the accused of the charge preferred against him, or, upon the charge being proved, may award such of the following punishments as the merits of the case may seem to require, viz.: (1) A reprimand; (2) a fine; (3) suspension for a period without deprivation of salary or emoluments; (4) suspension with such deprivation; (5) reduction of salary or emoluments; (6) reduction in rank; (7) enforced resignation; (8) dismissal. According to the regulations, therefore, reduction of salary or of emoluments is a punishment for breach of discipline or other misconduct, from which it is a fair inference that an official's salary or emoluments may not be reduced except in case of such misconduct on his part. The 34th section of the Act, however, provides for the grant of a retiring allowance in the case of the aboli-

tion of the office held by a person in the fixed establishment, and the 35th section provides for the removal from the service of any person on the fixed establishment in order to facilitate improvements in the department to which he belongs, but no such removal can take place without the previous concurrence of both Houses of Parliament. It appears to me that one or other of these sections would have been applicable to the position in which the Government found itself, in consequence of the persistent falling off in the railway traffic. If the Government found that there were too many employes in the department to which the plaintiff belongs for the work required to be done, the super-abundant offices might be abolished, but in that case, of course, the officers would have to be compensated, under the 34th section of the Act. If it was found that greater economy and efficiency could be effected without abolition of any offices, but by means of a re-organisation of the department, necessitating the removal of the plaintiff, then the Government could remove him, but only with the previous concurrence of Parliament. Neither of these sections has been applied in the present case. With the highly laudable object of avoiding the discharge of men who were not on the fixed establishment, the Government considered it the fairest course to all concerned to reduce the working hours all round, and thus retain the services of as many of the men as possible. I confess that I would have been glad to be able to hold that the more equitable course adopted by the Government is also the legal course, but the terms of the Act and the regulations framed by Government thereunder have forced me to a different conclusion. The safeguards provided by the Act for all Civil Servants would be completely nullified if the Government could reduce the emoluments of any Civil Servant without misconduct of any kind on his part. The plaintiff is paid at a certain rate per hour, whereas ordinary Civil Servants are paid at a certain rate per month, but his monthly wages, provided he works for the full month, are as much a known and definite quantity as the monthly salary of the ordinary Civil Servant. When in 1889 the plaintiff's working hours were reduced from 54 to 50, and again in 1890, when the working hours were reduced to forty-eight, the principle was accepted that such reduction should not entail a reduction of the monthly emoluments, for the rate of wages was correspondingly increased. Strangely enough, as late as July, 1906, when the falling off in traffic must already have begun, the plaintiff's wages were further increased from 1s. 4½d. to 1s. 6d. per hour. If the Government had refused this increase the plaintiff

would have had no legal cause for complaint, but only five months after such increase the Government notified that there would be a decrease in another direction, namely, by a reduction of the number of hours during which the plaintiff would be allowed to work. At the time when he received this notice the plaintiff was in this position. There was a definite and recognised rate of pay per hour, and there was a definite and recognised number of working hours per week, the joint effect of which was to entitle him to the receipt of wages at £3 12s. per week, provided that he worked the full forty-eight hours. The effect of the change was to reduce his wages to £3 5s. per week. The reduction is not great, but if once the legality of the reduction is admitted it would be impossible to fix the point at which such reductions are to stop. Mr. Jones admitted that the Government could not reduce the number of hours beyond what is reasonable, but the reasonableness of the reduction, if legal, would depend upon the amount of work there was for the men to do in the workshops. If, with the full staff of employees, there would be only work enough for ten hours a week, it would not be unreasonable to reduce the working hours to that number, but the wages would be utterly insufficient for a respectable artisan to live upon. On behalf of the Government reliance is placed upon the Regulation (Chapt. B. section 1), which provides that, "All officers and employees will be required to attend at their offices, or other places of business, for such period or periods as may from time to time be ordered by competent authority." This cannot, however, mean that the period or periods may be altered in such a manner as to entail a reduction of the salary or emoluments enjoyed by any officer or employee. It could not, for instance, be held, in the case of an ordinary Civil Servant, that the competent authority may require him to attend at his office for ten months only out of twelve, and forego his salary during the remaining two months. He would justly maintain that his salary cannot be reduced without proof of misconduct, and that if there are too many officers in his department for the work required to be done, the Government should bring into operation either section 34 or section 35 of the Act. In the case of artisans paid by the hour for 48 hours in each week, the policy of placing them on the fixed establishment may well be open to question, but, when once they are so placed, the principle that their emoluments cannot be reduced without proof of misconduct must be equally maintained. The fixity of tenure referred to in the Regulations would be reduced to a nullity if the Government, while ostensibly re-

taining such artisans on the fixed establishment, may at will reduce the number of working hours upon which their subsistence depends. For better or for worse the policy of placing artisans of ten years' efficient railway service on the fixed establishment has been adopted, and until Parliament sees fit to alter the law the Court must give effect to that policy. In the present case, it would appear that, while the plaintiff's emoluments have been practically reduced by 7s. a week, there is no corresponding reduction of the amount paid by him for Pension Fund purposes. This course was adopted, according to the Chief Locomotive Superintendent's evidence, in favour of the men and at their request, the impression being that when the men's pensions came to be calculated, the basis would be as though they had actually worked 48 hours a week. Unfortunately, however, for the plaintiff, his superannuation allowance will have to be calculated not upon the basis of his payments into the fund, but upon the average amount of salary and emoluments received by him during the three years next preceding the commencement of such allowance. The 40th section of the Act is clear and precise upon this point. The plaintiff will be entitled to his allowance 2½ years hence. If there should be further reductions of the working hours per week or even if the existing reduction only should continue, it will be found on his reaching the age of 60 years that his pension is to be less than it would have been if the 48 hours per week had been maintained, notwithstanding that during the interval deductions may be made from his emoluments upon the basis of the 48 hours' pay per week. That such a result would follow is not conclusive upon the rights of the plaintiff in the present case, but it strengthens the view which I have already expressed as to the effect and meaning of the Regulations (chap. B, section 1) relied upon by the Government. That regulation was not, in my opinion, intended to enable the Government to deprive Civil Servants of any of the safeguards conferred on them by the Act. If, at any period of time they enjoy a fixed salary or other emolument, even though it be an increase in the salary or other emoluments with which they began their service, they are not bound to acquiesce in a reduction of such salary or emolument except on one of the grounds specifically stated in the Act. The emoluments enjoyed by the plaintiff when his hours were reduced were, in my opinion, as much fixed emoluments as the salary of an ordinary Civil Servant, and as the necessary effect of the reduction of his hours of work was a reduction of those emoluments, I am of opinion that the plaintiff must succeed in this action. A

declaration will therefore be made in terms of prayer (a), with costs.

Maasdorp, J., concurred.

[Plaintiff's attorneys: Fairbridge, Arderne and Lawton. Defendant's: Reid and Nephew.]

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## SUPREME COURT

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[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

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### PROVISIONAL ROLL.

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GLUCKMAN V. NOTHLING. } 1907.  
 (Nov. 26th.

Mr. Marais moved for provisional sentence on a promissory note for £709 6s., with interest from the 18th August, 1907.  
 Order granted.

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### TEUBES V. NOTHLING.

Mr. Marais moved for provisional sentence on a promissory note for £200, with interest from the 1st August, 1906.  
 Order granted.

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### TEUBES, SEN. V. KLOPPERS.

Mr. Marais moved for provisional sentence on a mortgage bond for £400, with interest from the 1st July, 1905, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

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### VAN RENSBURG V. VERMEULEN.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £300, with interest from the 10th August, 1906, and for defendant's half-share in the property hypothecated to be declared executable. Counsel also applied for provisional sentence on a promissory note for £50, with interest from the 24th June, 1904. Defendant was sued edictally, and publication had been made in a paper published at Windhoek, German South-west Africa.  
 Order granted.



ILLIQUID ROLL.

LYONS V. MANSON. } 1907.  
Nov. 26th.

Dr. Greer moved for judgment, under Rule 329d, for £21, rent of certain premises at Milnerton, with interest *a tempore morae* and costs.

Order granted.

PURCELL, YALLOP AND EVERETT V  
WIID.

Dr. Greer moved for judgment under Rule 329d, for £16 3s., for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

SWART V. SWART.

This was an application for an order declaring the respondent of unsound mind, and appointing a curator of her person and property.

Mr. Benjamin, K.C. (with him Dr. Greer), was for applicant, and Mr. Burton, K.C., appeared on behalf of certain daughters, heirs of the respondent.

Mr. Benjamin said that when the matter previously came before the Court ter previously came before the Court (17 C.T.R., 892), the Resident Magistrate of Gordonia was appointed *curator ad litem*, and leave was given to prove the insanity by affidavit, and the curator was authorised to report in writing. Counsel added that he could not now ask that respondent be declared of unsound mind, but he would ask the Court to declare her incapable of managing her own affairs, and appoint the curator suggested by the Resident Magistrate, viz., Mr. Carl Franks, of Keimoes. Affidavits were read, from which it appeared that respondent was about 82 years of age and was in a very feeble condition. The present application had been rendered necessary by reason of a favourable offer for the farm having been received from a prospecting syndicate.

Mr. Burton said that he did not oppose the application, but there were certain important facts which had been brought to notice by his clients, and he urged that their costs should come out of the respondent's estate.

Mr. Benjamin said that he did not object to the costs of his learned friend's clients coming out of the estate.

Order granted declaring respondent incapable of managing her own affairs, and appointing Mr. Carl Franks as curator of her property, costs (including costs of parties represented by Mr. Burton) to come out of respondent's estate.

*Ex parte* ESTATE SWART.

Dr. Greer moved for the removal of the above-named Miena Swart from her office as executrix of the estate of her late husband, and for authority to the Master to take the necessary steps for the election of an executor in her stead.

Order granted removing the said Miena Swart from office, and authorising the Master of the High Court of Griqualand to take steps for the election of a fresh executor.

DISTRIBUTING SYNDICATE FOR COLD STORAGE V. IMPERIAL COLD STORAGE, LTD. IMPERIAL COLD STORAGE, LTD. V DISTRIBUTING SYNDICATE.	} 1907. Nov. 26th. " 27th. Dec. 9th.
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Sale and purchase—Cost—Invoice price—Construction of contract.

*The defendants, being purveyors of meat, undertook to purchase all their meat from the plaintiffs and to pay for the same "a price equivalent to 12½ per centum in excess of the invoice price (which includes cost, insurance and freight)". For the purpose of obtaining their supplies of meat in Australia and the Argentine, the plaintiffs employed agents in London, to whom they paid a buying commission of 2 per cent., and the plaintiffs also paid exchange on remittances.*

*Held, that the plaintiffs were entitled to debit the defendants with such commission and exchange in respect of supplies furnished under the contract.*

*Under another contract the defendants undertook to purchase all their supplies of meat from the defendants' cold storage works in Cape Town, and pay for the same "such sum as the said supplies should cost, laid down in the stores at Cape Town, plus ¼ of a penny per pound and 10 per cent." The plaintiffs did not, under this contract, charge the defendants with any buying commission, but as they had*

*now found it necessary to have their own offices and officers in London as well as in Cape Town for the purpose of arranging freight and insurance, they charged the defendants with a proportionate share of the expenses.*

*Held, that such expenses formed part of the cost of supplies laid down in the stores in Cape Town.*

*Held further, that the 10 per cent. must be charged, not only on the cost of the supplies laid down in the stores, but also on the  $\frac{1}{8}$  of a penny per pound which was charged to meet wastage and expenses of storage.*

The Imperial Company brought an action against Charles Sonnenberg and David Smith, trading as the Distributing Syndicate. Plaintiffs, under cession of the rights to the De Beers Consolidated Mines, Limited, under an agreement between De Beers and the defendants, alleged that the defendants owed them £3,625 8s. 7d. for supplies of meat and poultry for the year ended 31st March, 1903. Plaintiffs also alleged that defendants were indebted to them in the sum of £7,428 17s. 7d. for supplies during February, 1906, in terms of a contract dated 15th November, 1902, between the South African and Australasian Cold Storage and Supply Company, Limited, and defendant syndicate. It was alleged that a further sum of £8,917 17s. 3d. was due from the syndicate to plaintiffs for supplies during March, 1906. Plaintiffs claimed the aforementioned sums, with interest.

Defendants, in their plea, said that the transactions between the De Beers Company, the Australasian Company, and the plaintiff, on the one part, and the defendant syndicate had been extensive and substantial, and the accounts were long and involved. They said that the accounts rendered by the plaintiffs were incomplete, incorrect, and misleading, not framed on correct lines, and unduly unfavourable to defendants, and proceeded to set forth, under twelve sub-clauses, the grounds for this allegation. They prayed that the claim be dismissed, and in reconvention claimed a full and true account of the transactions, rebate of such account, and payment of what may be found due to the syndicate.

To this plaintiffs filed a replication and plea to the claim in reconvention, in which the alleged inaccuracies were denied.

Defendants filed a rejoinder and replication in reconvention.

This was followed by plaintiffs' sur-rejoinder.

The matter was referred to Mr. A. T. Hennessy, as special referee, with certain powers. He held—First: That the plaintiffs were entitled to include a certain proportion of their London and Cape Town expenses in cost.

Second: That the intention of the agreement was that the 10 per cent. should be calculated on the cost laid down, plus one-eighth of a penny per lb.

On the 19th June last (17 C.T.R., 548), counsel were heard in argument before Mr. Justice Maasdorp on a special case, stated by the referee, at the request of the defendant syndicate, arising out of the construction of the sixth clause of the agreement between the South African and Australasian Syndicate and the defendants, viz.: "The said syndicate shall be bound and obliged to purchase and obtain all their supplies of frozen or chilled meat or articles of chilled or frozen food from the company's cold storage works and from no other person or company, and shall pay therefor such sum as the said supplies shall cost laid down in the company's stores at Cape Town or Woodstock, plus one-eighth of a penny per lb. and 10 per cent., and the said syndicate shall be credited with any trade discounts on cost price and freight, in respect of all goods purchased by the said company, and supplied to the said syndicate." The referee reported that he ruled that the intention of the agreement was that the 10 per cent. should be calculated on the "cost laid down," plus one-eighth of a penny per lb. As to the question of what was the cost laid down, the syndicate objected to any part of the London office or Cape Town administrative expenses being calculated in the "cost laid down." He considered that it was impossible to draw a line in the manner in which defendants proposed. The whole machinery in existence to handle these supplies, whether indoor or outdoor, must be included. Whether the whole of the men's time so employed was spent on the supplies coming under the contract or only a portion of it was purely a question of the proportion of their wages or salaries to be charged to the "cost laid down."

The defendants were dissatisfied with that view.

Maasdorp, J., however, upheld the view taken by the referee, and from his lordship's decision the defendants now appealed.

The referee had presented his report on the various questions in dispute between the parties. He found that the defendants were indebted to the plaintiffs in the sum of £14,761 15s. 5d., and added that he thought substantial justice would be done between the parties

by the Court ordering the defendants to pay their own costs, his fees, and two-thirds of the plaintiffs' costs. He assessed the plaintiffs' costs at £210.

The plaintiffs now applied for judgment in terms of the referee's report. The defendants disputed the correctness of the findings.

Two special cases were also raised on which the full Court were asked to decide as a Court of first instance. In the first case the question was raised as to whether the defendants were liable to pay 2 per cent. commission on the purchase of meat in Argentina. Defendants denied liability because: (1) Any commission paid by the plaintiffs to the original buyers was a charge which came out of the contract price; and (2) buying commission was only payable on the plaintiffs' contract with Messrs. Hughes and Houlder for military supplies, and no other. In the second case the question of exchange was raised. Defendants admitted that they had to pay exchange between the Cape and Argentina or London and Argentina, but they denied that they were liable for any exchange between Cape Town and London, on the ground that that came within the terms of the agreement.

Mr. McGregor, K.C. (with him Mr. Wallach) for appellants. Mr. Schreiner, K.C. (with him Mr. Burton, K.C.) for respondents.

Mr. McGregor submitted that the 2 per cent. was foreign to the contemplation of the parties to the contract. It was foreign to the meaning of the contract. It meant that they had to pay 2 per cent. in addition to the 10 per cent. paid on the contract price. As it happened, the company was a large company having large contracts with the military and also with Hughes and Houlder Brothers for purchasing, and how could the 2 per cent. commission come in on the invoice price? That was the kind of element in the case. They had not paid on a fixed tariff as the price of meat fluctuated so much, but they were to pay 10 per cent. on the invoice rendered.

[De Villiers, C.J.: Rendered by whom?]

Mr. McGregor: By the purchasers to the Imperial Company.

[Buchanan, J.: These invoices do not contain the insurance charges?]

Mr. McGregor said it was not clear what the insurance rates were at the other side, but according to the contract they had to be paid. Counsel quoted *Ireland v. Livingstone* (Law Reports, 6 H.L., 396) and Benjamin on Sales, 3rd ed., p. 575. He also dealt with the question of defendants' liability for exchange.

Mr. Schreiner contended that it was reasonable that the plaintiff company should have an agent in England or elsewhere to buy for them. Mr. McGregor had contended that the invoice

sent in by Houlder Bros. was all they had to rely upon, but on the face of things that was not so, as no commission was therein charged. Nothing was shown that Houlder Bros.' invoice was the invoice to be relied upon.

Mr. McGregor said that the appellants objected to general management charges and salaries. They also objected to expenses of working, the company being charged to "cost laid down." They maintained that the one-eighth of a penny and the 10 per cent. covered all expenses after the supplies had been laid down. They also maintained that the general staff existed for the numerous purposes of the company, and that the agreement did not contemplate the allocation of either the salaries of any particular officials or a proportion of all salaries to the "cost laid down."

Mr. Schreiner in reply.

*Cur. Adv. Vult.*

*Postea* (December 9th).

De Villiers, C.J.: After an appeal against the judgment of Mr. Justice Maasdorp had been noted it was agreed by the parties and consented to by the Court that the full Court hearing the appeal should also decide the further questions arising out of a case stated by the referee. These questions were whether the plaintiff company is entitled to debit the defendant syndicate with a 2 per cent. buying commission in respect of supplies furnished to the defendants under the first contract, and whether, in calculating the cost to them of the supplies, the plaintiffs were entitled to include the exchange paid by them on remittances to London and to the ports of shipment. The decision of these questions must depend upon the construction of the fifth section of the contract, which, so far as relevant, reads as follows: "The said syndicate shall be bound and obliged to purchase and obtain all their supplies of meat and poultry from the said company's cold storage works, and from no other person or company, and shall pay therefor a price equivalent to 12½ per centum in excess of the invoice price (which includes cost, insurance, and freight)." It appears from the preamble to the contract itself that the company had for some time past been importing frozen or chilled meat and poultry from Australia, and, after storing the same in the company's storage works, had sold it by retail from sundry premises in the Cape Division, and that the object of the contract was to enable the syndicate to take over the business of retailing the meat and poultry from such premises. The contract accordingly provided that the company should hand over all such premises to the syndicate, and that the syndicate should sell the meat and poultry at the

prices previously charged by the company. The company reserved to itself the right to sell meat and poultry by wholesale to butchers and others. For the purpose of purchasing the meat required by the company it employed agents in London, who effected the purchases in Australia or the Argentine, as the case might be, and who, of course, charged the company with a commission for so doing. The commission was 2 per cent. on the purchase price, and the referee has held that such commission forms a portion of the cost which could be included in the price. The defendants' counsel, however, contends that the governing words of the passage fixing the price are the words "invoice price," and that any charges which would not ordinarily occur in an invoice rendered by a seller to a purchaser cannot fairly be included in the word "cost" appearing within the brackets. But the words "insurance and freight" also occur within the brackets, although insurance and freight would not ordinarily occur in an "invoice" rendered as such by a seller to a purchaser. The fact, therefore, of the words "invoice price" being used should not prevent the Court from construing the term "cost" in its ordinary sense. The cost to the company of obtaining the meat would include the commission paid to agents in the usual manner for effecting the purchase of the meat. No evidence of custom seems to have been given before the referee, but the Court may fairly take cognizance of the general commercial practice under which commercial agents, who keep touch with the markets of the world, are employed by wholesale purchasers of commodities which they cannot conveniently obtain direct from the producers. The objection in the present case is not that the commission is too high, but that the syndicate should not have been charged with any commission at all. In my opinion, the commission paid by the company formed part of the cost upon the basis of which the price under the contract had to be ascertained.

As to the exchange paid by the company, it seems that the defendant does not object to the exchange on remittances from London to the Argentine, but that he does object to exchange between the Cape and London. The Court has not been referred to any evidence as to whether the exchange between the Cape and the Argentine direct would have been less than the sum of the exchanges between the Cape and London and between London and the Argentine, although the plaintiff company's counsel stated that it would really be more. Whether this be so or not, I am not prepared to dissent from the view of the referee

that the exchange between the Cape and London should be allowed as part of the cost. The exchange was actually paid by the company, and the evidence does not satisfy me that the payment was unreasonable as part of the cost of obtaining the meat.

The decision of the questions raised on appeal depends on the construction of the 6th clause of the second contract. This contract, after reciting that the company was carrying on the business of importing frozen or chilled meat and other articles of food, provided that the company should supply the syndicate with such articles of good marketable quality, and that the syndicate should not buy from any other person or company any articles of frozen or chilled food. The 6th clause provides that "the said syndicate shall be bound and obliged to purchase and obtain all their supplies of frozen or chilled meat or articles of chilled or frozen food from the company's cold storage works, and from no other person or company, and shall pay therefor such sum as the said supplies shall cost, laid down in the company's stores at Cape Town or Woodstock, plus one-eighth of a penny per pound and 10 per cent., and the said syndicate shall be credited with any trade discounts on cost price and freight in respect of all goods purchased by the said company and supplied to the said syndicate." Under this clause, the company has not charged the syndicate with any agents' commission for the purchase of meat, but, on the other hand, the company has charged, as part of the cost, a proportionate share of the expenses of management in Cape Town and of the expenses of the London office, which had been maintained, *inter alia*, for the purpose of purchasing supplies and arranging freight and insurance on behalf of the Cape Town office. The referee has allowed the charge, and the learned judge has confirmed his ruling. It appears to me that if these expenses were necessary to enable the company to effect the necessary purchases on a large scale, they may fairly be held to be included in the cost to the company of the supplies laid down in the company's stores. It would have been wholly unreasonable to incur the heavy expenses of a London office if the work had to be done there by agents, to whom a commission was paid, but as such agents were not employed, or, at all events, are not charged for, I am not prepared to dissent from the view of the Court below that the expenses of the London and Cape Town offices and officers should be allowed as part of the cost.

The other question on appeal is whether the ten per cent. should be calculated on the cost of the supplies alone,



or on such cost, plus one-eighth of a penny per pound. The referee has correctly observed that if it had been the intention of the parties to the contract to calculate the ten per cent. on the cost of the supplies laid down only, it would have been a simple matter to avoid misunderstanding by inserting the words "and ten per cent." before instead of after the words "one-eighth of a penny per pound." That eighth was admittedly charged to meet wastage and expenses of storage, and although it could not be included in the cost of the supplies laid down in the company's stores, it seems perfectly intelligible that the parties should have agreed that the ten per cent. shall be charged upon such eighth, as well as upon the cost of the supplies up to the time of their being laid down.

The result is that the appeal must be dismissed, and that the direction of this Court must be given in terms of the referee's ruling in reference to the two other questions raised in this case.

Buchanan, J.: I concur in supporting the decision of the special referee and in dismissing the appeal.

Hopley, J.: I am of the same opinion.

De Villiers, C.J., said that, of course, the appeal would be dismissed, with costs, but the question remained of the other costs.

Mr. Schreiner, K.C. (for the Imperial Co.), said that he would like to address the Court on the whole case. There had been the most protracted litigation in this matter, and here they were at the end of 1907 with a debt of nearly £15,000 owing since early in 1906 still unpaid. His learned friend had had an opportunity of putting his whole case before the Court, but the Imperial Company's case had not as yet been placed before the Court.

De Villiers, C.J., said that if the other side were ready, the Court would hear counsel on the whole case.

Mr. McGregor, K.C. (for the Distributing Syndicate), said that they were prepared to have the matter disposed of now.

Mr. Schreiner said that he would, therefore, move for judgment in terms of the referee's report. Counsel proceeded to argue that the plaintiffs were entitled to interest *a tempore morae* from the date of summons, the 18th July, 1906. The referee had gone into the question of interest as agreed between the parties, and had found that £881 14s. 2d. was due to the plaintiffs up to the date of summons. The plaintiffs originally claimed a total sum of £19,972 3s. 5d., and the referee reported that £14,761 was due and owing to them. In the latter figure the amount of £881 14s. 2d. was not included. Plaintiffs now asked for judgment for interest on £14,761 from the date of summons, and £881 14s. 2d. interest on that sum up to the date of summons.

Counsel proceeded to urge that the Court should take a strong view of the costs the referee had not dealt with, viz., costs of the cause. The plaintiffs had very substantially succeeded in their action. Of the difference between the claim and the amount allowed, £3,000 was entirely attributable to the finding that the plaintiffs were not entitled to charge weight of wrappers. On the whole, a greater vindication of the accounts rendered by a big company than the referee's report gave to plaintiffs' accounts it would be difficult to find.

De Villiers, C.J.: Would it not be fair that the parties should each bear half the costs of the reference, seeing that it was for the benefit of both parties?

Mr. Schreiner said that the reference saved a lengthy and intricate trial. The work had been entailed largely by the questions raised by the defendants. He submitted that the Court should direct, as suggested by the referee, that the defendants should pay their own costs of the reference and two-thirds of the plaintiffs' costs, which the referee had fixed at £210. All the costs of the cause should have been paid by defendants.

Mr. McGregor submitted that the defendants were not now prevented from raising the question of interest. Interest was always an integral part of the judgment. Interest was not included in the special cases which had been stated. Defendants, in their plea, claimed that the accounts were wrong. The referee's report supported them in that. There never was at any time any specific sum due which could be rightly claimed by the plaintiffs. The defendants could not, on all the claims, set off on page 9 of the record, have correctly paid interest, because not one of these claims was a correct one. Counsel was addressing the Court on the question of costs, when

De Villiers, C.J., intimated that the feeling of the Court was that each party should pay half the costs of the reference, including the referee's fee. As to the costs of the cause, he did not see how the defendants could avoid these costs. The costs of the motions would, of course, be included.

Mr. Schreiner having been heard in reply on the point as to costs of the reference.

De Villiers, C.J.: The result is that there must be judgment for the plaintiffs for £14,761 15s. 5d., with interest thereon from the date of the summons. A further question has been raised as to whether the defendant syndicate should also pay the sum of £881 14s. 2d., interest computed by the referee as being payable. Now, I do not understand that the defendant syndicate was not entitled to raise any objection to the referee's report, except as to those matters that were specially referred back to the

Court. For instance, he makes certain suggestions in regard to costs. It is quite competent for the defendant syndicate to come forward and object to the decision of the referee in regard to costs, and in the same way I think that the defendants were not foreclosed from raising an objection to bear any interest upon the amount awarded. The general principle in these cases is that interest runs from the date of the summons; *a tempore morae*, and there seems to be no special reason in the present case why the Court should depart from the general practice. Mr. Schreiner has called the attention of the Court to a passage in a letter, which, taken from its context, does not assist the Court very materially. It would appear from that letter that Mr. Sonnenberg on one occasion, on behalf of the syndicate, did admit that he was prepared to pay 6 per cent. interest and "vice versa we should expect a refund from you." That is under the first agreement, "K." There is nothing to show that the defendants were at all times willing and ready to pay interest in respect of the whole amount due. Then Mr. Schreiner has referred the Court to the third clause of the contract (Annexure "N"), where it is provided that "the said syndicate shall, on or before the 15th of each month, pay for any frozen or chilled meat and other articles of frozen or chilled food obtained from the said company during the preceding month." No doubt there is an obligation on the syndicate to pay, on or before the 15th of each month, for meat supplied by the company during the preceding month, but it might fairly be contended that there has been a waiver of that clause. In any case it does not seem to be such a clear case of custom or otherwise as to entitle the plaintiff company to interest, and, therefore, notwithstanding the suggestion of the referee, the Court is not inclined to award interest. In regard to costs, it is quite clear that the bulk of the costs must be borne by the syndicate, and that the defendant syndicate should pay the costs of the cause. The Court will give judgment for £14,761 15s. 5d., with interest from the date of the summons, and with costs, except that each party should pay his own costs of the reference. Then, as to the fees of the referee, the Court thinks that the plaintiff company was responsible for the action, and that it was mainly on their account that the referee was appointed, and that the plaintiff company should be liable in the first instance to pay the fees of the referee, which the Court assesses at £993 11s., but the defendant syndicate to refund to the plaintiff company one-half of the referee's fees and expenses which he has paid.

Buchanan, J.: In concurring generally

in this judgment, I may say that, although as a matter of principle I think it is proper that the costs should follow the result, there are special circumstances, seeing that some of the items have been decided on the one side and some have been decided on the other, which make it only fair to say that each party should bear his own costs of the reference.

Hopley, J.: I concur.

De Villiers, C.J. (in answer to Mr. Schreiner) said that the costs of this motion and of the appeal must be paid by the defendant syndicate.

[Appellant's attorneys: Fairbridge, Arderne and Lawton. Respondents': Van Zyl and Buissinné.]

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ESTATE STOLTENHOFF V. HOWARD. { 1907.  
Nov. 27th.  
Dec. 5th.

Promissory note — Partnership debts—Insolvency of partner.

*Two partners jointly gave a promissory note for certain partnership debts. Thereafter one of the partners became insolvent, and the solvent partner was sued on the note.*

*Held, that the creditor was entitled to provisional sentence, and that it was not necessary to join the insolvent partner as a co-defendant.*

Mr. Watermeyer moved for provisional sentence on a promissory note, payable at the Bank of Africa, Cape Town, for £486 5s. 10d., with interest from the 30th September, 1907, and signed by Howard and Scott.

Mr. Bisset read an affidavit by defendant, who said that the amount was due by the firm of Howard and Scott, under which style deponent had carried on business in partnership with

John Gibson Scott, whose private estate had been surrendered as insolvent. The note was a renewal of a promissory note given by the said firm during the erection of the City Hall buildings for materials supplied. The firm went into liquidation on the 15th November, 1904, Mr. Thomas Masterton was appointed liquidator, the liquidation had not yet been completed, and the partnership had not been dissolved. There were assets of the said firm of both movable and immovable property. Deponent submitted that the firm of Howard and Scott must first be excused before either of the partners could be sued upon the note. Counsel also read an affidavit by the liquidator of Howard and Scott, Mr. Thomas Masterton.

Mr. Watermeyer submitted that plaintiff was entitled to provisional sentence in this case. He quoted Maasdorp's Institutes (vol. 3, p. 334), *Simpson v. Fleck* (3 Menzies, 217), *Blackburn v. McIntjes* (1 Roscoe, 56), and *Copestake v. Alexander* (2 S.C., 146). Plaintiff could not sue the firm in this case, because the insolvency of one of the partners had dissolved the firm. Scott was insolvent, and the only person that could be sued was the remaining partner, Howard. Counsel quoted Maasdorp's Institutes (p. 337), Voet (17, 2, 226), Grotius (3, 21, 8), Van der Linden (p. 579; Jura's Trans., p. 404), Institutes of Justinian (3, 25, 8), Lindley on Partnership (Library Ed., p.p. 557 and 289), and Story on Partnership (Library Ed., p. 572).

Mr. Bisset said he admitted that in the ultimate result the individual partners were liable for the debts of the firm, but there were various intermediate stages which must first be gone through. This was a debt of the firm, the firm was still an entity, it had assets, and, so long as the firm remained in existence, the ultimate liability of the partners would not come into operation. He referred to the Insolvent Ordinance (section 9), and cited *Luck v. Chabaud* (1 Menzies, 531), *King v. Porter, Hodgson and Co.* (1879 Buchanan, 117), and *Haarhoff v. Cape of Good Hope Bank* (4 H.C., 304). In *Simpson v. Flecke* there was an insolvency of the partnership.

Mr. Watermeyer submitted that *Luck v. Chabaud* was clearly in conflict with all the cases, which said that a partner was liable *in solidum* for all the partnership debts. He quoted Lindley on Partnership, pp. 730 and 733. *King v. Porter, Hodgson and Co.* could be distinguished from the present case.

Mr. Bisset mentioned the recent case of *Bell v. Estate Douglass* (17 C.T.R. 810).

Cur. Adv. Vult.

Postea (December 5th).

Maasdorp, J.: The plaintiff sues "Thomas Howard, of Cape Town, here-

inafter styled defendant, heretofore carrying on business as Howard and Scott, in co-partnership with John Gibson Scott, who is now insolvent," upon a promissory note made by Howard and Scott in favour of F. Stoltenhoff. The defendant excepts to the summons on the ground that the debt is that of the partnership of Howard and Scott, and that the firm of Howard and Scott should first be excused before the individual partners are sued. It was clear from the authorities cited by counsel for the plaintiff that the insolvency of one of the partners of a firm has the effect of dissolving the partnership, and it is also clear that the partners are all of them liable *singuli in solidum* for the partnership debts, but it does not necessarily follow from that that they are liable to be sued separately and individually for the debts of the partnership. The question remains whether partners whose partnership has been dissolved by operation of law through the insolvency of one of the partners possess any privileges as defendants in a suit which are not possessed by joint and several co-principal debtors generally. It appears that in England the rule prevailed at one time of including the bankrupt partner as a defendant in actions at law by third persons against the partnership (Story on Partnership, 338), but under the present law, if some of the partners are bankrupt, the solvent partners only need be sued (Lindley on Partnership, 289; and 46 and 47, Victoria, ch. 52, section 114). Here we find that in the English law, the principles of which are the same as ours, as to the effect of bankruptcy of a partner upon the partnership, and the liabilities of joint and several debtors, it is still necessary to proceed against the solvent partners of a partnership jointly after the insolvency of one or more partners. We have no special rule in our law upon this point, nor is there any direct decision upon the question. It seems to follow that if the insolvency of one partner dissolves the partnership, that the partners after that cease to be partners, and become in their relation to the creditors debtors liable *singuli in solidum* in respect of the partnership debts. But even such debtors might be entitled to claim that they should be sued as joint defendants, as stated by Voet (4, 2, 4), where he draws a distinction between the Roman law and the law of Holland, upon the authority of Grotius amongst others. We find in Grotius, 3, 3, 8, and the following paragraphs, the law laid down as follows: "When there are several principals (*correi debendi*) to one promise, all must according to the latest Roman law be sued together. This necessity, however, of suing all together, as also the division of a debt, does not take place: if one

of the principal debtors is notoriously unable to pay, or if the debtors have voluntarily renounced the privilege of being sued together, and of having their debt divided." It has been held that where a person in signing a contract describes himself as co-principal debtor, he thereby renounces the benefit of division and renders himself liable *in solidum*. (*Trustees of Du Toit, as Executors of Smuts*, 2, Men. 27.) Here, however, there cannot be said to be an express renunciation by, or special description of, the liability of the partner, they having merely by operation of law ceased to be partners, and become joint principal debtors. Such renunciation might be implied in their contract of partnership, or from their being as partners joint debtors upon the promissory note, but it is unnecessary to decide that point now or to go into the question whether in case there are more than one solvent partner they should be joined as defendants. That question came up in the case of *Simpson and Co. v. Fleck* (3 Men. 217). Here there are only two partners, and they are now two co-principal debtors, one of whom is insolvent, and upon the authority of Voet and Grotius, the plaintiff need not join the insolvent as defendant in an action against the solvent partner for the recovery of the joint and several debts due by the defendant and the insolvent, that is, of the debt due by the partnership. Provisional sentence is given for the plaintiff, with costs.

[Plaintiff's attorneys: Moore and Son. Defendant's attorney: G. Trolip.]

#### ESTATE McDONALD V. OSWALD AND NICHOLL.

#### Insolvency—Undue preference—Evidence.

Mr. Sutton moved, on the petition of Andrew Cunningham, in his capacity as executor testamentary of Robert McDonald, for the final adjudication of the partnership estate of defendants.

Mr. W. Porter Buchanan appeared for defendants.

The petitioner alleged that defendants were indebted to the estate in the sum of £1,600 upon mortgage of certain property in Woodstock. The bond had become due and payable by reason of non-payment of interest, and demand had been made for the capital, but defendants said that they could not pay the money, and negotiations ensued with a view of avoiding a forced sale. Defendants made certain proposals, which were accepted, but they fell in arrear with their instalments, and in a letter they intimated that they were unable to keep to their promise owing to the

bad times. Petitioner had been informed, and verily believed, that the defendants had parted with certain of their assets to one of their creditors in such manner as to constitute an undue preference, thus committing an act of insolvency. Petitioner believed that it would be for the benefit of the creditors that the defendants' estate should be sequestrated.

The defendant Nicholl denied that at the time he handed over the property that the estate was insolvent. He denied that they were insolvent at present, but that after paying liabilities on present valuations they would have a sum of £354 10s. to the good. He denied that the firm was indebted to plaintiff in £1,600, but admitted liability for £1,510. The property was valued by Messrs. Stamper and Zoutendyk at £2,835 on behalf of respondent, and the stock and plant at £600.

Mr. Sutton read an affidavit by a partner in the firm of Messrs. J. J. Hofmeyr and Son, who valued the property at £1,950, and the stock and plant at £450.

In the course of argument, Mr. Buchanan contended that the onus lay with the plaintiff to show that the respondents were insolvent, and from the affidavits that had not been done. He submitted that the valuations by Messrs. Hofmeyr were what could be called mortgagees' valuations, which meant valuations mortgagees would like to have fixed when advancing money. Although the stock was only valued at £380 by the plaintiff's valuers, it was held as security for a debt of £450.

Mr. Sutton contended that the giving of an undue preference was under section 4 of the Insolvent Ordinance an act of insolvency. The respondents had not endeavoured to prove that they had not given undue preference. Counsel quoted in support of his contention *Trustees Estate Daniels v. Van der Byl and Co.* (1 Roscoe), *Van der Westhuizen v. Steyn* (12 Juta, page 313). Counsel drew the attention of the Court to the fact that Messrs. Stamper and Zoutendyk's valuation was not under oath, and therefore not admissible.

Maasdorp, J.: "In this case the applicant obtained a provisional order upon the ground that the respondents had committed an act of insolvency in having parted with certain of their assets to one of their creditors in such a manner 'as to cause an undue preference.' On this ground the provisional order was made, and it now falls on the applicant to establish the allegations set forth in the petition. It would not be sufficient to prove that the respondents were actually insolvent. Such a statement is not made in the petition, but it may be said that it is involved in the allegation that an undue preference had been made by the respondents in favour of some of



their creditors. The applicant has taken on himself the difficult task of proving that the respondents contemplated the sequestration of their estate, and parted with their goods—with the intention of preferring one of his creditors. A number of letters have been put in which passed between the applicant and the respondents in respect of an indebtedness by the respondents to the applicant, and they would be useful to show what the parties contemplated at the time, and what was the intention of the respondents. It would seem that the respondents were unable to meet their debt upon a bond held by the applicants, and the applicants were pressing them. They made several efforts to come to some arrangement, but the applicants had some difficulty in meeting their proposals, and it ultimately resulted in the applicants saying they would be unable to wait any longer, that they would have to press their claim, and, thereupon, the respondents intimated that they would have to let the matter take its course. What they were contemplating was a suit on the bond by the applicant, and that suit was in respect of a debt for which security had been given. The debt was for £1,600 and the property is valued by an appraiser at £1,600, so it may have been in contemplation of the respondents that when the action was brought the property would be declared executable, and it might meet the judgment debt, almost entirely. However, it was discovered that shortly after this correspondence closed the respondents had parted with certain property as security to another creditor. That was objected to on behalf of the applicant, and some other creditors. It was pointed out to the respondents that they were actually giving a creditor undue preference, and that being pointed out to them, they promised to make every effort to recover the property to save insolvency. That proves that at the time they parted with the property they had no insolvency in contemplation, because they arrived at the conclusion that on recovering the property they would be restored to the position they occupied before the parting, and there would be no likelihood of insolvency. But there is another circumstance. It appears that before the application was made by the applicants, the respondents had already commenced inquiries as to their actual position, and for that purpose had obtained the appraisal of their property by a firm of appraisers, from which it appeared that the estate was solvent. Under all these circumstances, I think the Court cannot come to the conclusion that there was a contemplation of insolvency and intention to prefer. In reference to the other question that has been raised as to whether this estate would ultimately prove to be insolvent,

it is quite possible, but it is not a question which the Court has now to decide, because it is not on that ground that the application is made, and the application will be refused, with costs.

REHABILITATIONS. { 1907.  
Nov. 27th.

Mr. Roux applied, under the Act 38, 1884, for the discharge from insolvency of Jacobus Izak van Aarde.

Granted.

Mr. Watermeyer applied, under section 117 of the Ordinance, for the discharge from insolvency of Frank Nicburg.

Granted.

Mr. Marais applied, under the 117th section of the Ordinance, for the discharge from insolvency of Charles Frederick Austin.

Granted.

GENERAL MOTIONS.

*Ex parte* ESTATE DUTHIE.

Mr. Sutton moved, on the petition of the surviving executors of the late Archibald Hamilton Duthie, for an order authorising the amendment of a certain deed of transfer of the farm Belvedere, division of Knysna. The Registrar of Deeds recommended that a rule nisi should be issued.

Rule nisi granted in terms of prayer (1), returnable on the 4th February, publication once in the "George and Knysna Herald."

*Ex parte* ESTATE LE ROUX.

Mr. Marais moved, on the petition of the tutor testamentary of the minors Le Roux, for leave to join in the partition of certain landed properties, and to pass necessary mortgage bonds to enable the minors to take transfer of their defined shares.

Order granted as prayed, subject to Master's report.

*Ex parte* ESTATE PRETORIUS.

Mr. Sutton moved on the petition of Mrs. Botha, widow of the late Sarel Jacobus Pretorius, as mother and natural guardian of the minors Pretorius, for leave to raise a sum of £222 on mortgage of certain farm property in the division of Barkly East.

Order granted subject to Master's report.

*Ex parte* BEAHNISCH.

Mr. Bisset moved on behalf of petitioner for an order authorising him to

sue the executrix of the late Jacobus P. W. Odendal, and to attach a certain farm, Grootvlei, in the division of Albert, *ad fundandam jurisdictionem*, pending an action to be brought by petitioner to compel respondent to supply water to certain land according to conditions of sale and for damages.

Leave to sue by edict granted, and property attached *ad fundandam jurisdictionem*, personal service, citation returnable on the 1st February.

*Ex parte* ABELS.

Mr. Marais moved for a certain rule to be made absolute authorising petitioner to sue her husband *in forma pauperis* for divorce.

Rule absolute, Mr. Marais to be counsel, and Messrs. Van Zyl and Buissinne to be attorneys to the applicant.

VAN TONDER V. VAN DEN BERG.

Mr. Roux moved for a certain award of arbitrators to be made a Rule of Court, costs to be paid by the parties in equal shares.

Order granted as prayed.

*Ex parte* ESTATE OOSTHUIZEN.

Mr. H. S. van Zyl moved on the petition of the executor for an order authorising transfer of certain property.

Order granted in terms of Master's report, purchase price obtained from the properties to be invested to the satisfaction of the Master.

*Ex parte* ESTATE HEDDING.

Mr. Douglas Buchanan moved for an order relieving T. E. Hedding from his appointment as co-executor. Counsel explained that it had been arranged between applicant and his brother, who were co-executors in the will of their father, that applicant should retire from that position, and the present motion was brought for the confirmation of the Court.

The matter was ordered to stand over to enable his lordship to look into the papers.

*Ex parte* CHADWICK.

Attachment of money due —  
*Meditatio fugae.*

*The Court refused to grant a rule for the attachment of money due to respondent. Applicant alleged that on receipt of such money he believed*

*that respondent contemplated leaving the Colony, but gave no reasons for such belief.*

Mr. Roux moved on behalf of applicant for an interdict restraining the Cape Government from paying to William Stott a gratuity of £37 until a demand by applicant for £36 had been satisfied. The applicant believed that the respondent on the receipt of this money would leave the Colony.

Maasdorp, J., said the applicant gave no reason to the Court for his belief that the respondent would leave the country. It would be rather hard if a bare statement like that would enable a creditor to attach property.

Mr. Roux: All I ask for is a rule nisi. There need be no costs incurred on the return day.

The Court declined to make an order.

*Ex parte* ESTATE DU PLESSIS.

Mr. Gutsche moved for leave to register a certain transfer. The applicant was executor in the estate in which the property was sold. It was sold by public auction at £550, the Divisional Council valuation being £550.

Order granted.

*Ex parte* ESTATE VORSTER.

Mr. Marais moved for leave to pass transfer of certain property.

Order granted.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

*Ex parte* OTTO AND ( 1907.  
ANOTHER. ( Nov. 28th.

Mr. Bisset moved, as a matter of urgency, on behalf of the petitioners, who are married in community to Rebecca Otto and Calrence Gertse respectively, for a temporary interdict against one Jacobus Adrian Louw de Waal, as executor *dativo* in the estate of Jephtha Louis, who died intestate. Petitioners said that their respective wives were half-sisters of one Jephtha Louis, who died intestate about thirty

years ago at Dysseldorp, district of Oudtshoorn. Jephtha Louis during his lifetime lived in concubinage with one Roos April, and there were certain illegitimate issue born to them. At his death he left two pieces of land at Dysseldorp. Petitioners' wives and one Abram Magerman, also a half-brother of the deceased, were the lawful heirs *ab intestato* of the said Jephtha Louis. At a meeting of next-of-kin and others held in the district of Uniondale on or about the 28th June, 1907, the said Roos April and her illegitimate issue, who lived in that district, elected one Jacobus Adrian Louw de Waal as executor dative of the estate of Jephtha Louis, and the said De Waal had had letters of administration granted to him. Petitioners were poor illiterate coloured people, and knew nothing about the proceedings in the preceding paragraph set out, nor had they previously known that it was necessary to go through such formalities. The said De Waal now threatened to pass transfer of the land to Roos April and her illegitimate issue. The prayer of the petition was that Mr. De Waal be ordered to transfer one-third share of the property to each of the petitioners, and be interdicted forthwith from transferring the said property to Roos April and her children, or to anybody else, other than petitioners. Mr. Bissot said he recognised, of course, that he could not ask for such an order at the present stage, and that he could only apply for a temporary interdict, pending an action to be brought to establish the rights of the applicants.

Rule nisi granted, returnable on the 13th January, rule to operate as an interdict in the meantime.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

### PROVISIONAL TRUSTEE.

*Ex parte* WIENER AND CO. (1907. Dec. 2nd.

Dr. Greer moved, as a matter of urgency, on behalf of petitioners, who

are the creditors in the insolvent estate of Mahomed Khangool, shopkeeper, Cape Town, for the appointment of Wyndham Bishop as provisional trustee, with power to dispose of the perishables and collect and receive amount of certain promissory note, and, if necessary, take legal steps to recover same from the drawer.

De Villiers, C.J., said that the Court was prepared to grant the order asked for except as to the power to sue. The latter prayer could only be granted in case the petitioners were prepared to guarantee costs.

Dr. Greer said that he had no instructions on that point.

Order granted, with the powers sought, except power to sue.

REX V. MAGOGO. { 1907.  
REX V. QOPISO. { Dec. 2nd.  
" 9th.

Perjury — Evidence — Ordinance 72, Sec. 33—Two witnesses—Material but collateral fact.

*The accused Q. was convicted of perjury in having falsely sworn in a Resident Magistrate's Court on an application to re-open a case in that Court, on the ground that the defendant M. had been absent when judgment was given against him, "I did not point to a man sitting on the floor and say that Magogo was there. Magogo was not there." Only one witness stated that Magogo was there, but more than one witness swore that the accused, pointed to a man sitting on the floor and said in effect it was Magogo.*

*Held, that the fact that the accused, pointed to a man sitting on the floor and said that it was the defendant, was a material, although collateral, issue, and that as such fact was deposed to by more than one witness there was sufficient to justify the conviction of the accused for perjury in denying that fact on oath.*

This was an appeal from a judgment of the A.R.M. of Flagstaff, who had convicted appellants of contravening sections 106 and 107 of Act 24, 1886, and sentenced him to eleven months'

imprisonment and a fine of £15, or an additional month's imprisonment.

It appeared that a civil case had been heard in the Magistrate's Court, in which provisional judgment had been obtained against one Magogo. Magogo subsequently applied to have the case re-opened, under Rule 29, Schedule B of Act 20, 1856, on the ground that, by just and reasonable cause, he was prevented from attending the court. The question was then raised as to whether Magogo was actually in court when provisional judgment was given against him. In the end, both Qopiso and Magogo were prosecuted for perjury; they were both convicted, and both now appealed.

In Qopiso's case, it was alleged that on the 9th September last he went before the Resident Magistrate at Flagstaff, and falsely deposed and swore that at the hearing of the provisional case he had not pointed to a man sitting on the floor of the Court-house, and said, "There is Magogo." He did not see any one stand up and speak to the Magistrate. Magogo, he declared, was not in the court on that occasion. The perjury was alleged to have been committed in that accused (Qopiso) had at the previous hearing pointed out a man sitting on the floor, and said, "There is Magogo," etc.

Mr. Schreiner, K.C. (with him Mr. Watermeyer), was for appellant; Mr. Nightingale was for the Crown.

Mr. Schreiner said he believed that the Magistrate's mind was influenced by the previous proceedings. The only evidence to prove that perjury had been committed was that of the native constable, whose evidence was most unsatisfactory. There was absolutely no corroboration. As the Court knew, when on Circuit, the interpreter always knew the people round about, and he could not identify Magogo.

[De Villiers, C.J.: Is the same point raised in the other case (Magogo's)?]

Mr. Schreiner: The record is not put in in that case, and that I will prove is fatal. Continuing, he contended that it would be nothing short of a miscarriage of justice if on such evidence as this a man were convicted of perjury. It was perfectly clear from the record that Qopiso was not called at the first hearing of the re-opening application. That re-opening application was postponed. Now, why was it postponed? In order to hear what Qopiso would say. Probably the evidence up to that stage left the Magisterial mind in doubt as to whether Magogo was present or not. As to the other case, the Magistrate gave the only evidence against the applicant, and did not produce any records. It had been held that a certified copy of the record was sufficient, but the idea of bringing a prosecution for perjury without pro-

ducing the record was breaking away from the mode of procedure.

[Hopley, J.: But the record had been put in Qopiso's case.]

Mr. Schreiner: That may be, but I have nothing to do with that. In support of his contention that the records or a certified copy thereof must be produced, Mr. Schreiner quoted the cases of *The King v. Schwartz* (1 Appeal Court, p. 191), *Willem v. The State* (O.F.S. Court, Cape Law Journal, 1897, Vol. 14, p. 296), and Taylor on Evidence (Vol. 1, p. 362 of the 7th edition).

Mr. Nightingale contended that the point the Magistrate had to decide was whether or not Magogo was present in the court that day or not.

[De Villiers, C.J.: In Qopiso's case the technical point arises as to whether there were two witnesses to prove he has committed perjury.]

Mr. Nightingale contended that the fact that Qopiso had made several other wrong statements, supported the action taken by the Crown. With regard to the second case, it was admitted that the record was not put in, but the record did not speak for itself. It was necessary to call the Magistrate as well, and the record only refreshed his mind.

[Hopley, J.: But how do you get over the point raised by Mr. Schreiner?]

Mr. Nightingale said no serious objection had been taken to this matter at the original hearing. There was no doubt as to the correctness of the Magistrate's statement.

*Cur. Adv. Vult.*

*Postea* (December 9th).

De Villiers, C.J.: The case of *Rex v. Magogo* was tried before the Magistrate at Flagstaff. Magogo was charged with perjury. In that case it is admitted that there were two witnesses to prove the falsehood of the evidence given by the accused, but the objection is raised on behalf of the accused that, although oral evidence was given as to the statements made by him, which are alleged to amount to perjury, yet the record itself was not put in, and that, without the production of that record, there is not the best evidence before the Court. I find, however, on reference to the record, that the record was put in. On the 26th August the Magistrate gave evidence. Annexed to the record is the record of the case. As to the evidence, I confess I cannot imagine more satisfactory evidence if these two witnesses are to be believed, because they are two witnesses who positively swear that they saw Magogo in the Court when the provisional judgment was given. They positively swear that they saw him there, and the Magistrate believes these two witnesses, one of



whom was an induna. Here there is clear evidence by two witnesses as to the perjury, and therefore this appeal must be dismissed.

Now, in the case of Qopiso, the charge against him was that he was guilty of perjury in that he did falsely depose and swear as follows: "I (meaning the said Qopiso) did not point out a man sitting on the floor, and say 'There is Magogo.' I (meaning the said Qopiso) did not see any one stand up and speak to the Magistrate (meaning the said John Mould Young). I (meaning the said Qopiso) did not hear the Magistrate (meaning the said John Mould Young) tell any one to go to the interpreter. Magogo was not here (meaning the Court-house at Flagstaff) on the day the case was heard (meaning the case in which provisional judgment was given)." Now, it has been argued that the ultimate fact to be proved in the present case, in order to prove perjury, was that Magogo was not in Court on that day, and that, inasmuch as there was only one witness who deposed to the fact that Magogo was not in Court on that day, the terms of the Ordinance were not complied with which require that on a trial for perjury there must be in addition to and independent of the testimony of any single witness, some other competent and credible evidence as to the guilt of the accused. But in the present case, although the ultimate fact to be proved was that Magogo was present in Court, there were collateral facts which, in my opinion, were quite material to the issue in this case, and one of those collateral facts was that Qopiso did point to a man sitting on the floor, and say "there is Magogo," or words to that effect.

There were not two witnesses who deposed that Magogo was actually in Court, but two witnesses swore that the accused stood up, and pointing to a man sitting on the floor, said in effect that it was Magogo. This was a collateral fact, but it was highly material to the ultimate issue to be tried in the original civil case whether Magogo, the defendant in that case was present or not. The interpreter in his evidence said, "when judgment was being given the accused stood up and asked why judgment was given as Magogo was present, and pointed out with his finger to a man sitting on the floor." Blaje, another witness, said: "When judgment was being delivered, accused appeared and asked why the judgment was given as Magogo was present: accuser was asked who he was. He then ordered Magogo to stand up. Magogo then said he was present." Another witness, Pritchard, said: "A man stood up and said Magogo was before the Court and pointed to the man." The only man who, according to the rest of the evidence, pointed to another man saying it was Magogo, was the accused

Qopiso. Clearly therefore upon the material but collateral fact that the accused did so point to a man and give the Court to understand that it was Magogo, there was more than one competent, and, as the Court below found, credible witness in terms of the 33rd section of Ordinance 72. The accused denied that fact, and such denial constitutes one of the charges of perjury in the present case. The appeal must therefore be dismissed.

Hopley, J.: I am of the same opinion.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*In re* INSOLVENT ESTATE } 1907.  
COWLING. } Dec. 3rd.

Mr. Douglas Buchanan moved, as a matter of urgency, for the appointment of Messrs. G. W. Steytler and Johannes E. Roos as provisional trustees in the insolvent estate of John Frederick Cowling, with power to carry on the bar and hotel at Claremont.

Order granted as prayed.

### ADMISSIONS.

Mr. Upington moved for the admission of Percy Wm. Mallett as a conveyancer.

Application granted, and leave given to take oaths in this court at a later date.

Mr. Roux moved for the admission of Jonathan Alf le Roux as a conveyancer.

Application granted and oaths administered.

### PROVISIONAL ROLL.

WOODHEAD, PLANT AND CO. V.  
NIEUWOUDT.

Mr. Marais applied for an extension of return day of writ of arrest until Tuesday next.

Application granted,

WALKER V. EXECUTORS ESTATE  
MCKENDRICK.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £250, with interest from the 1st July, 1907, bond due by reason of notice having been given; counsel also applied for the property hypothecated to be declared executable.

Defendants applied for a stay of execution until the 31st January, pending sale of the property, which is situated in Stellenbosch.

Order granted, execution to be stayed until the end of January.

GOEDHALS V. GOEDHALS.

Mr. Pohl moved for provisional sentence on a mortgage bond for £600, with interest from the 15th July, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

VAN DER WALT V. FOURIE.

Mr. Payne moved for provisional sentence on two promissory notes for £95 and £32 5s., with interest and costs.

Order granted.

DREYFUS AND CO. V. ESTATE REYNOLDS.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LEGAL AND GENERAL TRUST AND  
INVESTMENT CO. V. LE SUEUR.

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

KRUGER V. MORGASEN.

Dr. Greer moved for provisional sentence on a promissory note for £80, with interest from the 2nd November, 1907, and costs.

Defendant said that he had lost this amount to Mr. Harry Stodell, upon the races. It was a betting debt.

De Villiers, C.J., said that this allegation should have been embodied in an affidavit.

Defendant said that he had no means to employ an attorney. He handed in a number of cheques which he said he had paid to Mr. Stodell, who was a bookmaker, for losses on races. He had paid £359 16s. 6d.

Dr. Greer said that he had no knowledge of the allegation made by the defendant.

De Villiers, C.J., advised defendant that if he wanted to stop paying he had better stop betting.

The defendant then went into the box, and said that Mr. Stodell had sent him tips to Robertson by telegram. He gave Mr. Stodell the promissory note on account of bets. By means of the £359 paid he had won £35.

Dr. Greer said his client was legal holder of the promissory note for value.

De Villiers, C.J., asked whether Hyman Kruger was also a bookmaker?

Dr. Greer: I am instructed that, as far as my attorney knows, he is not a bookmaker.

De Villiers, C.J., said that there should be some explanation by the plaintiff as to whether he knew of the circumstances under which the promissory note had been given, and also as to the circumstances under which it had come into his (plaintiff's) hands.

The case was ordered to stand over until to-morrow.

Postea (December 4th).

Mr. Upington appeared for the defendant.

Dr. Greer (for plaintiff) said he recognised that he could not press for provisional sentence. Plaintiff was the brother-in-law of the original payee, Stodell; plaintiff gave valuable consideration for the note, and at the time he received it, he did not know it was in respect of betting transactions, though he surmised that it was. On the matter of costs, counsel asked the Court to direct each party to bear his own costs, seeing that the present plaintiff was not exactly in the same position as the original payee, and that both parties were *in pari delicto*.

De Villiers, C.J.: I consider that the plaintiff has gone to law without sufficient legal ground, and that he should bear the costs of the action. There may be a *par delictum* in regard to the original transaction, but there is no *par delictum* in regard to the action. Plaintiff is alone responsible for bringing the action, and, therefore, he should bear the costs. Provisional sentence will be refused. If he goes into the principal case, then costs may be recovered again. For the present, provisional sentence will be refused, with costs.

ANDREWS V. RAWBONE.

Mr. Palmer moved for provisional sentence on an acknowledgment of debt for £22 4s. 1d., and costs.

Defendant said that he was only liable for £14, having paid £20 off a debt of £34.

Ordered to stand over until later, no costs to be allowed to plaintiff's attorney for attendance.

At a later stage the case was ordered to stand over until to-morrow

*Postea* (December 4th).

Mr. Palmer said that the balance was made up of costs of a previous summons, which was settled on the return day.

De Villiers, C.J.: The defendant stated yesterday that he understood at the time that the balance of £14 odd included costs. I told him that he need not remain until to-day.

The matter was again ordered to stand over, the Court intimating that notice would be given to defendant when he must appear again.

TEUBES AND ANOTHER V. { 1907.  
LOUWHENS. { Dec. 3rd.  
" 4th.

Act of insolvency—Sec. 4 of Ord. 6 of 1843—Provisional order of sequestration—Writ of execution.

*A provisional order of sequestration having been made upon the plaintiff's statement on oath that he had made repeated attempts without success to obtain satisfaction of a judgment against the defendant.*

*Held, that in the absence of any other proof of insolvency or of any statement that the defendant had been required by the officer charged with the execution of the judgment to satisfy the same, the order of sequestration should be discharged.*

Mr. Sutton appeared for applicants and Mr. McGregor, K.C., appeared for respondent.

This was an application for the final adjudication of the defendant's estate.

Mr. McGregor said that before proceeding to read the defendant's affidavit, he would direct the attention of the Court to the summons, because he found that there was no act of insolvency set forth. The summons was one where the petitioners asked that the estate should be sequestrated as they had obtained two judgments in the Supreme Court, neither of which had been satisfied, wherefore they prayed that the estate be sequestrated. Provisional sequestration was granted in Chambers. There was no act of insolvency set forth. It was not stated that the man

was insolvent, and the Act of 1884 did not come into operation here. Excluding the Act of 1884, there was no act of insolvency coming under the summons. There was nothing beyond the statement that judgments were obtained. The Court could not allow creditors to avail themselves of the extraordinary remedy of compulsory sequestration.

Mr. Sutton based his argument on section 17 of the Insolvency Ordinance. The petition set forth—

De Villiers, C.J.: The petition does not carry it any further. The petition does not state that there has been a return of *nulla bona*, nor does it state that the estate is insolvent. A man may not pay, and yet he may not be insolvent. There should be a return of *nulla bona* before the estate can be sequestrated.

Mr. Sutton submitted that there were two distinct acts of insolvency. In support of his argument counsel quoted *Webster v. Webster* (3 Menzies, 220). There had been a judgment, and the respondent had been required to satisfy it, but had not done so.

*Cur. Adv. Vult.*

*Postea* (December 4th).

De Villiers, C.J.: In this case a provisional order of sequestration was made upon a petition by the plaintiff, in which he stated that repeated attempts had been made by him without success to obtain satisfaction of the judgment which he had obtained against the defendant. There was no statement that a writ of execution had been obtained, or that the defendant had been required by a competent officer to pay the amount of the debt, and on behalf of the defendant on the return day of the summons an objection has been raised that there is no act of insolvency committed in the present case. Counsel for the petitioner stated that another ground might have been urged that the defendant was actually insolvent, but he stated that there was a practice to the effect that two grounds of insolvency should not be stated in the same petition. I am not aware of such a practice. I have spoken to my brother Maasdorp, and he is not aware of such a practice, and even if such a practice did exist the Court can only deal with the case actually before it, and the question is whether the mere fact that a judgment debtor has not paid the amount of the judgment after being called upon by the creditor to pay is an act of insolvency. If it is, I must say it is the first case in my experience in which this law has been acted upon, but, in my opinion, it is not the law, and I have consulted Mr. Justice Maasdorp, who granted the provisional order, and he agrees with me after carefully reading

the section that something more is required under the 4th section of the Insolvent Ordinance. The words are: "... or having against him the sentence of any competent Court, being thereunto required, shall not satisfy the same, or shall not point out to the officer charged with the execution thereof sufficient disposable property to satisfy the same." The plaintiff has relied upon the judgment in the case of *In re Webster* (3 Menzies, 220). All the Court there decided was that it is sufficient to allege that the defendant had not pointed out to the officer charged with the execution of the writ sufficient disposable property to satisfy the same, and that it is not necessary also to state that the Sheriff so required him to point out, etc., because the two clauses are separate. Well, I quite agree with that decision, but that is not conclusive. In the present case what the Court has to decide is whether the meaning of the word "required" is fully satisfied by the creditor himself asking for payment. If that were so, the number of insolvencies would be enormously increased. In many cases in which creditors had obtained judgment they would ask for payment, and if the debtor did not pay, although well able to pay, they would say here is an act of insolvency, and apply for a provisional order of sequestration. I am of opinion that "required" means required by the officer charged with the execution of the judgment. That view is by no means inconsistent with the case of *Webster*, and it is quite in accordance with the decision of the Transvaal Court mentioned yesterday, in which this point was decided. I fully agree with that decision, and I am of opinion, therefore, that in the present case there was no ground for the order, and that it should be discharged, with costs.

Mr. Sutton (for plaintiffs) submitted that the costs should not include costs of the affidavits filed by defendant, seeing that the case had been decided on a legal point. He quoted *Hoffman v. Black* (21 S.C., 23).

Mr. McGregor (for defendant) submitted that the ordinary rule should be followed as regards costs.

De Villiers, C.J.: In my opinion, this point ought to have been raised without any affidavits. The objection appeared on the face of the papers, and it was quite sufficient for the defendant to call the attention of the Court to it without any affidavit. I think, in ordering that the provisional order be discharged, with costs, the Court should direct that it should not include costs of any affidavits filed in the present case.

[Applicants' attorney: G. Trollip. Respondent's: Walker and Jacobsohn.]

#### MARAIIS V. HOLLOWAY.

Mr. Sutton moved for provisional sentence on a mortgage bond for £650, with interest at 6 per cent., and for the property mortgaged to be declared executable.

Order granted.

#### PAARL BOARD OF EXECUTORS V. VAN BEEK.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £50, with interest at 6 per cent.

Defendant appeared personally, and said he was making arrangements to pay the debt.

Order granted.

#### ESTATE McDONALD V. OSWALD AND ANOTHER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,562 10s., with interest at 6 per cent. from July 1, and that the property hypothecated be declared executable.

Order granted.

#### ILLIQUID ROLL.

#### COLONIAL GOVERNMENT V. } 1907. UITWYK SYNDICATE, LTD. } Dec. 3rd.

Mr. Howel Jones moved for provisional sentence, under Rule 329d, for £33 13s. 1d., and the cancellation of a certain lease.

Order granted.

#### ZEEDERBERG AND DUNCAN V. HUGHES.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £116 17s. 4d., for goods sold and delivered, together with interest.

Order granted.

#### FLETCHER V. MARITZ.

Mr. Watermeyer moved for judgment, under Rule 329d, for £95 7s. 2d., balance of purchase price of certain land, less £19 paid on account.

Order granted.

#### MAGGIO V. JOSSELEWITZ.

Mr. Upington moved for judgment, under Rule 319, for two sums of £100 and £112 17s. 4d., with interest *a tempore morae* and costs.

Order granted.



# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ESTATE MCGREGOR V. { 1907.  
VON DORP. { Dec. 4th.

Mr. Bisset moved for provisional sentence for £2,000, with interest from the 2nd November, 1907, upon certain surety obligations upon conditions of sale.

Mr. Upington (for defendant) read an affidavit by G. W. Steytler (agent for defendant, stating that plaintiff had accepted from the Montagu Estates Co. a mortgage bond for £12,000, thereby novating their claim, and releasing the defendant from liability, if any, under the conditions of sale, the terms of which were in some respects varied by the said mortgage bond.

Mr. Bisset read a replying affidavit by G. M. Walker, attorney, stating that the defendant was one of the directors of the company who signed the power to pass the bond. There was no deviation from the agreement between the parties, nor had there been any novation.

Mr. Upington said that he did not think he could rely upon the defence of novation, but he submitted that there certainly had been a material variance in the present obligation, to the prejudice of the surety. This mortgage bond contained a stipulation that on non-payment of interest at the due date the whole debt was to become due and payable. There was no such provision in the original conditions of sale, and the surety contended that by the insertion of that condition in the mortgage bond he was prejudiced in his right as against the principal debtor.

Mr. Bisset submitted that this was a far-fetched defence, and one to which no substantial merit could attach. The plaintiffs were not suing upon the bond; they were suing solely upon the conditions of sale, and seeking to hold defendant liable on those conditions of sale.

De Villiers, C.J.: The objection is raised now that the bond that is passed is not quite consistent with the terms of the conditions of sale. This seems a somewhat extraordinary objection by Mr. Von Dorp, the defendant in this case, who, in his capacity as a director of the Montagu Estates Company, actually signed the power of attorney authorising a bond in the form which has been framed, viz., that on failure to pay off the interest the bond was to be called up. But the bond has not been called up. I understand now that what the plaintiff is suing for is for such amount as under the conditions of sale he could

have sued for, so that there has been no possible prejudice to the defendant by the form in which the bond has been passed, so far as the present action is concerned. There must be provisional sentence, with costs.

FERREIRA V. FERREIRA.

Mr. Toms moved for a certain rule nisi to be made absolute admitting petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights. Counsel said that publication had been made in the "Knyena Herald" in terms of the order.

Rule absolute, Mr. Toms to be counsel, and the Messrs. Harold and Gie, attorneys to the petitioner.

## REHABILITATIONS.

Mr. Howes applied under section 14 of Act 38, 1884, for the discharge from insolvency of Johan Petrus Swart.

Application refused, with leave to apply again in three months.

Mr. Roux applied for the release from sequestration of the estate of Nicolaas Hendikus Schietekat. No creditors, he said, had proved against the estate, and all the creditors appearing on the schedules had consented to the release.

Granted.

LEWIS AND CO. V. SWANICH.

Mr. H. S. van Zyl moved for a temporary interdict restraining respondent from disposing of his rights in a certain general dealer's business in the division of Malmesbury pending an action to be brought by applicants to recover a sum of £65 1s. 1d. on a promissory note. Applicants said that the respondent had gone to Buenos Ayres and that before leaving he gave them the promissory note. They did not know whether it was his intention to return to this country. The promissory note became due and payable about two months ago, and had not been met. On the 22nd November last a notice appeared in the "Cape Times" that it was intended to transfer the licence of the defendant's business under section 11 of Act 36, 1906, to one Wassenaar.

De Villiers, C.J.: The case is somewhat special, because it would look as if this man had given the promissory note merely for the purpose of getting out of the clutches of the law. The Court will, therefore, grant a rule interdicting G. W. Kotze or any other

representative of the defendant from parting with any funds in his hands belonging to the defendant, and calling upon J. C. Wasseau to show cause why he should not be restrained from paying over to the defendant or his agent any sum payable by the said Wasseau to the defendant, pending further order of Court, the rule to operate as an interdict in the meantime, and to be returnable on the 12th January.

HOWARD, FARRER AND CO. { 1907.  
AND OTHERS V. EAST { Dec. 4th.  
LONDON MUNICIPALITY.

**Perpetual interdict—Temporary interdict—Nuisance.**

*On an application for a temporary interdict, pending action, to restrain the respondents from depositing Town refuse within a radius of 600 yards from the business premises of the applicants, which they had hired from the respondents, some medical men stated that the filth was dangerous to the health of the applicants' employees, whilst other medical men stated that there was no danger whatever. The only means adopted by the respondents to render the refuse innocuous was by depositing street sweepings on the top.*

*Held, that as there was prima facie evidence of a nuisance, the applicants were entitled to a temporary interdict pending action, which was to be forthwith instituted without prejudice to any claim the respondents might have to recover damages sustained by reason of such temporary interdict.*

This was an application upon notice to the respondent Municipality to show cause why a temporary interdict should not be issued debarring them and their servants from depositing rubbish and filth within a radius of 600 yards from certain property at East London known as the rough goods and timber site, pending the institution of an action on the part of the applicants to compel respondents to entirely abate the existing nuisance, and for damages arising out of the proximity of the rubbish tips to the said timber site, or, alternatively, cancellation of the lease entered into

between applicants and respondents on the 24th April, 1903, and damages.

Mr. Upington was for applicants; Mr. Close was for respondents.

Mr. Upington, in argument, cited *Bliss v. Hall* (4 Bingham's New Cases, 183) and *Gifford v. Hare* (14 S.C., 255).

Mr. Close cited *Beaufort West Municipality v. McIntyre* (16 S.C., 541), *Trill and Others v. Claremont Municipality* (21 S.C., 362), and *Colonial Government v. Mowbray Municipality* (11 C.T.R., 605).

De Villiers, C.J.: There is considerable conflict in the evidence in the present case, and it certainly is not a case in which the Court will, without an action, grant a perpetual interdict restraining the Municipality from depositing this filth in the neighbourhood of the applicant's premises. But a strong *prima facie* case has, in my opinion, been made out by the applicants. It is true that the majority of the doctors who made their affidavits state that on the occasions on which they visited the premises there was no nuisance. But, on the other hand, doctors on behalf of applicants state that there was a decided nuisance, and if they were there at different times then the evidence would be perfectly consistent. It is true that the nuisance is not continuous, but even if it be intermittent only, it may be very injurious to the health and dangerous to the life of those who have to transact their business in the neighbourhood. It is said that at the time when the applicants first took occupation of their premises, the nuisance already existed, but I can well understand that it would be an increasing nuisance. When the rubbish heap was not very large, the nuisance might be less, but if there is a constant adding to this rubbish heap without sufficient deodorisation of the contents, I can quite well understand that there is an increasing nuisance, which might ultimately become intolerable. The stuff which was put on the top of the filth or refuse is not of such a nature as to prevent it becoming dangerous to health, and there is the statement of some of the witnesses that they actually suffered from the effects. Their symptoms were not so serious apparently as to necessitate medical advice, but for the purpose of constituting a nuisance it is not necessary that it should be so serious that a doctor has to be called in, but there was serious discomfort from the smell, and several of the witnesses traced their illnesses to their contact with these bad odours. It stands to reason if filth of this kind be deposited within a distance of 150, 200, or 300 yards of a place like the applicants, that the effect of it would be to cause injury to health. The distance at which the applicants claim that the filth should be deposited is not an unreasonable one,

and I consider that, in refusing to grant a perpetual interdict and directing the applicants to proceed by action, the Court should grant an interdict in the meantime restraining the respondents from depositing rubbish, night soil, or any other filth of whatsoever kind within a radius of 600 yards from the applicants' rough goods and timber site. It is quite possible that when the parties go to trial it may be shown that there is no real nuisance. It is quite possible, on the other hand, supposing there is a real nuisance, that there might be a serious danger to the health of these people if in the meantime there is no interdict granted, and it seems to me it would not be a very serious inconvenience to the respondents then to have to deposit the filth at a somewhat greater distance from the applicants' premises. Judging by the plan there, I should think there must be sufficient space beyond the 600 yards radius. If there should be no space, the respondents might apply again to reduce the number of yards, but I should think that 600 yards would be about the nearest distance that would be quite safe. There is no statement here from either side that the Municipality have no space in which to deposit rubbish, except within the 600 yards, but, if there is no room there, I should think they will find room elsewhere. At all events, they have got the sea close to East London, where, I suppose, rubbish of that kind could be deposited pending the action. Costs of this application will be costs in the cause.

Mr. Olose applied for leave to the respondents to claim in reconvention any damage to which they may be put by reason of the interdict in case they succeed in the action.

[De Villiers, C.J.: I suppose that would be fair.]

Mr. Upington said he did not object to this being put in the order, though he thought it was unnecessary.

[De Villiers, C.J.: An interdict will be granted without prejudice to any right to damages which respondents may sustain by reason of the interdict. The applicants must go to trial next term. Notice of motion will stand as summons.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* LE RICHE. { 1907.  
Dec. 5th.

Mr. Roux moved on the petition of S. A. le Riche for an order authorising the Civil Commissioner of Gordonia to accept a certain declaration of seller, which had not been signed in accordance with the section 10 of Act 5, 1834. It appeared that petitioner bought certain land at Saulstraat, and that transfer had not been completed. The declaration of seller should have been made before a Justice of the Peace, but it appeared that there was no J.P. within a distance of 200 miles of Rietfontein, and the declaration had been made before two witnesses. It was now impossible to get the signature of the seller, as his whereabouts was unknown.

[De Villiers, C.J.: What power has the Court to dispense with the law? Is there no section which will authorise the Court to do this?]

Mr. Roux explained that the brief had just been put in his hands, and he had not had time to look up the authorities. The petitioner had the declaration by the seller, but it had not been made before a J.P. No J.P. was available, and they had the evidence of two witnesses that it was solemnly declared before them. If the Court approved of the solemn declaration which was now produced—

[De Villiers, C.J.: The Court can only make an order in case you show that it is a legal declaration. The Court cannot authorise illegalities. The question is, have you complied with the law? The Court can direct the Civil Commissioner to grant you a receipt if you have complied with the law.]

Mr. Roux: My submission is that strictly under this section we have complied with the law.

[De Villiers, C.J.: When the Legislature speaks of a solemn declaration, does it mean anything but a declaration made before a J.P.?]

Mr. Roux said that in the special circumstances the petitioner had brought the matter before the Court. There was an allegation that it was now impossible to get the declaration of the seller made before a J.P., because he could not be traced.

At a later stage, Mr. Roux again mentioned the matter, and called the Court's attention to section 12 of the Transfer Duty Act, which, he said,

authorised the Civil Commissioner to dispense with a solemn declaration if he were satisfied that the seller had left the country.

[De Villiers, C.J.: If the law authorised him to do it, let him do it. If the case is represented to him, no doubt he will do it. No order will be made.]

#### GENERAL MOTIONS.

*Ex parte* ESTATE BARRY { 1907.  
AND ANOTHER. } Dec. 5th.

Mr. H. S. van Zyl moved for a certain rule authorising the issue of a certified copy of a certain bond to be made absolute.

Rule absolute.

*Ex parte* Y.M.C.A., STELLENBOSCH.

Mr. H. S. van Zyl moved on the petition of Nicolaas J. Hofmeyr, as president of the Board of Managers, Y.M.C.A., Stellenbosch, for an amendment of a certain deed of transfer by the elimination of a special condition, which provided that in case the Y.M.C.A. ceased to exist the property should go to the Students' Christian Association, and in case the latter body should cease to exist to the professors of the Theological Seminary and the minister of the Dutch Reformed Church, Stellenbosch. Counsel stated that it was entirely at the wish of the petitioner himself that this special condition was inserted in the deed, and that the estate from which the property was acquired had not specified any conditions that must be inserted in the deed. It appeared that the Students' Christian Association did not exist at Stellenbosch. There was a body called the Victoria College branch of the Students' Christian Association. Petitioner had obtained the consent of the theological professors and the Dutch Reformed Church minister to the elimination of the special condition. It was now considered that other arrangements should be made. Such other arrangements had actually been made, and the Court was now asked to grant an order for the elimination of the special condition in order that certain other conditions might later on be inserted which would meet the object the petitioner had in view.

[De Villiers, C.J.: Why not insert them at once?]

Mr. Van Zyl: The idea was to have these other conditions registered against the title deed of the property. Petitioner desires to get clean transfer now, and then have the fresh conditions registered in the ordinary course.

De Villiers, C.J.: I think there should be a rule in this case. It may

be that somebody will come forward to represent the Students' Christian Association. A rule nisi will be granted calling upon all concerned to show cause why the condition mentioned in the deed should not be expunged therefrom, rule returnable on the 12th December, one publication in "Ons Land" and an English newspaper circulating in Stellenbosch.

*Ex parte* ESTATE RIGGE.

Mr. Sutton moved, on behalf of the *curator bonis* of Mrs. Rigge, for an amendment of the order granted on the 15th August, 1907, so as to vest petitioner with the custody and administration of the estate, with power to do all things necessary for the maintenance of Mrs. Rigge, and invest such moneys as may be received by him on mortgage of immovable farm property in the Colony, provided that the approval of the Master to such investment be first had and obtained, and for authority to the Master to pay out moneys from the Guardians' Fund for such purpose.

Order granted as prayed, costs to come out of the estate.

*Ex parte* ESTATE LATE MCGREGOR.

Mr. Bisset moved, on the petition of the executors of estate McGregor, for leave to sue by edictal citation one Henning, who was believed to be in German South-west Africa, upon a certain mortgage bond, and to attach 1,700 shares belonging to respondent in the stock of the Montagu Estate Co.

Order granted as prayed, citation returnable on the first day of next term, personal service to be effected.

ESTATE STEYN V. ESTATE BRITZ.

Mr. Howes moved, on the petition of the executor *dative* of the estate of H. R. de Vos Steyn, for cancellation of certain mortgage bond. The respondent set out certain facts on affidavit, and submitted to the order of the Court. Counsel stated that some 30 odd creditors of the respondent estate had consented to the application.

Rule granted calling upon all concerned to show cause on the first day of next term why an order should not be granted as prayed, rule to be published once in English and once in Dutch in a newspaper circulating in Oudtshoorn.

*Ex parte* ESTATE DE WIT.

Mr. Roux moved, on the petition of the curator, for leave to pass a mortgage bond for £450, to pay debts, etc.,



and empowering the Master to authorise the passing of such other bonds as may be necessary.

The Court granted an order authorising the raising of a loan of £450, and of such further loans on mortgage, and for such amount as the Master of the Supreme Court shall deem necessary.

*Ex parte* SCHARFF.

Mr. Roux moved, on behalf of petitioner, as guardian of his two minor daughters, for leave to sell certain property which had been donated to the said minors. Petitioner was proposing to leave Keimoes, division of Gordonia, and to settle in North America.

Order granted as prayed.

*Ex parte* ESTATE VAN WYK.

Mr. Roux moved, on behalf of the tutors testamentary of the minor children of the late Mr. Van Wyk, for an order authorising transfer of certain property.

Order granted in terms of Master's report, Mr. E. M. J. van Rensburg, J. son, to be *curator ad litem* to represent the minors in the proposed division of the property, costs to be paid by the legatees in equal shares.

*Ex parte* ESTATE ROSSOUW.

Mr. Gutsche moved for cancellation of a certain mortgage bond registered against property at Diep River in 1846. Counsel said that all efforts to trace the mortgage creditors or their heirs had failed.

Rule granted, returnable on the 12th January, one publication in an English newspaper, and one in a Dutch newspaper circulating in Cape Town.

*Ex parte* INSOLVENT ESTATE AITKEN.

Mr. Roux moved, on the petition of Geo. Wallis, jun., as sole trustee in the insolvent estate of Alexander Aitken, of Oudtshoorn, for leave to pass transfer of certain erven in the estate, sold at public auction to Mr. Wallis.

Order granted.

*Ex parte* ESTATE LLOYD.

Mr. McGregor, K.C., moved, on the petition of the executors testamentary, for the appointment of Mr. W. Porter Buchanan, K.C., as *curator ad litem* to represent certain minors in an action instituted by petitioners against the estate of the late Frank de Jong, and

for the joining of the curator as co-defendant with the executors of the late De Jong.

Order granted as prayed.

*Ex parte* SCOTT.

Mr. Roux moved for cancellation of certain sales of lots of the farm Kroenendal, Hout Bay, effected in 1903. Four parties—Thomas McCourt, Norman Taylor, Samuel Bodell, and Joaquim da Silva—had failed to carry out the conditions of sale, and could not now be traced. Counsel said that he only applied at present for a rule, and he referred to the recent cases of Friell-lander Bros., Albrecht, and the Fernwood Estate. In this case, only two instalments of the purchase price had been paid. It was true that the conditions did not contain a forfeiture clause.

Rule granted, calling upon all persons concerned to show cause on the 12th January why the sales mentioned in the petition should not be cancelled, and why transfer dues should not be paid out of the amounts paid to the petitioner in respect of any sales, with leave to petitioner to deduct from any balance in his hands the costs of these proceedings and any interest that might be due to him in respect of any sale, rule to be published once in a Cape Town newspaper.

*Ex parte* ESTATE FOURIE.

Mr. Watermeyer moved, on the petition of the executrix testamentary, for an order authorising registration of certain mortgage bond of £600 against landed property at Philip's Town.

Order granted as prayed.

HEYDENRYCH V. ESTATE	{	1907.
MACKIE, YOUNG AND CO.		Dec. 5th.
AND ANOTHER.		" 11th.
		" 17th.

Priority--Proof of debt--Insolvency — Covering bond — Novation.

*The respondents, under an agreement with C., a supporting creditor of M. on open account, satisfied his debts to C. and received bills drawn by C. upon M., accepted by M. and indorsed by C., and as security for these and other debts which M. might thereafter incur to the respondents, obtained cession from C. of two covering bonds of £5,000 and £3,000 passed*

the mortgagees, they are entitled to the same preference in respect of the bills thus proved by them as Creswell, Sons and Co. would have had in respect of the debts originally incurred in their favour by the insolvents. In support of this contention they rely upon the order of this Court that "a fresh distribution account be framed according to which preference under the different duly registered covering bonds shall be awarded according to priority of the dates when the debts respectively proved were originally incurred." It is clear, however, that the Court referred only to debts still subsisting and not to debts which had been extinguished by payment or by novation or by any other means. The original debts owing by the insolvents to Creswell, Sons and Co. were book debts. According to the affidavit of Henry John Gardiner, one of the second respondents, his firm was in December, 1903, induced by Creswell, Sons and Co. to take over the account of the insolvents, and he adds that the firm satisfied Creswell, Sons and Co. in respect of their claim against the insolvents. It is reasonably clear from the evidence that what took place was this. Until November, 1903, Creswell, Sons and Co. had been supporting the insolvents; and it was now arranged that they should transfer the securities which they held for the debts owing to them by the insolvents to the second respondents, who, on their part, should satisfy the claim of Creswell, Sons and Co. against the insolvents. No cession was, however, effected of Creswell, Sons and Co.'s claims on open account, but bills drawn by them for the amount on the insolvents, accepted by the latter, and indorsed by the drawers, were given to the second respondents as security for these bills, and for any other debts which the insolvents might thereafter incur to the second respondents, the firm of Creswell, Sons and Co. ceded their rights under the bonds of £5,000 and £3,000 to the second respondents, subject to the prior claim of the Standard Bank, but the only cession appearing on the face of the bonds is the cession to the Standard Bank. It is noteworthy that in the letter of 18th November, 1903, whereby Creswell, Sons and Co. agree to instruct the Standard Bank to transfer these bonds to the second respondents on certain conditions, they state that the bonds are to be held as security for the amounts owing by the insolvents to the second respondents. There is no statement in that letter, or in any of the correspondence produced, that the original debts owing to Creswell, Sons and Co. were to be ceded to the second respondents, or that the bonds were to be considered as security for such debts. The bills drawn on the insolvents were duly accepted, and as they were dis-

honoured they were proved upon the insolvent estate of the acceptors. Notwithstanding such proof made by the second respondents, they now claim a preference as if they had obtained a cession of Creswell's original claim, and had afterwards proved in respect of such ceded claim upon the insolvent estate. If there had been a cession of the original claim, it might fairly have been contended that the parties intended to keep alive the original claim on open account, which Creswell, Sons and Co. had against the insolvents. In the case of *Exors v. Resident Magistrate of Oudtshoorn* (Foord, p. 32), it was held that the mere fact that a debtor has given his own promissory note to his creditor does not lead to the necessary inference that the parties intended to substitute the note for the debt. In the present case, the drawing and endorsement of the eleven bills by Creswell, Sons and Co., and the acceptance thereof by the insolvents, formed part of a transaction which evidenced the intention of all the parties thereto that there should be a complete novation of the original debt. The original creditors, it is true, ceded the covering bonds which they held to the second respondents, but they did so to secure the fresh obligation which the debtors incurred to the cessionaries of the bond by accepting the drafts that became payable to such cessionaries. If it had been intended that the original debt should be resuscitated on failure of the payment of the bills, the parties would have taken care to provide for such an event by means of a cession of the original debt to the cessionaries of the bond. After the acceptance of the bills, the original debt was wholly ignored by all parties, including the insolvents, whose subsequent arrangements with the second respondents, to which I shall presently refer, were wholly inconsistent with a continued liability for the original book debts. It is said that those book debts had been purchased by the second respondents, but if there was a purchase at all, it was a purchase of the bills which were to be substituted for the original debts. When the second respondents themselves came to prove their claims they proved as holders of the bills and not as purchasers or cessionaries of the rights which Creswell, Sons and Co. had previously possessed in respect of the original book debts. There had, in my opinion, been a novation of those debts, and as they were no longer subsisting debts, no preference could be awarded in respect of them. Even, however, if there had been no novation of these debts, there is a further difficulty in the way of such preference. The bonds of £5,000 and £3,000 under which such preference was claimed and awarded had, by

arrangement between the parties, been superseded by a later bond of £15,000. This bond was passed on April 29, 1904, and was later in date than three of the covering bonds passed by the insolvents in favour of the applicant. The negotiations for the passing of the bond of £15,000 had begun in November of the previous year. On the 18th November, 1903, Creswell, Sons and Co. wrote to the second respondents as follows: "In consideration of you giving a guarantee to the Standard Bank in respect to our outstanding bills on Mackie, Young and Co., we hereby agree to instruct them to transfer to you upon payment of the said bills, the bonds which we have handed to them, to be held by you as security for amounts owing by Mackie, Young and Co. to you, until such time as they are cancelled or replaced by a new bond, which we understand you will obtain consequent on your decision to take over their account from us." The agreement for the passing of such a bond was made between the insolvents and the second respondents on the 4th of December, 1903. The amount was to be £15,000, and the fresh bond was to be held as security for all acceptances, advances, bills, interest, commission, and other indebtedness that may at any time be owing by the insolvents to the second respondents. It is then specially provided that until the bond for £15,000 is passed, the two bonds of £5,000 and £3,000 shall be a security to the second respondents for the indebtedness of the insolvents, subject to any prior claim of the Standard Bank. This provision clearly shows that the bond of £15,000 to be passed directly in favour of the second respondents was intended to be in substitution for any claims which they might have in respect of the two prior bonds ceded to them. On the 29th April, 1904, the bond of £15,000 was duly passed, and special reference is made in the bond to the agreement of 4th December, 1903. After the passing of that bond, it is difficult to see how the second respondents can, in justice to the other preferent creditors of the insolvent estate, be allowed to claim the benefit of the two prior bonds. It is said that these bonds have not been cancelled, but by accepting the bond of £15,000 the second respondents relinquished all claims to preference under the two prior bonds, whether those bonds were cancelled or not. It may well be that the Standard Bank may take advantage of the non-cancellation of these bonds, but the second respondents could not claim as against the insolvents, and cannot now claim as against other preferent creditors that these bonds are still in force. The only argument which at first raised any doubt in my mind is that, as no objection was raised by the applicant

to the second respondents' proof of debt, he is now foreclosed from objecting to the distribution account. In that proof of debt the two earlier bonds are mentioned along with the bond of £15,000 as part of the security held by the second respondents for the debts proved by them. On full consideration, however, I am of opinion that the admission of the proof of debt in that form is not conclusive as to the right of the proving creditors to preference in respect of every one of the bonds mentioned in the proof. After such proof, it would still be competent for the trustee, upon finding that the latest of the three bonds had been accepted by such creditors in substitution for the two earlier bonds, to award preference only under the latest bond. There is no evidence to show that the applicant knew at the time when the second respondents' proof of debt was filed that the bond for £15,000 was in substitution for the second respondents' rights as cessionaries of the two earlier bonds, but even if he did know it, he was not bound to raise any objection until he could ascertain from the distribution account under which of the bonds preference would be awarded. Under all the circumstances, I am of opinion that the distribution account should be so amended as to award to the second respondents such preference only as they would be entitled to under the bond of 29th April, 1904, in respect of the bills proved by them, according to the dates thereof. The second respondents will bear the applicant's costs, but the first respondents' share of the costs will be borne by the estate.

[Applicant's Attorneys: Van der Byl and De Villiers; Respondent's Attorneys: Reid and Nephew.]

[Before the Hon. Mr. Justice MAASDORP.]

## APPEALS.

ALLIE V. CHRISTIANSE. ( 1907.  
( Dec. 5th.

Mr. P. S. Twentymann Jones appeared for the appellant, and Mr. Benjamin, K.C., for respondent.

This was an appeal against the judgment of the A.R.M. at Piquetberg, delivered in connection with any exception taken to a summons in which Pieter Christianse, a painter, sued Sheik Allie to recover £18 12s. 6d. for work done.

It appeared that respondent, who was plaintiff in the Court below, sued Sheik Allie in the Assistant Resident Magistrate's Court at Piquetberg on August 12, to recover £18 12s. 6d. for work done. Allie did not appear, and judg-

ment went by default. On September 10 Allie summoned Christianse to show cause why the case of August 12, when Christianse was plaintiff, should not be reopened. The reason why he claimed the reopening of the case was because the service of the summons was not in accordance with law, Allie at the time being outside the jurisdiction of the Court, he being in Cape Town, and the summons being served on a clerk, who was not authorised to accept service of the summons, and judgment went against him in default. He wished to reopen the case on these grounds, and the Magistrate would not allow him to do so. The Magistrate questioned if the application to reopen the case was in time, but the Act 20 of 1856 as to Magistrates' Court Procedure laid down that application could be made within a month from the date of the judgment.

Mr. Benjamin submitted that the point raised was a technical one, and if it were wished to raise a technical point, the appellant should have complied with the technicalities, and that he had not done, because he failed to supply the respondent with a copy of the judgment. In support of his argument, counsel quoted the case of *Kriel v. Kriel* (15 S.C.L., p. 369). He submitted that there was great laxity shown in the whole of the proceedings.

Maasdorp, J.: In this case it appears that the plaintiff has very carefully and fully set forth in his summons all the grounds that he intends to rely upon in his action. It is there stated that the judgment was obtained on a certain day by the present defendant in the case, and gives the date of the summons on which that judgment was given. It alleges that a writ was taken out, and that he now claims to have the judgment set aside, on the ground that he was not resident within the jurisdiction of the Magistrate's Court, and also alleges in his summons that the original summons in the case in which he was defendant was not served on him, but was served at a place other than his residence, and upon a person who had no authority to accept service of the summons, and alleges that the return of the Messenger was annexed to the summons. So it is quite clear what Mr. King refers to when he admits that a copy of the service of the summons was served on the present defendant with the other summons. Without going into the question at any length as to what documents might or might not have been under ordinary circumstances required to be served on the defendant in this case, it is only necessary to decide whether he has suffered any prejudice through the want of service of the documents which are mentioned in the exception. The documents referred to are the judgment given in the

original case. Now it is quite clear that the defendant could suffer no prejudice from the absence of the service of the judgment which he had himself taken out of the Magistrate's Court, and which formed part of the record of the Court in which action was then brought. The summons in the original case and the writ of execution are all matters within the knowledge of the plaintiff himself, for whose benefit these processes were issued. The Magistrate himself in one part of his judgment states: "That defendant in this case would not be really prejudiced by the want of these documents, but that by some possibility it might appear that the time might have elapsed in which he should have reopened the case, and that certain documents should have been put in, in order to clear up the point." On the question as to whether he had moved in the matter, before thirty days had expired, from the service of the subsequent writ of execution, the Magistrate seems to have overlooked this fact, that the judgment in the original case was given on August 12, and that the summons to reopen the case was issued on September 9, and consequently it was impossible that the required period could have elapsed, which would bar the defendant from re-opening the action. It is quite clear that when he issued the summons on September 9, within a month after the judgment was given, it must necessarily be within a month of the writ of execution. The question the Magistrate has to decide is whether the defendant lives beyond the jurisdiction of the Court, and for the purposes of his decision on that question all the necessary documents were before the Court. Under all the circumstances, I think the defendant could not have suffered any prejudice on any of the grounds alleged in his exception, and the exception must be overruled, and the matter referred back to the Magistrate to be dealt with on its merits.

The appeal will be allowed, with costs, including the costs of the day in the Magistrate's Court.

#### MACMINN V. MACAZIMI.

This was an appeal from the judgment of the Resident Magistrate at Flagstaff. Originally the plaintiff (appellant) sued the defendant on a promissory note for £18. The Resident Magistrate gave judgment for £11, and the plaintiff appealed on the grounds that the judgment should have been for £18, and not for £11. From the evidence given in the Court below, it appeared that the respondent agreed to work on the mines for nine months in consideration of which appellant gave



him a cow, for which respondent gave a promissory note for £18, to be met in three months. Respondent did not work his full time, and when applied to for the amount of the note refused to pay it, or return the cow. The respondent admitted entering into the agreement to work, and receiving the cow, but denied that he had signed the promissory note. He owed the appellant six months' work for the cow.

The Magistrate, in his reasons for his judgment, was satisfied that the respondent had signed the note, and that he received a cow valued at £13 as an advance, and that for the period he worked the appellant drew £6. The appellant also paid £4 for respondent's travelling expenses to the Rand, which added to the value of the cow made £17, from which had to be deducted the £6, which left a balance of £11, for which there would be judgment.

Mr. Benjamin, K.C., for appellant; respondent in default.

Maasdorp, J.: The Magistrate admits in the reasons given for his judgment that he has gone outside the summons, but he says he considered it right to do so, with a view to arriving at an equitable finding. On the whole, I think it would have been safer for the Magistrate to have confined himself to the contract which was actually proved to have been made between the parties. The plaintiff alleges that the defendant made a promissory note in his favour for £18, to fall due on August 15. The defendant denied that he had made this promissory note, and in evidence he stated positively that he had never been a party to this note, but the Magistrate found that that was not true. Upon that finding of fact by the Magistrate, the defendant became liable on August 15 for the payment of this £18. If any portion of it had been paid off by the defendant, such payment should have been pleaded; but without going into the question whether the plea of payment was actually necessary, the Court will take into consideration the evidence given before the Magistrate, which amounts to an admission on the part of the plaintiff that he actually received at one time £6 from the defendant, but then he states that, on the other hand, he had also made an advance to him of £4, so that the actual amount to the credit of the defendant would only be £2. It seems that the defendant was on the point of going to the Transvaal to work at the mines, and he required some assistance. The assistance rendered to him by the plaintiff was what seems to amount to the gift of a cow, which apparently would be made use of by his family during his absence. For the assistance rendered by the plaintiff, he naturally wanted some profit, and although the cow is valued at £13, there

is nothing illegal in the plaintiff contracting with the defendant that he should receive in three months from the defendant the sum of £18. The plaintiff is liable upon his promissory note, and the only set-off that can be taken into consideration is the part payment of £2. The Magistrate was wrong in allowing other equitable considerations in favour of the defendant and reducing the claim to £11. The appeal must be allowed, and judgment altered for the plaintiff for the sum of £16, with costs (including costs in the Court below).

#### COOPER AND ANOTHER V. TRUTER.

This was an appeal from the judgment of the Resident Magistrate at George in an interpleader action. The defendant in the Court below was Truter, who had seized and taken in execution certain property (donkeys) belonging to George and Johannes Cooper. After these things had been attached in the suit of Truter v. Cooper, George Cooper brought this action to prove that the donkeys were the property of him and his brother. The Magistrate held that the appellants were wrong in their action, and that the property should be declared executable. From this decision, the present appeal was brought.

The evidence read by counsel was of a most contradictory nature.

Mr. J. E. R. de Villiers appeared for the appellant, and Mr. P. S. Twyman Jones appeared for the respondent.

Counsel having been heard in argument on the facts,

Maasdorp, J.: I do not see how the Court can interfere with the finding of the Magistrate in this case. He has decided mere questions of fact, and according to the credibility of the witnesses. His decision is supported by very strong circumstances in this case. It appears that an action was brought by Truter against George Cooper for debt, and the donkeys in question and harness were seized in execution of the judgment. Now there is evidence that at the time this debt was incurred George Cooper gave as security for the debt the donkeys and harness in question. George Cooper is now called as one of the principal witnesses for the defence to show that the property belonged to his brothers. There is a written document put in, in which he alleges that the property is his, and that he gives it as a pledge to Mr. Truter as security for the debt. He states he was unaware of the contents of that document, but the magistrate disbelieved him. I do not think the Court can go further than to say that the magistrate was justified in disbelieving him. The result is that George Cooper represented

that the property belonged to him, and that cannot prejudice his two brothers, but when we refer to the evidence of his brother James we find he says that the property was sold to him. He says, in his evidence, "Mr. Truter took my donkeys, as George had sold them to him. I did not come into town at once. I went home. I did not say anything to Mr. Truter. I did not say anything to my brother." Now, it was clear that if James stood by while George represented that the donkeys were his to obtain credit, then he would be guilty of fraud. The magistrate came to the conclusion that he said nothing, because the property was not his. I think the magistrate was justified in his finding. Later, when the donkeys were required for use by George, Mr. Truter allowed him to have them back upon his giving a promissory note, to which James and Johannes were sureties, and it was only on that document being signed that Mr. Truter gave the donkeys back to George, and it was understood at the time that if at any time the donkeys were needed they should be restored under this pledge to Mr. Truter. That disposes of the credibility of George Cooper. With regard to James Cooper, I will say that the magistrate also disbelieved him. Johannes was away from the farm for a considerable time, and never exercised any control over these donkeys, and the magistrate considered that there was no proof that the donkeys belonged to Johannes. The donkeys and harness were in the possession of George when he agreed that they should be pledged, and when he pointed them out as his property in the presence of James. Under all the circumstances, the magistrate came to the conclusion that James and Johannes were people of no means at all, and that James was merely a servant of George. Therefore there is strong evidence to prove that the appeal must be dismissed, with costs.

#### KOEN V. MASKE AND CO.

Purchase and sale—Acceptance—  
Inspection — Merchantable  
condition of goods.

This was an appeal from the Resident Magistrate, Aberdeen, in which plaintiff claimed £20 16s., less 16s., waived to bring the case within the jurisdiction of the Court, being the purchase price of 26 bags of mealies, which were sold as good and sound. Defendant delivered the mealies as agreed on, but in such a bad and unsaleable state that they were useless. Plaintiff demanded a refund of the purchase price, or the delivery of 26 bags of good mealies, with both of which demands the defendant refused to comply.

The Magistrate, in awarding the plaintiff £19 4s., held that the plaintiff was entitled to return the mealies, and to recover the purchase price, or the equivalent of sound mealies.

Mr. J. E. R. de Villiers appeared for appellant (defendant in the Court below); Mr. P. S. T. Jones appeared for respondent (plaintiff in the Court below).

Counsel having been heard in argument on the facts:

Maasdorp, J.: It appears that the plaintiff in this case ordered some mealies from the defendant. It is alleged in the summons that it was guaranteed that the mealies should be in a good, sound and merchantable condition, but no evidence of any special warranty was given at the trial. In my opinion, where, under such circumstances as the present, an order for mealies is given, the contract between the parties at least embraces the condition that the mealies shall be merchantable. The Magistrate has found on personal examination, and also on the evidence given by the witnesses, that the mealies were in a very bad condition, that the mealies were unsaleable. And from the condition in which the mealies were found to be when first inspected by the plaintiff, I come to the conclusion that the mealies must have been in a bad and unmerchantable condition at the time of the delivery. It appears from the evidence that the defendant, when he brought the mealies into town, went to see the plaintiff. Taking the evidence of the plaintiff, together with that of the defendant, it appears to me that at the time that the mealies were brought in and placed in the store there was not a full acceptance of delivery by the plaintiff. It was quite understood by the defendant that the mealies were still open to inspection by the plaintiff, and it must be implied that the plaintiff intended afterwards to inspect the mealies, and to see that they were in a merchantable condition. The mealies were delivered on May 25, and were in the store a few days before being actually inspected by the plaintiff. On such inspection he discovered that they were in a bad condition. The Magistrate has found that the evidence given by him is correct. Now, on the authority of cases quoted, it would seem that when articles which had to be merchantable were delivered, and had been received by the purchaser without inspection, but were inspected within a reasonable time, and then discovered not to have been merchantable at the time that they were delivered, the purchaser would be entitled to the return of the purchase price on delivering up the articles sold. The inspection was made within a week, and it appears to me to be a reasonable time. If there was evidence in this case that

the damage might have occurred after the mealies were delivered, without any fault of the defendant, then it might have been held that it had not been proved that at the time of delivery the mealies were in an unmerchantable condition. The Magistrate was justified in finding that the mealies were not in a merchantable condition at the time they were brought in the store, and under all the circumstances of this case there is no evidence to show that there was no final acceptance of the mealies, but that the final acceptance awaited the further inspection by the plaintiff, and the defendant was very well aware of that. The appeal must be dismissed, with costs.

## SUPREME COURT

[ Before the Hon. Mr. Justice MAASDORP. ]

STOFFELS v. JAMES.      ) 1907.  
   ) Dec. 6th.

### Magistrate's Court—Jurisdiction —Set off.

*When a plaintiff submits himself to the jurisdiction of a Magistrate within whose district he is not domiciled by suing in his Court, the Court has jurisdiction to deal with all liquid claims or sets-off between the parties exactly as if they were both resident within the jurisdiction.*

This was an appeal from a judgment of the Resident Magistrate of Lusikisiki in an action brought by respondent against appellant to recover £80 for cash advanced, commission on a certain sale of tobacco, and purchase price of a horse.

It appeared that in the Court below Mrs. James sued the present appellant for £80, and that appellant pleaded the general issue and counter-claimed for £61 for certain oxen lent, etc. Mrs. James was resident at Umtata, and Stoffels was resident at Lusikisiki. Objection was taken to the claim in reconvention, on the ground that the defendant in reconvention resided beyond the

jurisdiction of the Court, and that the Court had therefore no power to hear the claim in reconvention.

The Magistrate, in his reasons for judgment, said that, according to section 23 of Proclamation 112, 1879, a magistrate had jurisdiction only over such persons as resided within his district. The plaintiff in the action, Mrs. James, resided at Umtata, beyond the jurisdiction of the Court. He allowed the exception to the claim in reconvention, in which Mrs. James was defendant.

Mr. Sutton was for appellant, August Stoffels; there was no appearance for respondent, Flora James.

Mr. Sutton submitted that where plaintiff was rightly before the Court, and had submitted to the jurisdiction, the defendant must be allowed to raise any defence that he could raise, and that the claim in reconvention in this case was by way of a defence. He cited *Rennette v. Stanford* (3 Searle, 225), *Morat and Co. v. Hickson and Co.* (12 S.C., 448), *Walmsley v. James* (8 C.T.R., 149), and *Oxland v. Key* (15 S.C., 315).

Maasdorp, J.: It appears that the plaintiff in this case is resident at Umtata. The defendant resides in the district of Lusikisiki. Plaintiff brought an action against defendant in the Magistrate's Court of Lusikisiki for the recovery of certain moneys. To this claim the defendant pleaded what amounts to the general issue, and he also put in a counter-claim for the value of certain oxen belonging to him, which he alleged had been in the plaintiff's possession, and which had not been restored to him. There is a further claim for the price of certain cattle sold by the defendant to the plaintiff. The claim in reconvention put in by defendant was taken exception to by plaintiff's agent, on the ground that the Magistrate had no jurisdiction over the plaintiff, who was resident in the district of Umtata. Now, it seems to be quite clear from the authorities that when a plaintiff submits himself to the jurisdiction of the Court, as was done by the plaintiff in this case, the Court would be entitled to deal with all disputes between the parties, at least such as would amount to a liquid claim on the part of the defendant or to a set-off. It is not necessary now to go any further. It is not necessary for the Court to decide that all kinds of cases might be set up in reconvention by defendant as against the plaintiff. Plaintiff claims a certain sum of money. Now, it is quite clear that if defendant's claim is sound, he has a right of set-off against this amount, which would in itself reduce the claim of the plaintiff, and so far as that amount is concerned, it might have been pleaded as a set-off. But I take it that

the Magistrate had jurisdiction to deal with the further liquid claim put in by the defendant for the restoration of his oxen, or their value, and the Magistrate was wrong in holding that he had jurisdiction to decide plaintiff's claim, but that he had none so far as the defendant's claim is concerned. The appeal will be allowed, with costs, the exception overruled, and the case sent back to the Magistrate to be tried on its merits.

#### BIEL V. STEENKAMP.

#### Tacit emancipation — Trade or business—Transport rider.

*In order to show that a minor has been tacitly emancipated, it must be proved that he carries on some trade or business on his own account.*

*To be "engaged in transport riding" as a driver or in any other subordinate capacity is not to carry on a trade or business.*

This was an appeal from a judgment of the Resident Magistrate of Gordonia, sitting at the Periodical Court, Keimoes, in an action brought by respondent against appellant for £20, alleged to be due upon an exchange of horses.

In the Court below, exception was taken to the summons on the ground that defendant was a minor.

The Magistrate, in his reasons for judgment, said that the defendant was in his nineteenth year. He was living apart from his father, and in no way under his control, and was undoubtedly earning his own livelihood. He found for plaintiff for £20, with costs, or delivery of the horse exchanged by the defendant, in which latter case plaintiff was to pay the defendant £5.

Mr. J. E. R. de Villiers was for appellant, Philippus Ernest Biel; Mr. Close was for respondent, Johannes A. J. Steenkamp.

Mr. De Villiers said that the Magistrate seemed to have held that there was tacit emancipation of the defendant, who was 18 years of age. There were two essentials to constitute tacit emancipation—the minor must be living apart from his parents, and he must be carrying on business independently on his own account. Counsel cited Grotius (Maasdorp's Trans., p. 20), and Van Leeuwen (Kotze's Trans., Vol. I., p. 89), and submitted that appellant had not been tacitly emancipated. He also quoted Maasdorp's Institutes (p. 247).

Mr. Close submitted that defendant was clearly living apart from his father,

and that he was trading on his own account as a transport rider. The horse was required for his own business, and he had actually given a promissory note upon purchase of the horse.

Maasdorp, J.: The plaintiff sues the defendant in this case for the specific performance of a contract for the exchange of horses, and the defendant sets up the plea of minority. This is answered by the plaintiff saying that the defendant is not entitled to the benefits of the plea of minority, because he has forfeited them on the ground that he carries on a trade or business by himself. Now, it is quite true that if that had been established the defendant would have lost the benefit of that plea in respect of business carried on by him, and transactions of his in respect of that business. It is now for the plaintiff to prove that the defendant carries on a trade or business, and to my mind there is not a tittle of evidence that he does so, with the exception of a casual remark or answer given by his father in cross-examination. The other evidence amounts to this, that from time to time he bought some little articles at different shops. What trade or business can he be said to carry on? What specific business would you call it? The witnesses go so far as to say or imply that he carried on that independent business when he was of the age of 13, because the purchases made from one storekeeper, who was called, were purchases made five years ago, and then he was of the age of 13. The only thing the plaintiff can lay hold of in this case is some indication that a separate business was carried on, is, as I say, the remark of the father that the son had left him, and was engaged in riding transport. Well, that expression is altogether too vague to establish a business. It is contended that that proves that he is by trade a carrier. It may mean so many things. A man may be said to be engaged in transport riding when engaged as a driver for the purpose, or in some other subordinate capacity. If you asked him what he was doing, he would say riding transport, but that does not constitute the trade or business of a transport rider. There is no evidence of any kind that the defendant possesses the plant to carry on the business with. The least one would have expected was evidence that he is the owner of a wagon and oxen, or that he is the hirer of a wagon and oxen, and that he has the control of a wagon and oxen, and in that way has become a transport rider carrying on that trade. The whole of that is to be implied, as I have already said, from the statement by his father, that he is engaged in transport riding. I think the Magistrate was wrong upon the facts. The facts do not support his finding that this boy is engaged independently in a trade or business, and I



think this is one of the cases which show the benefit of a protection of this kind. Counsel have not gone into the merits of the case, and it is not now necessary to do so, but I may say it appears from the evidence of the witnesses for the plaintiff himself that he exchanged an unsound horse with the defendant. I do not say that it was fraudulently done, but still it shows that a minor should be protected from such a transaction, whether *bona fide* or not. The Magistrate should have allowed the exception. The appeal will be allowed, with costs in this Court and the Court below, the exception being allowed.

ISMAIL V. ISMAIL.

This was an appeal from a judgment of the Resident Magistrate of Wynberg in an interpleader suit to determine the executability of certain goods.

From the record, it appeared that the goods had been attached in satisfaction of a judgment obtained by respondent, Haroon, against one Mahomet Berry, for £4 18s. 9d., or for restoration of certain goods. Certain sweet jars, scales, etc., found in the possession of Berry were attached. These the claimant, Adam, alleged had been deposited by him with Berry for safe keeping.

The Magistrate, in his reasons for judgment, said he was not satisfied that the applicant's evidence was sufficiently strong to rebut the presumption that the goods attached were the judgment debtor's property.

Mr. Marais was for appellant, Adam Ismail, a general dealer, of Retreat; Mr. Bisset was for respondent, Haroon Ismail.

Counsel having been heard in argument on the facts,

Maasdorp, J., allowed the appeal, with costs in both courts, and declared that the goods attached were not executable, with the exception of a box and bedstead.

REX V. GIBISELA.

This was an appeal from a judgment of the Resident Magistrate of Elliotdale, who had convicted appellant under Act 35, 1893, as amended by Proclamation 109 of 1900, Act 7, 1905, and Proclamation 401 of 1905, of the theft of a red stallion, the property of Duna, a headman. Accused had been sentenced to two years' imprisonment with hard labour.

Mr. Swift was for appellant; Mr. Nightingale was for the Crown.

Mr. Swift, who appeared at the request of the Court on behalf of appellant, read a letter received from Gibisela, in which he stated that the witnesses were mistaken as to his identity.

Counsel briefly put the appellant's case before the Court.

Without calling upon Mr. Nightingale, Maasdorp, J.: In this case the evidence is very strong and clear against the accused. This horse was taken away from its owner, and very shortly afterwards prisoner was seen in possession of it by at least four witnesses. He denies that he was seen by them. As the Court believes the evidence of these witnesses, the conviction must stand, and the appeal must be dismissed.

REX V. BOTHA.

Cattle—Infected area—Acts 27 of 1893 and 16 of 1906.

*To negligently allow cattle to stray from an infected to a non-infected area is not a criminal offence either under Section 12 of Act 27 of 1893 or under Act 16 of 1906.*

This was an appeal from a judgment of the Resident Magistrate of Riversdale, sitting at the Periodical Court, Albertinia, who had convicted appellant of contravening section 12 of Act 27 1893, as amended by Act 16 of 1906, and sentenced him to pay a fine of £1. The charge against accused was that he wrongfully and unlawfully removed or caused to be removed from Brakfontein, district of Mossel Bay, to the farm Cauca, district of Riversdale, a certain number of horned cattle, the said district of Mossel Bay having been proclaimed an infected area (Proclamation 420 of the 14th December, 1904), and the said district of Riversdale having been proclaimed a non-infected area (Proclamation 248 of the 19th August, 1905).

Mr. Louwrens was for appellant (Marthinus Botha); Mr. Nightingale was for the Crown.

Mr. Louwrens (in answer to the Court), said that one of the grounds of appeal was that the section under which accused was charged and convicted provided no penalty, and another ground was that there was no evidence that the accused removed or caused to be removed the cattle from the one district to the other.

Mr. Nightingale explained that, after the record had been read, it was his intention to leave the matter in the hands of the Court. The evidence was that the cattle were left in an infected area unguarded. These cattle then apparently got across the river into an uninfected area.

Maasdorp, J.: It is quite clear upon the admission made by Mr. Nightingale in this case, who appears on behalf of the Crown, that no act has

been proved to have been committed on the part of the accused, which amounts to a removal of cattle from an infected to an uninfected area. The evidence really amounts to this, that the cattle, through what is taken by the Magistrate to have been carelessness by the owner, wandered or strayed from the one district into the other. Well, the regulations made under this Act do not provide for such a case, and the offence here charged has not been proved. The conviction and sentence must be quashed.

#### REX V. KLEIN.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town, who had convicted appellant of contravening section 31 (clause 2), and section 33 (clause a), of Act 36, 1902, and sentenced him to 17 months' imprisonment, with hard labour.

Accused was charged before the Magistrate upon two counts with (1) procuring, or attempting to procure, a woman or girl to become a common prostitute, viz., Maud Smith; and (2) living wholly, or in part, on the earnings of prostitution. He was found not guilty on the first count, but was convicted on the second count.

Dr. Greer was for appellant, L. Klein; Mr. Nightingale was for the Crown.

Dr. Greer said that in the notice to the Attorney-General two grounds of appeal were set out, viz., (1) that the charge in the summons was vague and embarrassing, and bad in law; and (2) that the conviction was against the weight of evidence. He intended to rely solely on the second ground.

Dr. Greer submitted that the evidence for the prosecution was tainted and untrustworthy.

*Postea* (December 9th).

Counsel having been heard in further argument,

Maasdorp, J.: There is no doubt that Dr. Greer has given very strong arguments in dealing with the evidence in the Court below, which will have to be duly weighed before any decision can be arrived at in this case. He has pointed out very weighty considerations, which the Court will have to bear in mind in disposing of the case, but it must be borne in mind that arguments similar to these have already been placed before the Court when disposing of this matter in the first instance. In the Court below, the accused was represented by an attorney of this Court, and, judging from the cross-examination to which he subjected the witnesses, it is clear that he directed the attention of that Court to the very same difficulties which have been raised in the arguments by Mr.

Greer. He may not have gone as fully and as clearly into these matters in the arguments which he advanced to the Court, but, at the same time, it is a fact that the Court that dealt with this case in the first instance dealt with it by the same light by which it is put before this Court. It is also the case, as stated by Mr. Greer, that the Magistrates, in dealing with these cases, have very difficult and responsible duties to perform, and with the considerable magnitude of the jurisdiction that is conferred on them, it should appear quite clear that these duties are performed with a due sense of the responsibility. The Legislature had that in view when the Act was passed, by which this jurisdiction was placed in the hands of the Magistrates, because it is provided by section 42 of the Act that no Magistrate shall preside over such trials, except such as have had a considerable experience. It is specially provided that they should have been on the Bench for at least five years, and they can only have risen to the Bench after a considerable experience. Now, not only that, but we know, as a matter of fact, from the cases which have come before the Court before, that the Magistrate who presided in this case possesses long experience, and possesses large judicial experience in similar cases. Under these circumstances, I must come to the conclusion that the matter was dealt with by a competent judicial officer. Now, the arguments which are advanced in this case, in order to induce the Court to come to the conclusion that the evidence of the witnesses for the prosecution is not reliable, is partly of this character, for although it appears that at least five witnesses have given most direct evidence of money that had been earned by prostitution, and some of these witnesses say that it had been handed over directly at different times to the accused in this case; if their evidence must be regarded with suspicion, because it has been elicited that they were not on very friendly terms with him, it is not surprising that people who associate themselves in this way should at times fall out. That is only what one can expect from the nature of their occupation, and the Magistrate knew that at times these unpleasantnesses had taken place, but he declined to come to the opinion that the evidence for the prosecution was incredible, and it is impossible for me to say that this Court should differ with him on that finding. Some part of the argument was addressed to the question whether the accused in this case is a man who had a visible and honest means of subsistence. Now, it does not appear by any reasons placed before the Court that the Magistrate has found that he has not, and consequently I must take

It that it has not been proved that he is not a man who lacks visible means of subsistence, and therefore I will take it that he had some visible means of subsistence. In this same clause of the Act which deals with that matter it is provided that where it is proved that the accused lives habitually in the company of prostitutes, and has no visible means of subsistence, that he shall be deemed to be existing on the earnings of prostitution, but the opportunity is given to him of satisfying the Court to the contrary. These two circumstances are taken as conclusive evidence that he lives on the earnings of prostitution unless he rebuts the presumption. Now, I may take it that the fact is admitted by him that he has habitually for years lived in the most close companionship with prostitutes, is a circumstance that tells strongly against him, although that is not conclusive evidence. Seeing that he so associates with these characters, he can hardly complain that his actions should be borne witness to by the very people with whom he so constantly associated. It is only the evidence of these people that can operate against him. Five of them have sworn that they have seen the money handed to him—the direct proceeds of prostitution—and I come to the conclusion that when he received the money he did so for the purpose of living partly on the proceeds of prostitution. In all the points, the Court must uphold the decision of the Magistrate in the Court below. If the arguments advanced by Mr. Greer had been put to a jury, and the jury had found him guilty, nobody could have questioned it. Therefore, the appeal must be dismissed.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BERGMAN V. COLONIAL GOVERNMENT. { 1907.  
Aug. 21st.  
Dec. 2nd.  
" 9th.

Sheriff—Writ of execution—Attachment—Debtor of execution debtor—Crown Liability

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ties Act (37 of 1888)—Execution against Government.

*The applicant, having obtained judgment and a writ of execution against one F., for the value of merchandise taken by F. out of the plaintiff's stores, applied for leave to attach certain moneys alleged to be in the hands of the Treasurer of the Colony, in satisfaction of the judgment. The money had been taken from F. when arrested for a raid on the Colony, and the Treasurer objected to the attachment, on the ground that he had a counter claim against F. for moneys stolen from the post, part of which consisted of remittances sent by Government by post. F. had not been convicted of the theft, but he had been tried for murder and sentenced to death, the sentence being commuted into imprisonment for life.*

*Held, that as the Treasurer would have the same defences against the applicant or against the Sheriff or against a purchaser of F.'s claim as he would have against F. himself, the order of attachment should not be granted.*

This was an application upon notice to the Treasurer to show cause why the Sheriff should not be authorised to attach certain moneys lately in the hands of one Jan Hendrik Ferreira, in satisfaction of a judgment of this Court at the suit of the present applicant against the said Ferreira.

The case arose out of the raid on the north-western border, led by Ferreira, in November last. Jacob Bergmann (the applicant) had a store at Karos, near Upington, from which he alleged that the freebooters led by Ferreira took away goods of the value of £73 2s. 6d. In June last he issued summons against Ferreira, and on the 5th July he obtained judgment against him for £73 2s. 6d., with interest and costs. A writ was taken out, to which a return of *nulla bona* was made. Applicant now said that when Ferreira was captured a sum of £75 was found upon his person, and taken possession of by the police. This sum, he claimed, should be attached in execution of the judgment he had obtained against Ferreira.

For the Government, an affidavit by the Postmaster-General was read, from which it appeared that the Government had considerable claims against the raiders, including those of individuals whose goods had been stolen. The mails were robbed by the freebooters led by Ferreira, and a number of registered letters and parcels and remittances were stolen. A few of the articles were recovered. Amongst the registered goods missing were rings, silver watches, etc. The total value of the articles which had been stolen was £104 16s. 1½d. For certain of these the Government was liable, up to a certain amount. When the freebooters were captured a sum of £101 13s. 6d. was found upon the persons of Ferreira and one of his followers, Jooste. This money was handed to the Civil Commissioner of Gordonia, who deposited it in his supplementary cash, and he was instructed to transfer same to deponent as a set-off against the amount stolen.

Mr. P. S. T. Jones, for applicant; Mr. H. Jones, K.C., for respondent.

Mr. P. S. T. Jones said supposing Bergmann had first caught Ferreira and relieved him of the £100, and other persons prior to Bergmann had got judgment against him, surely Bergmann could not be heard to say that he had recouped himself for the amount he had lost. What preference could the Government establish in the matter? The Government found the money in his possession, and instead of holding it for such persons as it might concern, they took the money to meet indirect claims they had against Ferreira. That was altogether wrong in principle. The Government could not take the money and distribute it between such claims they might have without regard to the other person. There was no judgment creditor before the Court except the applicant.

Mr. Howel Jones said that there was no proof whatever that this money belonged to Ferreira. The applicant had to satisfy the Court that this money was part of Ferreira's assets. The other presumption was that the property was not that of Ferreira. Here was a notorious freebooter and robber who robbed a mail. He took a large quantity of jewellery, merchandise, and cash, and shortly afterwards he was found in possession of large sums of money. Surely all the circumstances went to show that the presumption that this property belonged to Ferreira was wrong. Assuming the property belonged to Ferreira, that it was his *bona fide* property, and that he sued the Government for the recovery, then the Government could put up a counter-claim for moneys due by him to them, in an action. On an application of this sort it was impossible for the Court to find that this was Ferreira's money and that the Government had not right of set-off.

Mr. P. S. T. Jones, in reply, said that the only case he knew of to show the rights of a judgment creditor as to moneys lying in the hands of a third party was that of *Mackintosh v. Botha* (13 S.C.R.). Until the Government identified the money and proved satisfactorily that it could have been no other money, he contended that money found in the possession of Ferreira was his own.

Hopley, J., said counsel had better see if they could find any authorities in the matter. It seemed to him to be a legal point which required a certain amount of investigation. He would be glad if either counsel could find authority, as it seemed to him to be a point which could not be settled off-hand, and one which would require looking into more deeply.

*Postea* (December 2nd). The case was again argued before De Villiers, C.J., and Hopley, J.

The Chief Justice: Has any action been brought by the Government against Ferreira?

Mr. Howel Jones: No, my lord; practically we could not take action after the application was made to the Court.

Mr. Justice Hopley: Is your position at present that you are holding the money for Ferreira?

Mr. Howel Jones said that the Government position in regard to this claim was that Bergman had to show that it was Ferreira's money. Then, if the money did belong to Ferreira, the Postmaster-General was in the position of a bailee of this money. If it had been stolen he had an action against Ferreira, and if Ferreira were to bring an action the Postmaster-General would meet him with a counter-claim. The applicant could have no greater right over the money than Ferreira had.

Mr. P. Jones said that this money was found in the possession of Ferreira. The presumption was that the money was his until it was definitely shown that that identical money was stolen by Ferreira. Until that be proved by the Government, any judgment creditor of Ferreira was entitled to say that he should be allowed to execute upon that money. When they made application for leave to execute upon that money it was for the Government to show that it was not Ferreira's money, but money stolen from other persons and in the possession of postal officials. The presumption was in favour of the contention that this was Ferreira's money until it was shown that it was not his and belonged to other persons. Counsel referred to Act 34, 1902.

The Chief Justice: The case stood over for authorities to be cited. Has the Court ever attached moneys in the hands of the Government?

Mr. P. Jones said he must admit that he had not been able to find any par-



ticular case. Proceeding, he submitted that until the Government could show that they were holding the money for and on behalf of anybody else, the applicant was entitled to attach it. Respondents were really claiming a preference as against a judgment creditor. They had no judgment; they had simply an indirect liability to third parties who had entrusted certain goods to them. Counsel cited *Rex v. Barnett* (3 Carrington and Payne, 600). The Government had not traced any of the articles sent by the post into the hands of Ferreira. The most that their affidavits went to show was that £32 in money had been stolen from the post-bags. The affidavits were not clear even on the point that the remittances were in cash.

Mr. Howel Jones said that his learned friends' case was based on the allegation that this money found upon Ferreira belonged to him. Unless he proved that, he could not succeed in this application. He had given no proof at all that this was Ferreira's money. Applicant might have got an affidavit from Ferreira as to the original ownership of the property, but he had not done so.

*Cur. Adv. Vult.*

[De Villiers, C.J.: How much was there really in Ferreira's possession?]

Mr. Howel Jones said that, according to the applicant's affidavits, the amount found in Ferreira's possession was £75. Proceeding, he said his learned friend had argued that the presumption was that this was Ferreira's money. In looking at the presumption in a case like this, they must have regard to the surrounding circumstances. Here was a notorious robber out on a free-booting errand, and in the course of his free-booting he robbed the Post Office, and got jewellery and cash into his possession. Even assuming that this was Ferreira's bona fide property, he submitted that Bergman had not got any better claim to the money than Ferreira himself. Of the amount of £104, representing the losses of the Post Office, there was an amount of £41 which was actually Post Office money. Counsel cited *Melville v. Hooper* (3 Jura, 261), and *In re the Winkfield* (L.R., Prob. Div., 1902, p. 42). The Postmaster-General would have a right to retain this money as a set-off against any claim that Ferreira might bring, and Bergman could have no greater rights than Ferreira.

Mr. P. Jones having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (December 9th).

De Villiers, C.J.: This is an application for an order authorising the Sheriff to attach certain

moneys in the hands of the Treasurer of the Colony, in satisfaction of a judgment granted by this Court in an action brought by the applicant against one Ferreira. The action was for the value of goods taken from the applicant's store by Ferreira and his accomplices during their recent raid. At the time of his capture, Ferreira had a sum of money in his possession, which, under the Prison Regulations, was taken possession of by the Government, and it is that money which the applicant now wishes to attach. The Treasurer opposes the application, on the ground that the Government has a claim against Ferreira for robbery of the post, containing a number of registered letters and parcels, as well as remittances sent by the Government itself acting through the postmaster at U'pington. The Postmaster-General in his affidavit states that "when the free-booters were captured, money to the extent of £101 was found upon the persons of Ferreira and Jooste, and that this money was handed to the Civil Commissioner of Gordonia, who deposited it in his supplementary cash, and has been instructed by the Assistant Treasurer to transfer the same to the Postmaster-General, as a set-off against the amount stolen." It is unnecessary at this stage to decide whether a set-off does in law exist in respect of the whole amount of the loss sustained by the Government through the post robbery. As to the remittances made by the Government itself, it is clear that if the Government were sued by Ferreira for restoration of the money taken from him on his capture, it could compensate against such a claim its counter-claim for the amount of remittances proved to have been taken by Ferreira from the post-bags, but it is not equally clear that such a right of compensation would exist in respect of any counter-claim the Government might have by reason of its having to pay the senders of valuables or remittances by the post. The position, therefore, is this, that the Government does not admit that it is liable to return to Ferreira any portion of the money taken from him, and the question to be determined is whether the Court should, against the will of the Government, attach the money in execution of the applicant's judgment. Although ample time was allowed to the parties for the production of authorities, no case was cited in which this Court has ever ordered an attachment of moneys in the hands of the Government in execution of a judgment. All moveable property of the execution debtor may, under section 8 of Ordinance 37 of 1828 be attached, and there is no reason why debts owing to the debtor should not be so attached. Even under the cumbersome process of execution which for-

merly existed in the Netherlands, the attachment of the debt was complete when the sheriff had given notice to the judgment debtor, as well as to his debtor, that the debt was attached, and that the amount thereof was not to be paid (*Matt. De auctionib.* 1-6-17). I understand that under our practice the sheriff does not attach debts without an order of Court, nor does he attach moneys in the hands of the debtor of the execution debtor without such order. It is clear, however, that whether the sheriff himself calls upon the debtor of the execution debtor to pay the amount, or whether the purchaser of the debt in execution does so, it is competent for the debtor or the execution debtor to raise any defences against the claim that he might have raised against the original claim. The Court is asked in the present case to decide on motion the important question whether the Government would have a valid defence to an action brought by Ferreira to recover the amount in the hands of the Government. Such an action could be instituted under the Crown Liabilities Act, 1888, but, even if it were decided against the Government, no execution or attachment or process in the nature thereof could be issued against the defendants or against any property of the Crown. The execution creditor in the present case has no greater rights against the Government than the execution debtor would have enjoyed. If the debt owing by the Government be attached and sold, the purchaser would be entitled to sue the Government for the debt. The Government could then set up any defence which it had as against Ferreira, and if judgment should be given against the Government, the Treasurer of the Colony would have authority to pay the amount awarded, but no execution could issue against him. By granting the order now asked for the Court would in effect order execution against the Government, because the coins taken from Ferreira have been paid out, and the Government has expressed its unwillingness to pay the amount to the applicant. The application must, therefore, be refused, with costs.

Hopley, J., concurred.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HOWARD FARRAR, ROBINSON & CO. v. CLARKE. 1907.  
(Dec. 9th.)

This was an appeal from a judgment of the Resident Magistrate, at Port St. John's, on an action which came before his Court, and in which Messrs. Howard Farrar, Robinson and Co. of East London, sued the defendant, Lancelot Clarke, jun., of Lissikisiki, to recover £6 11s. 1d., balance of an overdue account, with interest thereon. The action was dismissed, with absolution from the instance, by the Magistrate.

The defendant is a farmer, residing in Pondoland, and had dealt with the plaintiffs for some time. In September, 1905, he required some belting for some machinery, and ordered it from plaintiffs, who, being unable to supply it from East London, communicated with their Durban branch, who supplied it, and, in due course, forwarded an account for it, amounting to £7 10s. This amount the defendant in due course forwarded to the East London branch, who replied, stating that the cost of the belting was £12 10s., and that they had placed the £7 10s. to his credit, and demanded the balance of £5, which he declined to pay. A sum of 15s. freight on the rubber was overlooked, and after some correspondence had passed, defendant tendered the 15s., but it would not be accepted without the costs to date, which he refused to pay.

Mr. Bisset appeared for the appellants (plaintiffs in the Court below); Mr. P. S. T. Jones appeared for the respondent (defendant in the court below).

Counsel having been heard in argument on the facts,

Maasdorp, J.: In this case the defendant ordered belting from the plaintiffs' firm at East London, and the plaintiffs sent on the order to their firm at Durban. From there certain belting was supplied to the defendant at St. John's. Shortly after receiving the belting the defendant also received an account from the firm at Durban, from which it would appear that he was charged for the belting at the rate of 9d. per foot, amounting in all to £7 10s. On receiving that account he settled that item, together with others, by a remittance to East London. Upon the East London firm receiving the remittance they informed the defendant that the charge made for the belting was incorrect, and that it should have been the usual

charge, and that the true charge should have been £12 10s. The defendant, however, refused to pay, saying he had already settled the former account. Now, without deciding the question at all as to whether the plaintiffs' firm, having sent an account, which was subsequently found to be incorrect, were or were not entitled to correct that account by subsequently charging the correct indebtedness to the defendant, I may say that the question rather takes the form in which it was treated by the Magistrate. It is quite possible that it would have been in the power of the plaintiffs subsequently to send in a correct account. It does not quite appear for what purpose the first account was sent. It is said that it was not intended to represent the amount due by the defendant to the plaintiff, but was only sent for Customs purposes. However, the defendant took it that it was a correct account, and he settled it. The plaintiff then comes into Court, and it lies with him to prove that he has sent belting to the defendant for which the right charge is £12 10s. and not £7 10s. No witnesses, however, appeared on behalf of the plaintiff, who saw the belting which was despatched from Durban, and only the person who supplied the article could swear to the usual charge that the firm made for such an article. It appears from the evidence for the defendant that really a very inferior article was sent, and that it was not what he expected. Now, it is quite possible that the plaintiff's bookkeeper in East London may be under the impression that quite a different article was sent to the defendant from what the defendant says he received, but the result is that there was no evidence before the Magistrate to prove that the article sent from Durban was one usually charged at £12 10s., which would in this instance be a contract price between them and the defendant. If a person orders an article without agreeing to the price, he is supposed to contract for the usual price charged by the shopman. We must, therefore, have evidence as to what the usual charge is for the article sold but there is no evidence of any witness who has seen the article supplied to the defendant. Therefore there is no evidence before the Court as to the usual charge for the article. Under the circumstances, I think the Magistrate was perfectly right in his judgment, considering the insufficiency of the plaintiff's evidence. It appears that when this claim was made by the plaintiffs a small item was lost sight of by defendant, to which his attention was only called after some expense had been incurred. That was a charge of 15s. for the shipping expenses, but on discovering that he tendered to the

plaintiff 15s., with the costs of summons. Now, it appears that, besides the summons, other sums were due for costs. There was no question raised as to whether the tender was sufficient in view of the costs, but it was immediately rejected by the plaintiff. It is quite clear that the plaintiff would not have accepted it together with costs up to date. I think the plaintiff was entitled to the order which the Magistrate offered to make at the trial, and which I think he should have made without any reference to the plaintiffs' agent, that was judgment for 15s., with costs up to the date of the tender. The Court will now alter the judgment to one of 15s., with costs up to the date of tender, and of absolution with respect to the rest of the plaintiffs' claim, and as I come to the conclusion that the difference between the parties as to the tender of 15s. was not a material consideration, in bringing this appeal, the appellant will be ordered to pay the costs of appeal and the costs subsequent to the tender.

#### LYONS V. WHEELER.

This was an appeal from the decision of the Resident Magistrate at Woodstock, dismissing an action, in which Sol. H. Lyons sought to recover from Thos. H. Wheeler, promoter of the Maitland-Belville Tramway Co., the sum of £50, commission due under a certain agreement.

It appeared that when defendant got concessions from the Divisional Council to run the tram between Maitland and Belville, he agreed to pay plaintiff 5 per cent. for services rendered in floating the company. The scheme fell through, and the plaintiff sued the defendant to recover the sum of £50, fees due, but the Resident Magistrate dismissed the action.

The Magistrate, in his reasons, stated that defendant pleaded no consideration, the services referred to not having been rendered. After giving the evidence careful consideration, he felt convinced that though the document sued upon contained the words "in consideration of services rendered," as a matter of fact, no services had been rendered by plaintiff excepting the drafting of the memorandum of agreement, and possibly some few interviews with different people. The position of affairs was recognised by both the parties, and the £50 was not to be paid until the £1,000 was raised, and the purchase of the half-share completed. This part of the scheme was abandoned by mutual consent, and a fresh arrangement was made. For these reasons plaintiff was not entitled to a judgment for the £50.

Mr. Upington appeared for applicant and Mr. Bisset for respondent.

Maasdorp, J.: Some time before the 29th of February, 1907, Wheeler got a concession from the Cape Divisional Council for the construction of a certain tramway, but found it necessary, in order to carry out his scheme, to raise some money, and he proposed doing so by disposing of half a share in this concession. Amongst others, he seems to have spoken to Lyons, and Lyons and Wheeler together made an effort to obtain purchasers for this half-share. It is quite possible that the services of other persons were also utilised for this purpose. By the 28th of February, it appeared that some substantial services had been rendered by Lyons, and he must have considered himself therefore entitled to some remuneration. The document which is now sued upon was consequently executed. In it Wheeler promises, in consideration of the services rendered by Lyons in connection with the raising of capital for the purchase price of half a share of the Tramway Concession, to pay the sum of £50, and the sum was to be paid on the completion of the purchase. In my opinion the document must be construed to mean for past services, which were to be paid for upon a certain condition happening. The Magistrate in his judgment refers to it as embracing future services, and that payment depended on the performance of such services. Now, that is not necessarily so. The money has to be paid on the completion of the said purchase of a half-share. Now, that may have happened without Lyons rendering any further services, and he would have been entitled to his £50, but confusion has arisen, because this document is associated with another, which was drawn up on the same day, and in taking these two documents together, it will be found that the Magistrate's conclusion, although it is not stated in strictly legal terms is, on the whole, correct. On February 27 it was found that Lyons had already performed some service for which he had to be paid, but at the same time it was necessary to secure his services for the future, and that was done by Wheeler giving a further promise to pay Lyons £200 for services he may render in securing the necessary purchasers to purchase the half-share for £1,200. That is how it comes about that in order to perform the condition upon which the first promise to pay becomes due, some services are expected from Lyons himself. The position then was this, not that the completion of the contract depended simply on Wheeler passing the purchase through, and thereupon becoming liable to Lyons for the £50, but the two together undertook to endeavour to bring about the success of this scheme. That is why the Magistrate seems to regard the future service of

Lyons as a condition precedent to payment, although it was not necessarily so, since the mere fact of the purchase being brought about would entitle Lyons to payment. Still, now, Lyons becomes a party to the endeavour to secure this purchase, and if he had succeeded, he would have been entitled to both his £200 and £50. He has failed to bring about the purchase, and that failure stands in his way. The failure is not due to Wheeler, but merely because the circumstances would not allow of success to either party. Later on a stage was reached when Wheeler and Lyons understood that it was no longer profitable to try and push the matter through. Under the circumstances, the Magistrate has based his decision on the ground that the payment depended on future consideration—yet his ultimate decision is right, because, although the payment did not depend on future consideration, still the conditions which had to be performed virtually amounted to future services to be rendered, and in my opinion, therefore, the appeal must be dismissed, with costs.

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## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

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### PROVISIONAL ROLL.

EATON, ROBINS AND CO. V. ( 1907.  
MEYERS. ( Dec. 10th.

Mr. Howes moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

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### BOARD OF EXECUTORS V. SONNENBERG.

Mr. Philipson Stow moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

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### LEWIS AND CO. V. SWANICH.

Mr. H. S. van Zyl moved for provisional sentence on a promissory note for £65 2s. 1d., with interest from the 30th September, and costs.

Order granted.



**PURCELL, YALLOP AND EVERETT V. DUMBLETON.**

Dr. Greer moved for provisional sentence on a promissory note for £33 18s., with interest from the 15th September, and costs.

Order granted.

**CHADWICK V. STOTT.**

Mr. Watermeyer moved for provisional sentence on an I.O.U. for £36, defendant having paid two instalments of £3 10s. a month, and failed to pay further instalments.

Defendant said that he had lost his employment, and had been unable to pay further instalments.

Final judgment granted.

**AFRICAN HOMES TRUST, LTD. V. ROHM.**

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £624 13s. 9d., with interest from the 1st August, 1906, less £35 2s. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable and the rents attached, and also for certain certificate for £800, ceded to and held by plaintiffs as collateral security, to be declared executable.

Order granted.

**ESTATE SMITH V. SADIE.**

Mr. De Waal moved for provisional sentence for £89 19s. 6d., being interest on a certain mortgage bond for £1,300.

Order granted.

**BOARD OF EXECUTORS V. SADIE.**

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,700, with interest from the 8th June, 1904, less £38 5s. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**HERHOLDT V. THERON AND ANOTHER.**

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £1,400, with interest from the 1st November, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**HOFMEYER V. HOLLOWAY.**

Dr. Rainsford moved for a provisional sentence on a mortgage bond for £200, with interest from the 1st January, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**ILLIQUID ROLL.**

**QUINE V. COHEN AND ) 1907.  
ANOTHER. ( Dec. 10th.**

Mr. Alexander moved for judgment under Rule 319, in default of plea, for £109 3s. 2d., moneys lent and expended on behalf of defendants. Counsel explained that, after the defendants had been barred and the case had been set down for judgment, a plea was tendered to plaintiff, but without any offer to pay plaintiff's wasted costs. The first defendant had been committed for trial on a criminal charge.

Mrs. Cohen, who appeared, said it was not her debt, and that she was married by ante-nuptial contract.

Mr. Alexander said the defendants had carried on business together, the licence being in the name of the second defendant.

Judgment entered as prayed, subject to being set aside on defendants paying to plaintiff's attorney £5 towards costs. If the amount be paid, defendants to be given leave to purge default and file plea, payment to be made before the 31st December next.

**ETTLINGER V. SHOCKER.**

Mr. P. S. T. Jones moved, on behalf of defendant in the action (Ettlinger), for leave to sign judgment against plaintiff, with costs in this court and the Magistrate's Court, for not proceeding with his action within the time fixed by Rules of Court. Counsel explained that the case had been removed from the Magistrate's Court, under section 3 of Act 21, 1876. He quoted Rules 25 and 330 (a).

Respondent Shocker stated that he was too poor to proceed with the action, and that there had been some negotiations with a view of arbitrating on the matter in dispute.

Mr. Jones said he believed Shocker had already applied for leave to sue in *forma pauperis*, but that counsel, on looking into the petition, declined to certify *probabilis causa*.

Judgment granted, with Magistrate's Court costs, and costs of this motion, and leave reserved to plaintiff to apply for such costs in any future action or arbitration proceedings.

## REHABILITATIONS.

Mr. Palmer applied, under section 117 of the Ordinance, for the discharge from insolvency of Richard Page.

Granted.

Mr. Gutsche applied for the discharge of John Wolstenholme.

Granted.

*Ex parte* KELLERMAN.

Mr. H. S. van Zyl moved, as a matter of urgency, on the petition of Jacobus J. Kellerman, of the Worcester district, for an interdict restraining the Messenger of the Resident Magistrate's Court, Worcester, from proceeding with execution against his movables pending an application by petitioner for leave to surrender his estate as insolvent. It appeared that judgment had been taken against petitioner by J. W. Jagger and Co., and another creditor, and that his movables had been attached in execution. He had, however, given notice to surrender his estate on the 9th inst. to one of the Judges of the Supreme Court, but, owing to an informality, an amended notice had been issued for surrender on the 16th inst. Before that date the period allowed by section 11 of Act 17, 1876, for stay of execution would have expired, and petitioner desired to restrain the Messenger from selling or disposing of his movables pending sequestration.

Buchanan, J., asked whether notice had been given to the judgment creditors.

Mr. Van Zyl said that the application was made *ex parte*. He quoted sections 1 and 2 of Act 38, 1884, and section 11 of Act 17, 1876.

Buchanan, J., said that it would be a pity to stop the sale now if the expense of advertising had been incurred. An order would be granted restraining the Messenger of the Resident Magistrate's Court from paying over the proceeds of any sale held by him until the 17th inst. He also directed that, should the sequestration of applicant's estate be granted, costs of this application be paid out of the estate as part of the costs of sequestration.

## GENERAL MOTIONS.

*Ex parte* ESTATE VAN HEERDEN. { 1907.  
Dec. 10th.

Mr. J. E. R. de Villiers moved, on the petition of the executor testamentary in the estate of the late Aletta M. van Heerden, for leave to sell certain property in the division of Cradock. Certain minors were interested.

It appeared that an advantageous offer had been received for the property. The Master's report was favourable.

Order in terms of Master's report.

*Ex parte* ESTATE KOTZE.

Mr. Watermeyer moved, on behalf of the executor testamentary, for leave to pass a bond of £1,000 on mortgage of farm property in the district of Colesberg, in order to pay off certain liabilities, etc.

Order granted as prayed.

*Ex parte* INSOLVENT ESTATE EXLEY AND CO.

Mr. Howes moved, on the petition of Harry Hands, as trustee in the insolvent estate of Charles Exley and Co., for recognition of his appointment in the Transvaal, where certain of the assets in the estate were situated.

[Buchanan, J.: There has been no reciprocity established yet under the Act of Parliament?]

Mr. Howes said he thought not.

Buchanan, J.: We have recognised Transvaal trustees, and the Transvaal Courts will recognise ours. An order will be granted asking for process in aid.

*Ex parte* MURDOCH.

Mr. Douglas Buchanan moved, on behalf of petitioner, for leave to sue her husband by edictal citation, and *in forma pauperis*, for divorce.

Referred to counsel for report petitioner to appear personally before the Court on the 12th Decembr.

*Ex parte* INTRONA.

Mr. P. S. T. Jones moved for the amendment of certain deeds of transfer and mortgage bonds by the substitution of petitioner's correct name. Petitioner was an Italian residing at East London, and he stated that the mistake was due to the fact that he was illiterate, and did not know what was the correct spelling of his name.

Order granted as prayed.

*Ex parte* FRYER.

Mr. Burton, K.C., moved, on the petition of R. C. Fryer, of Calvinia division, for an order for the attachment of the persons of respondents for contempt of Court by reason of their non-compliance with an order granted by the Court on May 1, 1907, for transfer of certain land purchased by applicants from the late Jacobus Adrian Louw on

the 25th August, 1893. The respondents were Maria Anna Louw, Adrian J. Louw, Jacobus W. Louw, and Wallace L. Louw, of the division of Calvinia, and Bismarcke von Mollke Louw, as executrix and executors testamentary in the estate of the late Jacobus Adrian Louw. Counsel said that no explanation was given as to why the respondents had failed to give transfer as directed.

Rule granted in terms of prayer "B" of the petition, personal service to be effected, rule returnable on the 12th January.

*Ex parte* INSOLVENT ESTATE JENKS.

Mr. Inchbold moved for an order authorising the registration of a certain transfer.

Granted.

VAN ZYL V. VAN ZYL.

Mr. P. S. T. Jones moved for the appointment of a commission *de bene esse* at Christiana, Transvaal.

Granted. Commission to be held by Magistrate at Kimberley. Notice to be served on the defendant of the date of the sitting of the commission.

*Ex parte* ESTATE MYERS.

Mr. Payne, on behalf of the trustee, moved for leave to sell certain property.

Granted.

*Ex parte* VAN DER WALT.

Mr. Wallach moved for an order authorising the amendment of a certain deed, for the purpose of inserting the second name of the applicant.

Granted.

*Ex parte* DE WET.

Dr. Greer moved for leave to mortgage certain property, for the purpose of educating applicant's son, Cornelius de Wet. The Master, in his report, stated that the School Board Act provided for the education of a child of eight years for some years. He suggested that if the order was granted, the money should be placed in the hands of the Board of Executors, and paid out from time to time. Counsel contended that the section of the School Board Act referred to by the Master would not be applicable in this case.

In view of a clause in the transfer to the effect that the land should not be hypothecated for debt, Mr. Greer said he did not see how he could ask for the application.

No order for the present was made.

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

## GENERAL MOTIONS.

HALL V. INSOLVENT ESTATE ( 1907.  
KLAASSEN. ) Dec. 11th.

Lease—Hire—Suspensive condition—Passing of *dominium*.

This was an application to make absolute a rule nisi calling upon the respondent to show cause why he should not be interdicted from selling certain goods. The applicant claimed the goods in question, which were on a farm in the Laingsburg district, hired by one Klaassen from the applicant. The respondent was the trustee in the insolvent estate of Klaassen, and he claimed that the goods belonged to the estate of Klaassen. Applicant said that Klaassen agreed to buy the goods in question, comprising an oil-engine, mill, stock-in-trade, etc., and to pay for same by instalments, but it was agreed that the *dominium* should not pass until all the instalments had been paid. Applicant held a covering bond over the movables, but the respondent contended this was in the nature of an undue preference. Respondent further referred to a judgment of the Resident Magistrate in a certain matter, in which it was held that the goods were sold by applicant to Klaassen, and that the *dominium* had passed. In replying affidavits, it was stated on behalf of the applicant that the bond was passed in the ordinary course, and after the applicant had paid all the claims which Klaassen said his creditors had against him, and after the judgment of the Magistrate.

Mr. Gardiner was for the applicant; Mr. Molteno for the respondent.

Mr. Molteno, in argument, contended that there could be no change of ownership by agreement, that no change could take place without handing over delivery of the goods and taking possession of them. He referred to the cases of *Orson v. Reynolds* (2 Appeal Cases, p. 102), *Hofmeyr v. Gous* (10 Juta, p. 115), and *Payne v. Yates* (9 Juta, p. 497).

Without calling upon Mr. Gardiner, the Court made the rule absolute, with costs.

Buchanan, J.: The affidavit that was before the judge in Chambers sets forth that the applicant had leased certain landed property, together with a certain oil-engine and other movables to one Klaassen, whose estate has since been

sequestered. The petition goes on to say that after this lease Klaassen permitted certain of his creditors to attach certain of the property so leased, that thereupon an interpleader action was brought before the Resident Magistrate of Laingsburg, who decided that the goods were executable at the instance of the creditors, and that, thereafter, without contesting the matter any further, Hall settled with these creditors, and entered into a new agreement with Klaassen, who, of course, was not then insolvent. The objection that the facts were not sufficiently disclosed in the first instance therefore falls away. In this agreement it is stated that these are the goods of the lessor, and did not belong to the lessee, now insolvent. Learned counsel for the respondent has quoted cases which lay down the law that there could be no valid pledging of movables without delivery, but in this case the goods were not the goods of a pledgee pledging them to a creditor. They were goods which belonged to a creditor, and which were leased on what is known as the lease-hire system in this country. The *dominium* of the property never passed from the owner of the goods, and they were leased under the express condition that the *dominium* was to remain with the owner of the goods until they were paid for. The present creditors were not parties to the proceedings in the Magistrate's Court, when the interpleader action was heard, so that they are not in position to take advantage of any benefits which accrued to the execution creditors in those proceedings. The applicant is entitled to oppose such goods being sold in the insolvent estate, and the rule nisi must be made absolute, as regards so much of the goods as are the property of the applicant, with costs, but this order will not affect the applicant's lien as landlord, or his claim under his bond to preference on the rest of the estate; or to prejudice any further legal proceedings the trustee may take.

#### FINKELSTEIN V. FINKELSTEIN.

#### Costs — Discretion of taxing officer.

This was an application for a review of taxation.

The application arose out of proceedings in the Circuit Court at Oudtshoorn, in a case in which the present applicant—the wife—sued for judicial separation. The learned judge (Sir John Buchanan) granted the order, with costs, but with regard to the costs of two applications—one for alimony and one for an interdict—the Court made the following order: "Defendant to pay costs of suit, to include the costs of

only one application to the Supreme Court for alimony and interdict."

The taxing officer disallowed all costs in connection with the application for an interdict, but applicant contended that there were costs which should be allowed, inasmuch as they were costs which would have been incurred even if the applications for alimony and interdict had been made in one application. The taxing officer reported that as the application for the interdict was made on the assumption that there was community of property, and as at the trial it was shown that there was not marriage in community, the application for the interdict was unnecessary, and he interpreted the order of Court as meaning that the costs of only the application for alimony should be allowed.

Mr. Alexander was for the applicant; Mr. Bisset (with him Mr. Howse) was for the respondent.

After hearing counsel in argument, the Court refused the application, with costs.

Buchanan, J.: This is not an appeal from the judgment given in the Circuit Court, but is only a motion for a construction of that judgment as regards costs. In the action between husband and wife, two applications were made in the Supreme Court, one for an interdict and the other for payment of money in advance as alimony. Both these applications were granted in the Supreme Court, costs of these applications being made costs in the cause. That, I take it, means, generally, they were referred to the Judge to deal with when deciding on the question of costs at the trial. There were several matters in dispute between the parties at the trial, and after dealing with all the different issues, the judgment goes on to say, as recorded by the Registrar: "The defendant to pay costs of suit, to include the costs of only one application to the Supreme Court for alimony and interdict." I was the Judge at the Circuit Court, and my own note in the book is: "Costs to include costs of only one application in the Supreme Court," with a note which specifies that the applications referred to were the two for the interdict and for alimony. Now, the Master, to whom this has been referred for taxation, exercised his discretion, as I think he ought to exercise his discretion, in determining what costs were necessary. He has followed the strict letter of the order and allowed costs on only one of the two applications in the Supreme Court. In deciding which of the two applications he would allow the costs of, he takes the application for alimony, and the reason he gives is that when the matter came on for trial it was discovered that it was not necessary to have made any application as



all for an interdict. The application for an interdict was founded on the idea that the parties were married in community of property. As there was no community of property, the taxing officer held, and I think properly held, that there would have been no interdict granted if it had not been for the allegation that there was marriage in community. The taxing officer has strictly followed the judgment in allowing the costs only of one application, and I do not think he was wrong in the course he followed. The ground which influenced me in giving the order was that altogether unnecessary costs were incurred in making two applications when one could have been made. In this case I cannot say the taxing officer was wrong, and the application must be refused, with costs.

*Ex parte DE WET.*

Dr. Greer moved, on behalf of the petitioner, for leave to mortgage certain property at Gubenza, Elliott, belonging to his son, a minor, Cornelius de Wet, in order to pay for the minor's education.

The Master reported that the minor was only eight years of age, and the School Board Act probably provided for his education, but if the Court granted the application, then the money should be paid into the Guardians' Fund.

The matter had been before the Court on the previous day, and adjourned for further inquiry. Counsel now referred to section 2 of Act 40 of 1906.

Order granted in terms of the Master's report.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

CRIMINAL APPEALS.

REX V. SCHARFF. { 1907.  
Dec. 11th.

Public place—Abusive of obscene language—Act 27 of 1882, Sec. 5, Sub-sec. 18.

*S. had been convicted of "using abusive and obscene language" to G. to the annoyance of the inhabitants in a public place. S., when using the language complained of, and also G. were standing on their respective stoeps which adjoined*

*each other, and both abutted on the public road.*

*Held on appeal, that S. had been rightly convicted.*

This was an appeal by Annie Scharff from a decision of the Resident Magistrate at the Keimoes Periodical Court, fining her £1 for contravening subsection 18, section 5 of Act 27 of 1882, in that on August 23 she wrongfully and unlawfully made use of abusive, obscene, insulting, or threatening language to the annoyance of the inhabitants in a public street or road.

From the evidence it appeared that Mrs. Goldberg, a neighbour of appellant, was sitting with her child on her own stoep when appellant's child joined her. Her husband called the child back, and as he did not come, beat him, when defendant made use of the language complained of. She was sitting on her stoep at the time.

Dr. Greer for applicant; Mr. Nightingale for respondent.

Dr. Greer submitted that, under section 10 of the Act the action of the defendant must be to the annoyance of the inhabitants and in a street, road, or public place. He contended that the stoep was part of the house, and, therefore, not in a public place.

[Hopley, J.: Under section 18 of the Act, if one stands inside his drawing-room window and uses abusive language that can be heard in the street, he would come under the 18th section.]

Dr. Greer, in support of his contention that a stoep was not a public place, quoted the cases of *Rex v. Cillie* (22 S.C.R., page 614), where it was held that a shop was not a public place; *Rex v. Muller* (16 S.C.R., page 534); *Rex v. Steynerseldt* (19 S.C.R., page 39); *Rex v. Crozier* (22 S.C.R., page 182), and further contended that the language complained of was not to the annoyance of the inhabitants, as Mrs. Goldberg was the only inhabitant called who made any complaint of the language used, and she was the party most affected.

Mr. Nightingale submitted that the language was perfectly audible to anybody in the vicinity, and, as proof of it, a gentleman passing through the street at the time stopped to listen. He submitted that the stoep of a house abutting on the road was a public place, although it might be private property.

[Hopley, J.: The difficulty I find is, is it a public place? Take the literal meaning of the section. Does it mean swearing or causing annoyance in any street, road, or public place, to the annoyance of the inhabitants, or does it mean causing annoyance to the inhabitants in a street, road, or public place by swearing, etc.?)

Mr. Nightingale said they had an analogy in the case of indecent exposure.

[Hopley, J.: That is Common Law, and this is one of the Statutes.]

Mr. Nightingale submitted that for a place to be public, it was not required that there should be no private ownership. A public place was a place to which the public had access. In England a railway carriage was held to be a public place.

[Hopley, J.: How is the bar of a canteen treated?]

Mr. Nightingale: That is provided for in section 10.

Dr. Greer submitted in reply, that in the case of *Rex v. Crozier* it was held that a shop was not a public place, and that was very strong evidence in support of making the stoep of a man's house not a public place.

[Hopley, J.: But a man can shut his door and make his shop private.]

Hopley, J.: In this case the accused was charged with contravening sub-section 18 of section 5 of Act 27 of 1882 in that upon the 23rd day of August she made use of abusive, obscene, and threatening language to the annoyance of the inhabitants in a public street or road. Then the words are given. The words as given in the charge, and believed by the Magistrate, on sufficient evidence to have been uttered, are of an extremely abusive, obscene and insulting nature, and it is perfectly clear that this woman in her rage made use of such intemperate and prohibited language. The only two points that arise are as to whether she made use of them in a public street or road, and whether it was to the annoyance of the inhabitants or not. Now, as to the annoyance of the inhabitants, the person to whom the remarks referred was an inhabitant, as was also her little boy, who was on the stoep with her, and even if no other inhabitants heard it, they must have been annoyed. Even the person who was with the defendant said he never heard anything like it before, but he does not say he was annoyed, but if he was a decent-minded man, he must have been. There is quite enough evidence to show that these people were annoyed, and that they were inhabitants intended by the section, and that there were other people in the street, but it is quite unnecessary to call everybody within ear-shot. The only point left is whether this was a public place or not. The language was used from one stoep to another, and both of these stoeps abut on the street. Can it be said that because words are shouted from one stoep to another along a street, instead of across, that it is not just as likely to be heard. Sound is not confined to the place from which it emanates. Although language may be used by a person stationed or in

motion at a place which is his private property; still, if the sound travel to and the words can be distinguished at a place, road or street which is public, then it appears to me that the language is used in such public place quite as much as if the person uttering it were actually there. The other cases that have been decided seem not to touch the exact point we have to decide at present, as the real point the Court has to decide was whether the language used was such as to provoke a public breach of the peace." In the case of *Crozier*, which was quoted, the Chief Justice, at the conclusion of the judgment, said: "In the case of *Brown*, the person to whom the words were addressed was in the street, and the words were used in a public place, because they were intended to reach the person outside. Now, if two people are standing on adjoining stoeps, and the words used can and do reach the street, all I can say, as a matter of common-sense, is that I am prepared to hold that such behaviour comes under the mischief aimed at by the sub-section with which we are now dealing. The Magistrate has held the same view, and I do not see any reason for interfering with his decision. The appeal will be dismissed."

#### REX V. GRONBECK.

This was an appeal from the judgment of the Resident Magistrate at Uppington fining Michael Cronbeck £3 for contravening section 250 of the Cape Police Regulations.

Under Regulation 250 it was the duty of the defendant to enter reports of occurrence in the occurrence book or diary immediately it was possible to do so, but in the case of a man Gertse, although removed from a farm to Rietfontein, and there given a pass to another part of the country, this matter was not entered in the occurrence book, and for this breach of the regulations Cronbeck was fined.

Mr. Wallach appeared for appellant; Mr. Nightingale appeared for respondent.

Mr. Wallach having been heard in argument,

Hopley, J., without calling on Mr. Nightingale. Accused was a policeman in charge of an out-station called Biesjespoort, on the borders of Gordonia, and as such, it was his duty to keep a diary at that out-station, properly written up. On a certain day he went on patrol with another white constable, who was under him, and a native constable. The evidence shows that they went on patrol to search for Hottentots who had come from German territory over our colonial border, the Germans having complained that rebels

were escaping from them in that manner. They went to Saulstraat, some miles off, and there found a Hottentot named Gertse, whom they brought back to Biesjespoort with them. There were two versions as to how he was brought back. One that he came under compulsion, which was believed by the Magistrate, and this was borne out by the evidence of Philander, the interpreter, who had accompanied them. He says this man was actually arrested at Saulstraat, and brought to Biesjespoort. The other version, as given by the accused, was that the man came simply because one Petrus, who lives at Saulstraat, said that he was a nuisance, and he wanted him removed, and that Gertse agreed to go to Biesjespoort, where he could get a pass to go away. The Magistrate does not believe that, nor do I think it necessarily follows, as argued by Mr. Wallach, that we must believe all that Gronbeck said, because he was not cross-examined. It may be that nothing of importance could be extracted from him. Often witnesses are not cross-examined because of the palpable untruthfulness of their evidence. The Magistrate held that Gertse was brought under compulsion to Biesjespoort, but whether he was brought under compulsion or not, the fact remains that he travelled several hours' journey, and that was an occurrence that should have been entered in the diary, as every matter of importance should. That is what the policemen are given diaries for. Otherwise these policemen might do all sorts of atrocious things which they would not enter in the diary; they might hustle people about from farm to farm, and cause a lot of trouble and inconvenience, which would never be entered in the occurrence book. It is for that reason that the diary is kept, so that the inspector can see that they have been doing their work properly. To take a man from a farm and order him about the country are things which are not the duty of policemen, and which they have not the power to do, and if they have acted in that way, it should be entered in the diary. The Magistrate held that view, and found the accused guilty, and I cannot disagree with him. The appeal will be dismissed.

REX V. HEALEY.

Liquor licence — Indictment —  
Evidence of accomplice —  
Act 28 of 1883, Sec. 73,  
Sub-sec. 7.

This was an appeal from the decision of the A.R.M. at Cape Town, fining the appellant £3 for a breach of the Liquor Licensing Laws.

In the Court below, Patrick Thos. Healey, proprietor of the Hope Hotel, Hope-street, was charged on two counts with the crime of contravening subsection 7 of section 73 of Act No. 28 of 1883 of the Liquor Laws, 1883-1904, in that, about June 30 and July 7, he did wrongfully and unlawfully sell certain intoxicating liquor to George Matthews and William Castledine Jones. There was a third count, but, on appeal, this was abandoned.

Mr. Close appeared for appellant, and Mr. Nightingale for respondent.

Mr. Close contended, in the course of argument, that there was no allegation that the accused sold drink without supplying either lunch or dinner, and, according to his licence, he was empowered to supply liquor with meals. The onus of proving that he did supply lunch or dinner did not lie with the accused, but with the Crown, and that onus they had not discharged. In the second count, he was charged with selling at a time when he was not authorised—at about 8 p.m. on Sunday. According to his licence, he was entitled to sell at that hour. The only material evidence was on the first count, and on that the witness, it was admitted, had a grudge against the defendant, and in his evidence was contradicted by Jones and the positive evidence for the defence.

Mr. Nightingale having been heard in reply,

Hopley, J.: In this case the accused, who is a publican, is charged on two counts, with contravening the 7th subsection of the 73rd section of the Liquor Licensing Act, in that upon a Sunday—the first count says—June 30, he sold at his licensed premises to one Matthews a certain quantity of intoxicating liquor, to wit a bottle of whisky for 7s. and a glass of whisky for 6d., at a time when under his licence he was not entitled to sell, to wit, in the morning. The second count charged him similarly with selling a week later to Matthews and Jones four bottles of stout at a time that he was not authorised by his licence to sell, and there is an alternative charge in connection with the same offence. As to the second of these counts, it seems to me that it must fail, because it is contradicted by the licence put in. The charge says that the accused, a licensed publican, sold at a time when he was not entitled to sell, to wit, at 8 p.m., and when you look at the licence it appears that he is licensed to sell between the hours of 7 and 9 to any person who pays for and consumes a *bona fide* luncheon or dinner. Now, when a licensed victualler is charged with supplying people with liquor on a Sunday between the hours during which he is entitled to supply a customer with liquor, provided he has luncheon or dinner, then the charge should state that a

*bona fide* dinner or luncheon was not obtained, but when the accused is charged simply with selling at a time when he is not entitled to sell at, he may get confused, and the exact nature of the charge he has to answer may not strike him, so that he might neglect to call the evidence which would prove that the law and the terms of his licence had been complied with. I think, therefore, that that charge was badly drawn, and that it does not set forth the crime with which it was intended to charge the accused, and that it must fail for want of proper expression. The first count is also of rather an unsatisfactory nature. Although, strictly speaking, it states what the licence does not contradict. It states that the accused sold to Matthews a bottle of whisky and a drink at a time when he was not authorised to sell to witness on Sunday morning. Well, that is very vague. "During the morning" may have more than one meaning, and as the many people might think morning ran on until one o'clock, which would be within the time when accused was allowed to sell to *bona fide* travellers or diners, between 12 and 3 o'clock. The essence of the charge in this case ought to have been more satisfactorily stated, and there is no reason why it should not have been stated that the sale was at 10.30 in the morning, as was afterwards given in evidence, but they have not drawn it like that. I am not saying it is wrongly drawn, but I am just pointing this out. It is supported by the evidence of Matthews, and his is the only evidence in this case, that on the morning of Sunday, June 30, at 10.30, he went to the hotel private entrance and purchased a bottle of whisky from Mrs. Healey, and a glass of whisky, for which he paid 7s. 6d. on the Monday. It must be on that evidence alone that the Magistrate found the defendant guilty, and I think that there is much force in the contention for the appellant that the terms of section 12 of Ordinance 72, 1830, should apply to this case, and that there should be proof of the crime *aliunde* before the Magistrate was entitled to act upon the evidence of Matthews. It is indeed argued by the Crown that this man Matthews was not an accomplice in the commission of this crime, since the purchasing of liquor is not a crime, but that of selling is. But surely the purchaser must be an accomplice, because if he did not go there to purchase the crime would not have been committed. In this case there is not the slightest evidence of the crime being committed beyond the evidence of Matthews. He therefore stands as the sole prop of the whole charge. He comes and proves—if he proves it at all—that the crime was committed, and he says that the prisoner's agent was the

person who committed the crime, therefore the whole case rests on him, and him alone. The question then resolves itself into whether Matthews must be regarded as such an accomplice as is contemplated by the 12th section aforesaid, because, if he is, the case against the accused must fail. The 10th section of the Ordinance defines an accomplice as one who has been either a principal in, or accessory to, the commission of a crime. One species of accessory is a person who procures the commission of a crime, and if a person goes up to another, who ought not to sell liquor, and procures him to sell, he is an accomplice as an accessory to the committal of crime. Matthews confesses himself to be an accessory, for he says he sneaked in at a private door and got the liquor and sneaked out again. Mrs. Healey denies that. There is no evidence to corroborate this man, and he must be looked on as an accomplice, and a conviction should not have taken place on his evidence only. I think the whole of the circumstances are so exceedingly unsatisfactory that I should not feel myself safe in confirming this decision. The Magistrate seems to have accepted his evidence, but I think any judge would have told a jury to be very careful before accepting the evidence of a person who appears most probably to have a grudge against the defendant, for he has been prosecuted for not leaving the premises of the defendant. Under such circumstances, I think the evidence in itself is tainted, because it is very possibly spiteful, and might very easily have been trumped up for the purpose of the case, and is exceedingly unsatisfactory. I think the only safe course to adopt, especially considering the grave circumstances to the defendant, and considering the nature of the evidence, the way the charge is drawn and the class of man Matthews is, is to quash the conviction and allow the appeal.

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## SUPREME COURT

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[Before the Hon. Sir JOHN RUCHANAN.]

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### PROVISIONAL ROLL.

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MICHAELSON V. WOBBE. { 1907.  
Dec. 12th.

Provisional sentence — Foreign judgment—Undue delay.

*The plaintiff sued for provisional sentence upon a judg-*



ment obtained 15 years ago in the Court of Hamburg.

Held, that as facts were in dispute and plaintiff had unduly deferred the prosecution of his claim, provisional sentence must be refused.

Semle, the Court will recognize a judgment obtained in any competent court of a foreign friendly power.

Mr. P. S. T. Jones moved for provisional sentence for £277 16s. 4d., on a judgment of the Hamburg (Germany) Divisional Court, with interest from the 9th May, 1892, in terms of judgment, and for £8 3s. 3d., taxed costs.

Mr. Benjamin, K.C., was for the defendant.

This matter was before the Court in September, and was then postponed in order that further affidavits should be filed.

An affidavit by the defendant was now read. He stated therein that in 1892 the plaintiff issued a summons against him, but agreed to withdraw the same, on his (defendant's) mother becoming surety for the debt. They agreed on the amount owing, and defendant's mother became surety. Defendant came to South Africa in 1893, and did not know until 1907 that judgment had been taken out against him.

The plaintiff, in answering affidavit, stated that the defendant's mother became surety only in respect of an old debt, which was subsequently liquidated. Thereafter Wobbe became indebted to him in a further amount, for which plaintiff obtained judgment in 1892.

Mr. Jones, in argument, referred to 4 Nathan's Common Law, p. 2,080, and to the cases of *Hackett, Blaine and Co. v. Colonial Marine Insurance Co.* (1 Sup. Court, 406), *Jaffe v. Salman* (Transvaal Sup. Court, 1904, p. 317), on the point of the jurisdiction of the Court in regard to the judgments of foreign Courts. On the question of whether the judgment was prescribed, counsel said that the point was whether the German law or the Cape law applied. If the Cape law, he would admit it was superannuated, but in that case he contended it could be revived, either by getting judgment in the way now taken, or by proceeding on notice of motion. Mr. Jones referred to the German Civil Code, paragraph 218, to show that the period of prescription in German law is thirty years, and to Nathan, p. 2,396, par. 2,457.

Mr. Benjamin said he would draw the Court's attention to the fact that there appeared to be no authentication

of the judgment of the Court of Hamburg. The judgment was signed by the Registrar, but there was no authentication of his signature, as appeared to be usual, by some official, certifying that the person signing the judgment was the Registrar. Counsel referred to *Benjamin v. Benjamin* (1 E.D. Reps., 273). On the law point raised with regard to the prescription of action, counsel quoted section 2 of Act 6 of 1861. He contended, further, that before a judgment of a foreign Court could be enforced here, it must be revived in the country in which it was given. This was a stale judgment, and if the plaintiff had any claim, he should be made to go into the principal case.

Buchanan, J.: This is an application for provisional sentence upon a judgment of the Court of Hamburg, obtained by the plaintiff against the defendant. This judgment was obtained as far back as the year 1892. Our prescription Act prescribes a butcher's account, among other things, within a period of three years. Where a written document is obtained upon which provisional sentence can be obtained, the second section of the Act extends the period of prescription to eight years. The original debt arose in respect of cattle sold to a butcher's business, and really would stand more in the position of a debt for goods sold and delivered than as a butcher's account; but the second section of the Act, which prescribes claims upon documents, upon which provisional sentence can be obtained, expressly states that nothing in the Act contained shall extend to or affect any mortgage bond, general or special, or any judgment of any Court in this colony or elsewhere. The judgment sued upon is not a judgment obtained in this colony: it is a judgment obtained elsewhere, and in pursuance of the comity which exists between friendly nations, this Court has on previous occasions recognised, and would, I have no doubt, in this instance recognise the judgment of a Court of competent jurisdiction in Germany. But the defence set up is that this judgment has been obtained without the knowledge of the defendant, and against an agreement entered into at the time. The defendant alleges that when the summons was served upon him, when he was still in Germany, it was arranged that his mother should interpose as surety for the debt and pass a bond, and that the summons should be withdrawn. The mother, it is admitted, did interpose as security, and she did pass a bond, and did pay certain moneys to the plaintiff. But the plaintiff now says that the moneys so paid and the bond so given by the mother were in relation to an antecedent debt, and not to the debt which is sued upon in this case. Here is a disputed fact

which it is difficult to decide upon affidavit, and there is also the question of the antiquity of the claim, and it is said that certain official certificates of the validity of the document sued upon is wanting. Under these circumstances I think it is a case in which the principal case should be gone into. Where there has been this delay in enforcing a judgment, and as a question may possibly be yet raised as to whether the judgment is prescribed in this country or not, I think that the delay of 15 years without any proceedings requires that the Court should hold its hand, and not grant provisional sentence. If the principal case is gone into, the costs will abide the result; otherwise plaintiff will pay the costs.

#### FALSE BAY QUARRY CO. V. HIRSCH.

Mr. Close moved for a writ of civil imprisonment against the defendant.

The defendant appeared and said he did not owe the money. Judgment was given in his absence. He was sued as a partner in an insolvent partnership estate, but he pleaded that he was not a partner at the time.

Mr. Close said that judgment was given by default.

Buchanan, J.: You had far better put your case in the hands of an attorney, Mr. Hirsch, and have things done in proper order.

Defendant said he had no funds.

[Will you go into the box and swear you have no property?]

Defendant: Yes. The defendant then entered the witness-box, and said he had no property. He was employed on the railway in German West Africa at a salary of £25 a month, and he had to maintain his family in Cape Town. He had very little furniture.

By Mr. Close: He had £2,000 in the bank in his name within the last nine months, but that belonged to the railway firm.

Buchanan, J., said he would make no order at present. The matter would stand over.

#### HASKINS V. DE GOUVEA.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate.

Order granted.

#### TRILL V. JOHN JAMES WESSELS (TRADING AS THE BEACH ESTATE SYNDICATE).

Mr. Gardiner moved for provisional sentence against the four defendants Wessels, trading as the Beach Estate Syndicate, for £3,000 on a mortgage bond. Counsel said that the return of

service by the Sheriff stated that, being unable to find any of the defendants, he had, at the request of the plaintiff's attorney, served summons upon certain Cape Town attorneys as agents for the defendants. Except in one case, however, these gentlemen had refused to accept service.

An affidavit was read in which the plaintiff sought to show the agency of the several gentlemen in question. Various transactions were described in which the attorneys had acted on behalf of the defendants.

Provisional sentence granted, as prayed.

### REHABILITATIONS.

#### *Ex parte* HENSLEY.

Mr. De Waal, on behalf of the petitioner, asked for a postponement *sine die*.

Ordered accordingly.

#### *Ex parte* MILLIN.

Mr. De Waal moved for insolvent's rehabilitation.

Order granted.

### GENERAL MOTIONS.

#### HOFFMAN V. HOFFMAN. { 1907. Dec. 12th.

Mr. Marais moved for a decree of divorce, the defendant having failed to comply with a rule nisi ordering him to return to or to receive the plaintiff.

Rule made absolute, as prayed, with costs.

#### *Ex parte* MURDOCH.

Mr. Douglas Buchanan moved for leave to sue *in forma pauperis* for divorce.

Mrs. Murdoch gave evidence. She said she had no means. The trustees of her husband's father's estate allowed her children £100 a year for only one year. Her husband held property in trust. He was now in Canada.

Rule nisi granted, to be served personally, if possible, failing which by registered letter to defendant's attorneys in Scotland, and by one publication in a newspaper circulating in Latchford, Ontario, Canada; returnable March 12.

*Postea* (December 13th).

Leave was granted to serve *intendit* together with notice of trial.

*Ex parte PEYPER.*

Mr. D. Buchanan moved to make absolute a rule nisi granted under the Derelict Lands Act.

Rule made absolute.

*MAXWELL AND EARP V. DREYER.*

Mr. P. S. T. Jones moved to make absolute a rule nisi to attach a certain inheritance.

Rule made absolute.

*Ex parte DE MARILLAC.*

Mr. Watermeyer moved to make absolute a rule nisi calling on respondent to show cause why a certain sale should not be cancelled.

Rule made absolute.

*TRUTER V. TRUTER.*

Mr. Long moved to make absolute a rule nisi. The rule called upon the respondent to show cause why he should not be declared a prodigal, why he should not be interdicted from dealing with his property, and why a curator should not be appointed, but counsel said he only asked for the rule to be made absolute in respect of the last two prayers, and for the appointment of applicant, who was respondent's wife, as *curator bonis*.

Rule made absolute accordingly, costs to come out of the estate.

*Ex parte Y.M.C.A., STELLENBOSCH.*

Mr. H. J. van Zyl moved to make absolute a rule nisi in respect of the amendment of a certain deed of transfer.

Rule made absolute.

*Ex parte ESTATE GOUS.*

Mr. Upington moved for the appointment of a *curator ad litem* in proceedings *de lunatico inquirendo* in regard to one Jacob Marthinus Gous, an heir in the estate.

The Court appointed the Resident Magistrate of Prince Albert curator, with instructions to make a special report to the Court upon the mental condition of the alleged lunatic, leave being given to take evidence by affidavit.

*HUNKIN V. KING.*

Mr. Bisset moved for an order in terms of a rule nisi calling on respondent to deliver up a certain diamond ring.

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In her supporting affidavit, the applicant, Annie Hunkin, said that on the 19th August, 1907, the respondent agreed to advance her £10, on which advance she was to pay interest at the rate of 10s. per month. As security she deposited with him a ring which had been valued by several jewellers at between £70 and £75. Respondent informed her that as he did not hold a pawnbroker's licence he was unable to give her a receipt. She had received from him £8 10s., and she now asked for an order compelling him to deliver the ring against payment of the amount owing by her.

King appeared, and produced a receipt for the purchase price of the ring. He said the applicant still owed him £4 on account of goods she had from him for sale. He gave evidence on oath, saying he bought the ring from Mrs. Hunkin.

The matter was ordered to stand over, in order to enable the plaintiff to file replying affidavits.

*Ex parte EQUITABLE MARINE AND FIRE ASSOCIATION CO., LTD.*

Dr. Greer moved for an order placing the company under final liquidation, and for the appointment of Mr. Francis Chiappini as liquidator.

Order granted.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

### PROVISIONAL CASE.

SCOTT V. FRAME. { 1907.  
Dec. 13th.

Insolvency—Compulsory sequestration—Opposing creditors—Ordinance 6 of 1843, Sec. 5.

*S. had applied for the compulsory sequestration of F.'s estate. Certain creditors opposed, on the ground that the sequestration would not be for the benefit of the creditors in general.*

Held, that under Sec. 5 of Ord. 6 of 1843, the petitioning creditor could claim an order of final sequestration.

Mr. Howse moved for the final adjudication of the defendant's estate as insolvent. A provisional order was granted on the 4th inst.

Mr. J. E. R. de Villiers opposed the application on behalf of certain creditors, Bennett and Heydenrych.

Answering affidavits were filed on behalf of the opposing creditors, in which it was stated that these creditors had obtained writs of civil imprisonment against Frame, which were suspended on payment of certain amounts per month. A petition by Frame for leave to surrender his estate had previously been refused by the Court. It was further alleged that the respondent was in receipt of an income from the estate of his father, and that the respondent's wife had become surety in respect of the debt due to the petitioning creditor. The opposing creditors asserted that the sequestration would not be in the interests of creditors.

In a replying affidavit, the petitioner said he had a guarantee from the respondent's wife for payment of the debt, but the validity of this had been impugned, and the document had been repudiated by the wife.

Buchanan, J., said that an act of insolvency had been committed, and the question of whether sequestration was for the benefit of creditors did not come into the case.

Mr. De Villiers referred to Section 18 of the Insolvency Ordinance, and quoted the case of *De Vos v. Borchill and Co.* (1 Buchanan, 1868, p. 1). He submitted that the Court would exercise its discretion, even where there had been an act of insolvency. Counsel also referred to the case of *Keefer and Others v. Von Ron* (2 High Court, p. 435). Another point, he said, was that there were practically no assets in the estate. There must be something to surrender. If the estate were sequestrated, the creditors would have to contribute to the costs, as they had been obliged to do on the occasion of a previous surrender by Frame in 1887. To sequester an estate when it must result in a contribution account was not, counsel contended, a legitimate use of the Ordinance.

Buchanan, J.: There are two enactments dealing with the compulsory sequestration of a debtor's estate. Act 38 of 1884 provides for cases where no act of insolvency has been committed. In such a case the 3rd section requires the petitioning creditor to show that the debtor's estate is insolvent, and that the sequestration of the estate will be

for the benefit of creditors. But where an act of insolvency has been committed Ord. 6 of 1843 applies. Section 5 of the Ordinance provides that when any creditor has a claim against the debtor and the debtor has committed an act of insolvency, he may then, on proof of these facts, apply for the sequestration of the debtor's estate. In this case the debtor has committed an act of insolvency, and the application is made under this section of the old Ordinance. The debtor does not oppose the sequestration, but other creditors come in, and say the sequestration will not be to their benefit, or for the benefit of other creditors. The fact that other creditors may be damaged by the sequestration does not, however, deprive the petitioning creditor of the right expressly given to him by the Ordinance to apply for sequestration. In this case, there being an Act of Insolvency and the provisions of the Ordinance being complied with, applicant is entitled to have the final sequestration of the estate of his debtor adjudicated. The only question that arose in my mind was this: The opposing creditors allege that the applicant has security for his debt. If he had such security and failed to comply with the 30th section of the Ordinance, he would, of course, not be entitled to ask for sequestration, but in his answering affidavit he explains the circumstances and swears he has no security of any kind. The security referred to was supposed to have been given by the respondent's wife, but she has repudiated that, and it has been abandoned altogether by the plaintiff. An order will be granted for the final adjudication of the respondent's estate. The costs of the application will, of course, have to come out of the estate, but the costs of opposition must be paid by the opposing creditors.

#### GENERAL MOTIONS.

DOORNBRAK V. INSOLVENT } 1907.  
ESTATE DOORNBRAK. } Dec. 13th.

Insolvency — Trustee — Costs *de bonis propriis*—Ordinance 6 of 1843, Sec. 98.

*The trustee of D.'s insolvent estate, previous to the third meeting of creditors, advertised a sale of the property in the estate. At the third meeting the majority in number and value of the creditors refused to sanction the sale as to certain household furniture. A rule nisi had been obtained,*



*interdicting the sale of the furniture.*

*Held, that the rule be made absolute, and that, as the trustee had contravened Sec. 98 of the Insolvent Ordinance by attempting to force the sale contrary to the wish of the majority of the creditors, he be adjudged to pay costs de bonis propriis.*

This was an application to make absolute a rule nisi restraining the respondent, who is the trustee in the insolvent estate of Doornbrack, from proceeding with the sale of certain immovable property and household furniture, and calling upon him to show cause why he should not be ordered to give effect to certain resolutions passed at a meeting of creditors.

The applicant's affidavit set forth that he represented a majority in number and value of the creditors. At the third meeting in the estate he moved resolutions instructing the trustee to place the immovable property in the hands of Messrs. A. B. de Villiers and Co., of the Paarl, for sale, and allowing the insolvent to retain possession of her furniture, and to trade in her own name. These were passed, but respondent had refused to act on the resolutions, and had advertised the sale of the immovables and of the furniture.

The respondent (the secretary of the Paarl African Trust Company, Ltd.) stated in an affidavit that at the second meeting of creditors, the applicant attempted to prove debts on behalf of the children of the respondent, but on deponent objecting these claims were rejected. At the third meeting, however, they were accepted, but the insolvent was unable to be present at that meeting, and deponent was unable to examine her as to her insolvency, and especially as to her dealings with her children. Deponent intended calling a special meeting for the purpose of examining the respondent. He admitted advertising the auction sale, which had been interdicted, but said he did so with the consent of all the creditors (including the only preferent creditor), with the exception of those represented by the applicant. Excluding the claims of the children, applicant did not represent a majority in number and value of the creditors.

The applicant, in a replying affidavit, said that the sole reason for the rejection of the claims of the children at the second meeting, was that the amounts in respect of the claims were not sufficiently specified. This was rectified, and the claims were admitted at the third meeting.

Mr. Russell for applicant; Mr. McGregor, K.C., for respondent.

Mr. McGregor submitted that the best course would be to order the matter to stand over until there was an opportunity of examining the insolvent and ascertaining further as to the claims of the children.

Without calling upon Mr. Russell, the Court made the rule absolute, with costs against the respondent *de bonis propriis*.

Buchanan, J.: At the second meeting of creditors in this estate certain claims were proved, and the respondent was elected trustee in the estate. He proceeded to take out letters of confirmation, and after he got letters of confirmation he prepared a report, which he presented to the third meeting of creditors. Up to that time no resolutions of any kind relating to the disposal of the property in the estate had been passed by the creditors. In his report the trustee says he has advertised the sale of the fixed property, and of the household furniture. The 98th section of the Insolvent Ordinance is clear as to the trustee's duties. It requires the trustee, subject to the direction of creditors to make sale of the property in the estate. At the third meeting the trustee moved the adoption of his report. This was not carried, but certain other resolutions were carried in lieu of this. The trustee's report proposed to sell the immovable property as well as the household furniture. This 98th section says that the trustee shall not sell, among other things, the household furniture until the creditors have resolved upon that. The creditors have never resolved upon the sale of the household furniture. On the contrary, the majority of the creditors in number and value passed a resolution that the insolvent be allowed to retain the household furniture. In these circumstances, the insolvent's trustee is wrong, and is directly contravening the Ordinance in attempting to force the sale of the furniture in the estate. The trustee, notwithstanding the resolution of the majority of the creditors, wishes to force the sale of the immovable property in the same way. In spite of the resolutions of the creditors, and without any appeal to the Court objecting to these resolutions, the trustee insists upon going on with the sale. I am of opinion that he is not justified in so doing. He is wrong in compelling the applicants to come to the Court in order to force the trustee to carry out the instructions of the creditors. It is said now that the claims of particular creditors who have proved may be upset afterwards, but so long as these claims remain as proved, the votes of these creditors must be regarded by the trustee. Until the claims are struck out, the trustee's duty, as the

officer administering the estate, is to follow the instructions of the creditors, and, as he has refused to carry out the instructions the applicants were justified in coming to the Court. The rule nisi must be made absolute, and as there was no justification at all for the trustee acting in violation of the resolutions of the creditors, the costs of the application must be borne by the trustee *de bonis propriis*.

After hearing Mr. McGregor further on the question of the costs,

Buchanan, J.: It appears, from the record, that when the trustee stated he would carry out his own views, his attention was specifically directed on the 98th section of the Ordinance. Notwithstanding that, he still persisted, and when the creditors succeed in compelling him to carry out their instructions in accordance with the Ordinance, he wishes them now to pay the costs of disobeying their instructions. I think this is especially a case where the trustee should pay the costs *de bonis propriis*.

#### *Ex parte SPILHAUS.*

Dr. Rainsford moved for the appointment of a curator in the estate of the respondent.

The Court appointed Mr. E. Schroeder, of Upington, curator, with power to sell the perishables at the risk of the petitioning creditor.

REX V. COOK. 6 1907.  
( Dec. 43th.

Liquor licence — Absence of licence-holder — Act 28 of 1883, Sec. 76, Sub-sec. 1.

*The holder of a retail liquor licence, who allows his business to be conducted by a manager without the permission of the R.M. and visits the premises frequently, is not guilty of contravening Sub-sec. 1 of Sec. 76 of Act 28 of 1883, unless he absents himself for an entire continuous month from the premises.*

This was an appeal from a conviction and sentence by the A.R.M. of Herbert.

The appellant was charged before the Assistant Resident Magistrate with a contravention of section 76, sub-section 1 of Act 28 of 1883, in that, being the holder of a retail wine and spirit licence on the premises known as the Albania Hotel, at Douglas, he wrongfully and

unlawfully permitted one James Charles Gilchrist to manage, superintend, or conduct the business of the said licensed premises during his absence for a period longer than one month, without the consent in writing of the Magistrate. The Magistrate convicted the accused, and ordered the forfeiture of the licence, which was the penalty provided for by the Act.

Mr. Upington was for the appellant; Mr. Howel Jones, K.C., was for the Crown.

Mr. Upington said that one of the points for decision was whether the words "for a longer period than one month" qualified the words "during his absence," or qualified the words "manage, superintend, or conduct the business of the licensed premises"—qualified these words alone. The accused was never absent from the hotel premises for a period of one month—there was no dispute on the evidence as to that—and the next point for decision—at least, the important point—was whether the section meant that if a person were appointed to manage, superintend, or conduct the business of the licensed premises in the event of the licensed proprietor being absent for a couple of hours a day, and if that appointment continued for longer than one month—whether that would be a contravention of the section. The contention of the appellant was that the section meant that if the licensed holder went away for a period of more than a month, and left someone behind to manage and conduct the business for him for that period, he must get permission in writing from the Magistrate. The facts might possibly constitute an offence against the second sub-section, but did not constitute, he would submit, a contravention of sub-section 1.

The evidence showed that Cook, who is the editor of a paper in Douglas, received 10s. a month from the owners of the hotel—Messrs. A. W. Cumming and Co.—for allowing his name to be on the licence as the licence-holder. Gilchrist was employed at the hotel, and in his evidence, he said that Cook never came on duty in the bar, but only occasionally visited the hotel as a customer. Cook, in his evidence, stated that he had never been absent from the hotel premises a month at a time. He visited the hotel at least half a dozen times a month. Mr. Cumming instructed him to inspect the premises occasionally. Cumming stated that Gilchrist was engaged as a barman.

The Magistrate, in his reasons, said he believed Gilchrist managed the licensed premises for the period stated in the summons, accused being a mere figurehead. In the advertisement in the "Griqualand West Observer," published by Cook, and on the billheads of

the hotel, Gilchrist was styled manager. The defence made no endeavour to produce the testimony of independent witnesses to prove that accused did actually exercise supervision over the licensed premises. He (the Magistrate) was satisfied that accused did not exercise control and supervision over the premises, and he considered it absurd to suppose that occasional casual visits from the licence-holder was all that the law required.

Mr. Upington said that the point was what was the construction of section 76. It was a penal section, and its construction was important to a large number of people throughout the country. He submitted that it must be construed apart from the special circumstances of this particular case. There were two possible constructions, the one contended for by the Magistrate and the other contended for by the applicant. Counsel submitted that the ordinary rules of interpretation should be followed and that the words "during his absence for a period longer than one month" qualified all the words that preceded them, or, at the most, that they qualified the words which immediately preceded them. If the Magistrate's view were taken it would result in a large number of licensed victuallers having laid themselves open to forfeiture of their licences. He urged that the proper construction of the section was that if a licence holder went away from his premises, left the place for an extended period of one month or more, then he committed an offence against the Licensing Act if he allowed another person to take his place there and to conduct the business entirely without any kind of supervision on his (the licence holder's) part. The test that must be applied was not whether the supervision or control of the licence holder was sufficiently elaborate, but whether in fact he was absent from the premises for a period of one month or longer.

Mr. Jones submitted that if the Court had any doubts upon reading the sub-section in question, those doubts would be dispelled by considering the object of the Act and the intention of the Legislature. It must have been intended that the licence-holder should be the person who should manage the business. He contended that in the meaning of the Statute Gilchrist was managing the business for more than a month, and the licence-holder was absent. If the contention of his learned friend was right, then it would have been sufficient for Cook to go to the licensed premises once a month. If that were the case, the section was absolutely valueless. He submitted that it could only have been the intention of the Legislature to secure that the licence-holder, being a man worthy to hold the licence, should exercise proper supervision and control over the premises.

Buchanan, J.: The accused was charged with contravening section 76, sub-section 1, Act 28 of 1883, in that, being the holder of a retail licence on the premises known as the Albania Hotel, in the township of Douglas, he did wrongfully and unlawfully permit one James Charles Gilchrist to manage, superintend, or conduct the business of the said licensed premises during his absence for a period longer than one month without the consent in writing of the Resident Magistrate. The evidence as to the absence of the licensee from the hotel is very unsatisfactory. The Chief Constable says that between the dates specified in the summons he was frequently at the hotel, and never saw the accused there. He admits that the accused was in the village during the period in question, but he never saw him at the hotel. The next witness is William Anderson, who said in cross-examination, "Cook has never been away for a month from the town or the premises." That is a witness for the Crown. Then Gilchrist says: "I have several times seen the accused in the bar drinking. He never came there on duty as licensee. I warned him not to come to my bar," and he says he took no orders from anyone. The sergeant of the police says: "From the 8th July to the 21st September I have seen the accused in the bar occasionally." Then the Magistrate was called, and said: "I have received no application from accused for permission to have any manager upon his premises at any time." The Magistrate in his reasons has not found that the accused was absent from his premises at any one time for a month, but says, "I believe that Gilchrist actually did manage the accused's premises, known as the Albania Hotel, and the defence did not by independent witnesses prove that he exercised reasonable control and supervision." That is the offence of which the Magistrate found him guilty, and for which he sentenced him: that he did not exercise reasonable control and supervision over the conduct of the premises. Now we must turn to the Act to see what provisions of the law the accused is charged with having contravened. The language of the section may be obscure, but I think that its grammatical meaning can be ascertained. It says that the holder of any licence shall be liable to forfeit such licence if he shall permit any other person to manage, superintend or conduct the business of the licensed premises during his absence for a longer period than one month without the consent, in writing, of the Resident Magistrate. It is contended for the Crown that if a licence-holder appoints a man as his manager, say, for six months, to manage the hotel during his absence, and if the licensee should happen to be ab-

sent, say, for a week at a time during those six months, then taking all those absences together, if the total was for more than a month, he would be guilty of a contravention of the section and thus render his licence liable to forfeiture. I think the intention of the section is that a person shall not allow another to manage or conduct the business of his premises for a longer period in his absence than one month at a time without getting the permission for a longer absence from the Magistrate. If there is any doubt as to the construction of the section, then such construction as is most favourable to the accused would have to be placed upon it. Other parts of the Act, as pointed out by Mr. Upington, show that the Legislature does contemplate the appointment of managers, because another section provides that any such manager convicted of contravention of the Act shall be liable to the penalties under the Act, but that this liability shall not relieve the holder of the licence also from liability. If a manager has been appointed the Act says that such manager, as well as the licensee, shall be liable for any contravention of the Act; and this section, I think, is intended to mean that if a manager is absent for more than a month at a time without obtaining the permission of the Magistrate he then renders his licence liable to forfeiture. The contention of the Crown that if a man has been appointed as manager for six months, and if during those six months the collective absence of the licensee should amount to a month he is liable to have his licence forfeited, is not, I think, the intention of the Legislature as expressed in this subsection. The Magistrate has not found that the accused was absent for more than one month from the premises, but that the licensee has not exercised the requisite and proper control over the premises. That may or may not be an offence under another section, but we are confined to the strict letter of the charge, and the charge laid under this subsection no crime has been proved. There may be other provisions of the Act more applicable to the circumstances of this case, but if so, the proper charge must be laid under such provisions. The conviction and sentence will be quashed.

## SUPREME COURT

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### ADMISSIONS.

{ 1907.  
} Dec. 17th.

Mr. Toms moved for the admission of Archibald Alexander W. Dichmont as an attorney and notary.

Application granted and oaths administered.

Mr. Toms moved for the admission of David Johannes du Plessis as an attorney and notary.

Application granted and oaths administered.

#### PROVISIONAL ROLL.

##### EGERTON PARK ESTATE CO. V. WILLIAMS.

Mr. H. S. van Zyl moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £57, together with £2 4s. costs.

Defendant did not appear.

Decree granted, with costs.

##### ESTATE GORDON V. SILBERBAUER, WAHL AND FULLER.

Mr. H. S. van Zyl moved for provisional sentence for £117, upon a certain agreement. Counsel said that in the summons credit was given defendants for £30 and £3, but it was found that the former credit had been wrongly allowed, and that the amount actually due was £117, and not £87, as shown in the summons. He, therefore, applied for an amendment of the summons by striking out clause (a) referring to the credit of £30. A letter had been written to defendants pointing out the mistake, but no reply had been received from them.

The amendment of the summons was allowed, and provisional sentence given for £117, with costs.

##### OSBORNE AND CO. V. LAWRENCE, TRADING AS E. J. LEE.

Mr. H. G. Lewis moved for provisional sentence on a dishonoured cheque for £41 2s. 1d., with interest from the 2nd December, 1907, and costs, plaintiffs being legal holders of the cheque.

Order granted.



REHABILITATION. { 1907.  
Dec. 17th.

Mr. Inchbold applied, under section 117 of the Ordinance, for the rehabilitation of Henry Distin.

*Ex parte* ESTATE THEUNISSEN.  
Executor and tutor—Unauthorized expenditure.

*The applicant had expended certain moneys on the construction of buildings on a farm, the property of his wards, without the previous sanction of the Court, and now applied for an order on the Master to pay out from the funds in the estate the costs of the said buildings.*

*Held, that under the special circumstances of the case, the Master be authorized to pay out the moneys so expended.*

Mr. J. E. R. de Villiers moved, on the petition of J. C. Theunissen, as guardian of the minors Theunissen, for an order authorizing the Master to pay out certain money. Counsel said the matter had previously been before the Court. The tutor built a house on the minors' property, in the district of Beaufort West; he had lived in the house as a lessee, and had paid a fair rent. The only point in the Master's report was as to the item of £604 paid for the erection of the house. The Master said he was not aware of any similar case in which the Court had sanctioned such expenditure without express authority having first been obtained. He was not prepared, he added, to say that the property had been improved to the extent of the value of the house erected thereon. When the present application was originally mentioned, it was ordered to stand over for further information on certain points. This information was now embodied in supplementary affidavits, read by counsel.

Hopley, J.: I think the executor took a great risk when he built to the extent he did build, incurring large expenditure without an order of the Court authorising him to do so. He seems to have looked after the minors, and to have lived at this very building, and it may very well be that he would have had no decent house to occupy, and certainly there would not have been much sense in paying a large rental for a farm on which there were no proper buildings. It may have been a matter of necessity, but, as far as I can see,

this is just one of those things in which the Court would have authorised a prudent expenditure of moneys in the estate, if the facts had been properly laid before the Court. The executor seems to have taken matters into his own hands, and he has put on the farm buildings which have, as far as I can now follow from the affidavits, enhanced the value of the farm by the full amount which he claims. The enhancement is placed by people who seem to be credible witnesses at £700, whereas the executor asks for £600 odd. The house seems to be kept in good repair, according to the affidavits, and it might very well be that it is one of the elements that the present tenant took into consideration when he took the lease of the farm. Under all these circumstances, although it is not a course that the Court should encourage executors to adopt in the future, and although it is a thing that the Court must warn executors not to do, I think the Court may pass the account with this item in it, and authorise the Master to pay out the deficiency, as shown in the account.

*Ex parte* UNITED FREE CHURCH OF SCOTLAND.

Free Church and United Free Church (Scotland)—Transfer duties.

*The Court has no power to sanction the transfer of immovable property from one religious body to another free of transfer duties.*

*The Free and United Free Churches (Scotland) are different religious bodies.*

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain immovable property free of transfer duty. The petitioners were the Revs. James Henderson, principal of Lovedale Missionary Institution; John Lennox, M.A., secretary of the Kaffraria Missionary Council; David Duncan Stormont, principal of Blythwood Missionary Institution; Wm. Gavin, secretary of the Transkei Missionary Council; and John Bruce, secretary of the Natal Mission Council, as representing the General Body of Trustees of the United Free Church of Scotland.

The petition was as follows: "In or about the year 1899 steps were taken in Scotland with a view to effect a union of the Free Church of Scotland and the United Presbyterian Church of Scotland, under the name of the United

Free Church of Scotland. This was ultimately carried with a small number of dissentients of the Free Church of Scotland, locally designated the "Wee Frees," who initiated legal proceedings to maintain their rights. Matters eventually became so complicated that the Imperial Parliament passed the Churches (Scotland) Act, 1905 (5, Edw. VII., ch. 12), appointing Commissioners to deal with all the property of the original Free Church of Scotland. The Commission duly reported on the 18th February, 1907, as per certified copy annexed marked "A," dealing with foreign missions in South Africa, and in such report all the properties belonging to the Free Church of Scotland were allocated to the United Free Church of Scotland (not including the "Wee Frees"). The properties so allocated include, *inter alia*, those set forth in the schedule annexed marked "B." In consequence of the union of the two bodies aforesaid, and the change of name and the allocation of properties under Royal Commission, it has become necessary to change the name of the trust in which the said properties have hitherto been held in the deeds of grant and transfer. There has been no change in the objects for which the said properties have been granted, acquired, and used in the past. These objects will in no way be affected by the change of trust. Wherefore your petitioners pray that your lordships may be pleased to grant an order authorising the Surveyor-General and the Registrar of Deeds in Cape Town and King William's Town respectively to endorse on the grants and transfers of the properties as per schedule "B," the change of the name of the trust to that of the United Free Church of Scotland.

From annexure "A" (Order No. 2, Foreign Missions, South Africa), it appeared that the Commissioners, acting under the Act, had allocated to the United Free Church of Scotland, "the whole property, heritable and movable, real and personal, situate in South Africa, which belonged to or was held for the said Free Church of Scotland, and any interest in property situated in South Africa which the said Free Church of Scotland possessed, all as at the thirtieth of October, nineteen hundred, including the following properties, which are hereby allocated to the said United Free Church of Scotland, *videlicet*—the Missionary and Educational Institution of Lovedale, with all buildings, houses, churches, and schools, whether at the central institution or at out-stations, and lands, water rights, and others attached to or in connection with the said central institution, or any of said out-stations; the whole schools, churches, mansees, and other buildings and lands at or in connection with the stations and their out-stations in Cape Colony, known as

Burnehill, Pirie, Macfarlan, Cunningham, Main, Duff, Somerville, Ross, Rainy, Port Elizabeth, Tora, Ugie, Donhill, Stuartville, and Sibias; the Missionary and Training Institution at Blythwood, Cape Colony, with all houses, buildings, schools, farms, lands, and water rights in connection therewith; the manse, schools, and churches at Pietermaritzburg, and out-stations, Natal; the mission house, schools, churches, farm, and others known as Kalibasi and Renier, and out-stations at Dundee and Ladysmith, Upper Natal; the buildings and farm in connection with the Gordon Memorial Mission, Natal, and the Overtoun and other out-stations in connection therewith; the land on which the mission house and church is being built at Polela, Bulwer, Natal; the property at Johannesburg, in the Transvaal; and all other property which belonged to the said Free Church of Scotland or institutions connected therewith, in the colonies of Cape Colony (with Bechuanaland and Basutoland), Orange River Colony, Transvaal, and Natal (with Zululand). The Commissioners then go on to state that in order to carry the allocation into effect they transfer the property from all persons in whom it is vested to certain persons residing in Glasgow, Edinburgh, and elsewhere, "who shall hold the same for the purposes of the missions of the said United Free Church of Scotland in South Africa, or for similar purposes, and shall, as regards the management and disposal of the said property, be subject to the regulation and direction of the General Assembly of the said United Free Church of Scotland for the time being, etc."

The following report on the petition has been prepared by the Registrar of Deeds under date December 12: "This petition is presented as the result of an award made by a Royal Commission appointed under the provisions of the Churches (Scotland) Act, 1905 (5 Edw., 7 Ch., 12), in terms of which the United Free Church of Scotland became entitled to the properties enumerated in the annexure to the petition, some of which at present stand registered in the name of the Free Church of Scotland and others in the name of officers, who apparently represented that institution: the object of the petitioners being to procure an order from the Court, which, if granted, would have the effect of vesting the lands in the former Church. The grounds upon which the petition is based are that all the properties were held by the Free Church, subject to certain trusts, and that they will continue to be devoted to the same objects. Petitioners contend, therefore, that they are entitled to be substituted as trustees. It would no doubt cause the Church authorities very considerable in-

convenience if they were put to the expenses of procuring transfer in the ordinary course, and I would have been only too pleased, in view of the purposes to which the properties are devoted and the undoubted benefit the Colony derives through the operations of the institution established upon it, could I have added my recommendation, but I unfortunately feel that I cannot. It is true that the majority of the deeds by which the land is held provide expressly that it shall be used for church or mission or educational purposes, and that it must therefore continue to be used for those purposes, but there is no getting away from the facts that the two churches are entirely distinct bodies, and that the proposal, if carried out, would actually effect a change in the ownership of the land. The petitioners must therefore, I fear, even as regards the properties so acquired, proceed to procure transfer in the ordinary course, and also, as no exception is provided by the Act, pay the usual transfer duty on their value. The objections I have pointed out apply, of course, with still greater force in the case of the properties acquired free from any restriction, or from which the restrictions have been removed, as in the case of the grants dated September 1, 1849, November 22, 1849, and May 7, 1858, the conditions of which were annulled by Act 20 of 1876, as the Church will not only become the owner, but will have the power to alienate the land, or devote it to other purposes, at its pleasure."

In a supplementary report, dated December 13, the Registrar of Deeds said: "I desire to add that since writing my report in this matter I have discovered that 52 of the deeds of grant affected by the petition expressly limit the use of the land granted to church, mission, or educational purposes in connection with the Free Church, and that 18 of these were issued under the provisions of section 6 of Act 15 of 1887, by virtue of a special resolution of both Houses of Parliament. It would seem, therefore, that the land thus obtained, as well as that held under a grant issued under the provisions of Act 14 of 1878 by virtue of a similar resolution, cannot be alienated without the sanction of Parliament."

Mr. Close for applicants; Mr. H. Jones for the Colonial Government.

Mr. Close submitted that for all practical purposes the Free Church and the United Free Church of Scotland were one body, and that the case was one in which the Court would grant an amendment of the transfer. He cited *Ex parte Botha* (13 C.T.R., 1,142), *Blauwklip Garden Co.* (20 S.C., 383), *Strathsomers Estate Co., Ltd., v. Colonial Government* (17 C.T.R., 916), *Union-Castle Steamship Co., Ltd.* (19 S.C., 180), and *Liquidator, Cape of Good*

*Hope Bank v. Registrar of Deeds* (9 Juta, 144). Counsel also referred to Act 5, 1884 (section 19, sub-section 9), to Act 3, 1873 (sections 2 and 3), and to the Imperial Act No. 5 of 1905.

Mr. Howel Jones submitted that what was asked for was transfer from one body to another. The Free Church and the United Free Church were in law two distinct bodies. He referred to Act 20 1876. He contended that the applicants ought to proceed by special Bill in Parliament.

Mr. Close having been heard in reply.

*Cur. Adv. Vult.*

Hopley, J.: This is the petition of certain gentlemen describing themselves as representing the general body of trustees of the United Free Church of Scotland. It would appear that in 1893 there was a union of the Free Church of Scotland with the United Presbyterian Church of Scotland, the union so made describing themselves in future as the United Free Church of Scotland. A small minority of the Free Church dissented from this union, and refused to abandon their possessions, alleging that there was no union, that no union was possible because the United Free Church was a body different from the Old Free Church in that it departed from some of the distinctive tenets of the Free Church and abandoned some of their essential dogmas. Litigation of a protracted character ensued, and eventually the House of Lords, reversing the decision of the Court of Session, held that the contentions of the Free Church were correct, that essential tenets and dogmas had been abandoned by the United Free Church, and consequently final judgment was given in favour of the small body of dissentients who then still represented the Free Church of Scotland. This judgment had the effect of vesting in the small body of the Free Church a vast amount of property, more than they could manage, and of leaving the quondam members to a large extent without endowment. Thereafter, matters became so complicated, that there was legislation by the Imperial Parliament, and a body of Commissioners was appointed with full powers to deal with the property held by the Free Church, and to allocate it in such manner as they might deem advisable practically between the two branches of the Free Church. This has been done, and properties in South Africa vested in the Free Church and given to them in trust for missions, cemeteries, educational establishments and suchlike uses were allocated by the Commissioners to the United Free Church. But we now have to consider what the effect of such allocation is with regard to our own law of transfer in this colony. The requirements of the law regulating the transfer

of landed property in this colony are very well known, and the Registrar of Deeds conceives that he is unable to transfer from the one body to the other without certain formalities having been gone through, and, in the absence of relief therefrom, the payment of the ordinary dues for transfer, nor do I see any way in which the position so maintained by him can be controverted. However much the Registrar of Deeds may sympathise with the petitioners, and wish to oblige them in any way, and however much this Court may wish to do the same thing, the Court cannot neglect, and the Registrar of Deeds cannot neglect, the requirements of the laws of this colony. There would be a great difficulty, as far as I can see, having regard to the various trusts that are created by the various deeds of grant in making one comprehensive order which would embrace every case in such a manner that the parties could act upon it, though that difficulty might be got over by a very carefully and very elaborately worded order, but as far as I conceive the matter as it stands, we should be departing from the law, and granting an order which this Court has no right to do, if the prayer of the petitioners were granted. I think myself that the sympathy of the whole community would be with the applicants, and that they would be assisted in every possible way by everybody, who is legally able to assist them, but, as far as I can see, there are only two modes by which they can get transfer. One is by an order from this Court, which, in the circumstances, might very probably be granted, provided the transferees pay transfer dues and ordinary charges. But the object of the present petition is to escape the payment of such dues and charges, so that resort will probably be had to the other course, which is that suggested by Mr. Jones, viz., that the petitioners should wait until the next session of Parliament, and obtain a private Bill, which would invest them with these properties and grant a remission of the fees. This latter would, I think, be the easier and less expensive plan, because, having regard to the good work done in this country by the institutions founded on the land embraced in the titles of grants in question, I cannot conceive any circumstances which would cause any difficulty whatever in procuring such legislation. At all events, I can see, as far as this Court is concerned, no way of helping the applicants, and the application must be refused.

[Applicants' Attorney: G. Trollip.  
Respondents' Attorneys: Reid and Nephew.]

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

REX V. ABRAM, ALIAS BULL. { 1907.  
Dec. 18th.

Special J.P.—Civil judgment—  
Jurisdiction.

*A special J.P., who convicts a prisoner of theft, has no jurisdiction to sentence him to compensate the owner of the property for the goods stolen.*

Hopley, J.: A case came before me yesterday from the Special Justice of the Peace for Victoria West at Loxton, who found a man called Abram alias Bull guilty on sufficient evidence of stealing a pair of veld-schoen (the property of a Mr. Theunissen, of Loxton), valued at 7s. 6d. He sentenced accused to pay a fine of 20s., or to undergo three weeks' imprisonment, with hard labour, and to pay to Mr. Theunissen the value of the shoes, viz., 7s. 6d. This latter part is in effect a civil judgment, which the Special Justice had no right to pronounce in this case, and that portion of the sentence must be struck out. The rest of the sentence will be confirmed.

## GENERAL MOTIONS.

*Ex parte* WIPPLINGER AND WIFE.

Mr. Howes moved on behalf of petitioners, who reside at Britstown, for an order authorising registration of a certain contract excluding community of property between husband and wife as if the same had been entered into prior to marriage. The first named petitioner stated that he had entered into partnership with another person, and that it was a condition of the partnership that should one of the partners marry he should enter into an ante-nuptial contract. On the 12th October last the first petitioner married the co-petitioner upon her arrival in Cape Town by steamer from Germany, but on proceeding to Britstown they were informed by a local attorney that it was then too late to enter into an ante-nuptial contract. It was the intention of the parties prior to marriage to enter into a contract excluding community of property. They had been and still were desirous that their property should be kept separate. Counsel cited Lezard's Case (16 C.T.R., 1019).

Hopley, J.: An order will be granted as prayed. The contract



will, of course, have to be worded in accordance with the facts of the case. The order will be subject to any rights of any creditors which have accrued up to date of registration. I only grant this because apparently there is strong evidence of an intention to enter into an ante-nuptial agreement, and it was a mistake that it had not been registered.

*Ex parte* WARREN.

Mr. Payne moved on the petition of Mary Warren, of De Aar, for leave to sue her husband, Thomas E. Warren, by edictal citation and *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce. Respondent's whereabouts, it was stated, were unknown. Counsel said that he was prepared to certify *probabilis causa*.

Rule nisi granted, calling upon respondent to show cause on the first Tuesday in February why petitioner should not be admitted to sue him *in forma pauperis* and by edictal citation, personal service if possible, failing which one publication in the "Friend" (Bloemfontein).

*Ex parte* SHERRY.

Mr. Bisset moved on behalf of petitioner for the appointment of a *curator ad litem* to represent James Elders in an action to have him declared incapable of managing his own affairs, and a curator appointed.

Order granted appointing Mr. Struben *curator ad litem*, summons returnable on the 7th February.

*Ex parte* EXECUTORS ESTATE HIDDINGH.

Mr. Douglas Buchanan moved for leave to sue by edictal citation one Susanna Elizabeth Lilienfield, of Pretoria (assisted as far as need be by her husband), on a mortgage bond for £1,650, which had become due and payable by reason of non-payment of interest and for the attachment of the property hypothecated.

Property attached, and leave to sue by edict granted, personal service, citation returnable on the 5th February.

*Ex parte* ESTATE LATE KREUSCH

Mr. Russell moved on the petition of the executors of the late F. W. Kreusch for an order authorising the Registrar of Deeds at King William's Town to register transfer of certain lot of ground "in the township of East London," to be passed by petitioners in favour of Christian F. W. Ziemann. From the petition and annexures, it appeared that

Friedrich W. Kreusch and his wife made a mutual will, leaving their property to the survivor and the children. After the death of the survivor the property was to go to all the children then living, and if any child died before the survivor, the grandchildren would step into his place. After the death of his wife, Kreusch made an agreement in December, 1895, by which his daughter, Mrs. Ziemann (wife of C. F. W. Ziemann); undertook to provide him with maintenance, and look after him, and she was to have his landed property in East London at his death for £450. One of Kreusch's sons (F. W. Kreusch, jun.), predeceased his father, leaving four children, two majors, and two minors. Application was now made for transfer of the lot of ground in East London to Mrs. Ziemann for £450 in terms of the agreement. The Master, on behalf of the minors, opposed the application on the ground that the minors were not bound by the agreement, but he eventually consented to the prayer of the petition, provided that the minors were paid out on the basis of a valuation made by a sworn appraiser, less the value of the improvements made to the land by Christian F. W. Ziemann. This valuation had been made, the amount being £1,220. The improvements made in good faith by C. F. W. Ziemann were valued at £680. Petitioners said that C. F. W. Ziemann and his wife were prepared to take transfer in so far as the amount appertaining unto the said minors was calculated, the major children of the late F. W. Kreusch, sen., and F. W. Kreusch, jun., being held bound by the agreement of December, 1895.

The Court authorised transfer to Ziemann, provided that the minors' shares were calculated on the basis of £1,220, and provided that the majors interested in the property filed their consents.

LAINGSBURG MUNICIPALITY V. BURGER.

Dr. Greer was for applicants; Mr. McGregor, K.C., was for respondent.

Dr. Greer said that he recognised, after the respondent's replying affidavits had been filed, that it was impossible to try the issues raised in this matter upon motion.

By consent, the parties were ordered to proceed by action, notice of motion to stand as summons in the action, costs to be costs in the cause.

SOEKER V. COLONIAL GOVERNMENT.

Mr. Upington (with him Mr. Douglas Buchanan) moved for leave to set down this matter for hearing on the 3rd February, 1908, when a full Court would be available. Applicant was moving under sections 35 and 39 of the Jury

Act for a new trial. Counsel said that, as far as he was aware, there was nothing in the Jury Act which required that such an application should be heard before a full Court, but the practice had been up to the present that that course should be pursued.

[Hopley, J.: It is not likely that one judge sitting alone will set aside the judgment of another judge, for that is what it would amount to.]

Mr. Upington said that the Jury Act was in some respects inconsistent with the constitution of the Supreme Court, and one was in a difficulty to know what to do in a matter of this kind. One would like to know whether the 41 days would apply to a case of this kind. The difficulty was that, if this case were treated as an appeal, 41 days would elapse before the next sitting of the full Court, and it had thus become necessary to make the present application for leave to set down.

[Hopley, J.: It is in effect an appeal from a judgment which has been given.]

Mr. Upington informed the Court that the Government consented to the present motion.

The application was ordered to be set down for hearing in the First Division on the 3rd February.

#### *Ex parte* ESTATE LOMBARD.

Mr. Marais moved for an order for the appointment of a curator dative to represent certain minors of the late Antonie C. Lombard, in connection with the partition of certain farms in the division of Bedford.

Order granted as prayed, no subdivisional transfers to be given until the division has been approved by the Master, or the Court has made further order.

#### *Ex parte* DE WET.

Dr. Greer applied for an amendment of the order granted by Mr. Justice Buchanan in this matter, by the inclusion of the costs of the application in the loan authorised to be raised, this point having been overlooked when the petition was originally before the Court.

Mr. Justice Hopley said he preferred that the matter should be mentioned to Mr. Justice Buchanan, either in Court or in Chambers.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* HERZFELDER. { 1907.  
{ Dec. 2th.

Arrest—Affidavit of creditors—  
*Incola*—8th Rule of Court.

*Applicant had been arrested for debt when about to leave for England, under the 8th Rule of Court, on the affidavit of a manager of a firm which was domiciled in England, but carried on a branch business in this Colony, without, however, being registered here. Applicant was domiciled in the Transvaal and was only passing through this Colony. The alleged debt was in respect of a judgment obtained in the Transvaal High Court, against which judgment an appeal had been noted.*

*Held, that the writ of arrest be set aside with costs.*

This was an application on behalf of Julius Herzfelder, formerly manager in Johannesburg on behalf of the Standard Cold Storage, for his release from arrest which had been made under the 8th Rule of Court, the notice of motion calling upon McArthur, Atkins and Co. to show cause why the writ of arrest should not be set aside as irregular and illegal.

The affidavit of Lewis Alex. Solomon, upon which the writ had been issued, stated that he was manager for McArthur, Atkins and Co., Limited, of Cape Town. Julius Herzfelder was indebted to the firm of McArthur, Atkins and Co. in the sum of £4,575, owing for certain moneys due to the said firm, received by the said Herzfelder on behalf of the said firm, in the conduct of and in connection with their business as general merchants, and not accounted for by him to the said firm. Deponent knew of his own knowledge that Herzfelder was about to leave for England by that day's mail, and that he had booked his passage. McArthur, Atkins and Co. had no mortgage, pledge, or security for the said amount or any part thereof.

The answering affidavit of Herzfelder stated that he resided in Johannesburg, where he was domiciled. He left the Transvaal Colony on the 9th instant, and was on his way to England, when

he was arrested on Wednesday afternoon, in pursuance of the writ granted on Mr. Solomon's affidavit by the Registrar of the Supreme Court, and was lodged in the civil gaol, where he was at present detained. The statements in paragraph 2 of Mr. Solomon's affidavit, in regard to the cause of the alleged debt, were incomplete, incorrect, misleading, and conveyed a totally wrong impression of the position between the parties. Respondent obtained a judgment against him for the amount mentioned in the said affidavit, and costs of suit in the Rand High Court, Transvaal, on the 10th December, and he was not indebted to them in any other sum of money. The action on which the said judgment was given arose from a certain agreement entered into at Johannesburg aforesaid, between the said respondents and himself, in connection with certain cold storage business in Natal, and no part of the agreement had to be performed in this colony. He had caused an appeal to the Supreme Court of the Transvaal to be noted through his attorneys against such judgment, but the said appeal could not be heard before March or April, 1908. Deponent was on his way to England to transact important business there, and make arrangements for satisfying the said judgment, in case the same should be confirmed on appeal, and he had been advised by counsel that he had good grounds for the said appeal. He intended to return to the Transvaal in time to prosecute the same. He had no intention of removing from the Transvaal for good. He owned 9,336 fully paid-up shares in the respondent company, which were at present registered in the name of Henry Atkins, one of the directors. All the said shares except 2,000 were unenumerated. Respondents had in their application for his arrest withheld material facts from the Registrar, which he submitted ought to have been disclosed.

The replying affidavit of Mr. Solomon said that the agreement between his company and the said Herzfelder, out of which this indebtedness had arisen, was entered into at Cape Town and not in Johannesburg, as stated by him. His company verily believed that Herzfelder intended leaving the Colony solely with the intention of defeating the judgment obtained by deponent's company. He denied that any material facts had been withheld from the Registrar.

Mr. Close was for applicant; Mr. P. S. T. Jones was for respondents.

Hopley, J., pointed out that the respondents did not answer the allegation of applicant that he had certain shares in the company.

Mr. Jones said that the answering affidavit had been necessarily prepared in a hurry.

Hopley, J., said he thought it would have been possible to ascertain whether this was a fact.

Mr. Jones said that the point could only be determined by reference to the share register.

Mr. Close said he was informed that the company's head office was in London.

Mr. Jones said that his information was that the head office was in Johannesburg.

Mr. Close submitted that had the Registrar been in possession of the facts now before the Court he would not have granted a writ. Applicant was not resident in this colony, but was simply passing through. He was instructed that the head office of the company was in London, so that neither the applicant nor the respondents were within the jurisdiction of this Court. He submitted that under Rule 8 it was clear that the Court had no jurisdiction in this matter. Counsel cited *Schunke v. Taylor and Symonds* (8 Juta, 103), *McLeod v. Benjamin* (9 Juta, 183), and *Kinwald v. German African Co.* (5 Juta, 86). The only way in which respondents could have secured the arrest of applicant was by attachment *ad fundandam jurisdictionem*, and the only suit they could have brought was on the Transvaal judgment.

Mr. Jones submitted that on the authorities it was competent for the Court to order the attachment to continue. Applicant actually left the Transvaal on the day before judgment was given, and had been waiting for a matter of eight or nine days.

[Hopley, J.: Is it not a fact that respondents have simply got an agent here?]

Mr. Jones said that the company was not registered in this colony, but it was trading here. He pointed out that the contract was entered into in Cape Town. He contended that the fact that the company traded here, and had a manager here, and that the contract was entered into here, would be sufficient to entitle the Court, if Herzfelder were suing the company, to throw out an exception which might be taken to the jurisdiction. He cited *Solomon v. Wolff* (15 S.C., 152) and *Ohlsson's Breweries v. Bradshaw* (22 S.C., 251).

Mr. Close, in reply, said that respondents could not sue in this Court upon a judgment of another Court, which was still awaiting final determination on appeal.

Hopley, J.: This is an application by Herzfelder, who was arrested at the instance of McArthur, Atkins and Co. under the 8th Rule of Court, to have the writ of arrest set aside. The terms of the 8th Rule are well known, and set out that anybody having a cause of action amounting to £15 sterling or upwards, may by applying to the Regis-

trar get a writ of arrest if there be delivered to the Registrar a direct and positive affidavit sworn by the plaintiff or his agent or his servant before a judge or commissioner of this Court, attested by him, and which affidavit shall contain a true description of the person and party contracting the same, the true cause of debt and so on. Now, in this case, an affidavit was sworn by Mr. Solomon, who is the agent, as I understand it, of the plaintiff company here in Cape Town. He says that he is the manager for McArthur, Atkins and Co., Ltd., of Cape Town. I do not know that this is a true and proper description of the plaintiff firm. As far as I am able to ascertain, McArthur, Atkins and Co., Ltd., were not registered in Cape Town as a limited liability company, though they might have an agent here, and for all I know may carry on a sort of branch here, but I have to conjecture all that from the affidavit and from what has been stated in argument to-day. His affidavit as presented to the Registrar looked as if McArthur, Atkins and Co. were carrying on business in Cape Town, and were registered in Cape Town, and, therefore, within the jurisdiction of this Court. Their agent as such may be, but I do not know that that is a proper description of the plaintiff firm. Then the affidavit goes on to say that Julius Herzfelder is indebted to McArthur, Atkins and Co. in the sum of £4,575, being for moneys due to the said firm, received by the said Herzfelder on behalf of the said firm in the conduct of and in connection with their business as general merchants and not handed over by him to them. Now, it does not seem to me that in the circumstances as they now appear before me that such is a true and proper description of the cause of debt, because it appears that the sum of £4,575 is due and owing by Herzfelder as the amount of a judgment obtained from Mr. Justice Wessels, one of the judges of the Transvaal High Court, in an action which had been instituted by the firm against Herzfelder, and against which an appeal has been entered in the registry of the said Court, which was pronounced only a few days ago. Whatever the cause of action may have been or however this indebtedness may have arisen, it seems to me that the present cause of debt is the existing judgement of the Transvaal High Court, an existing judgment which is, it now appears, under appeal and not finally settled between the parties. Now all these facts ought to have been set forth before the Registrar, but there is another matter, which may not have been concealed intentionally from the Registrar, but which certainly was not brought under his notice in the affidavit, viz., that all these transactions took place in a foreign jurisdiction, and

that Herzfelder is not an *incola* of this country, and was not subject to this Court by virtue of his domicile. The bald and wholly insufficient affidavit put before the Registrar must have left him under the impression that the amount of money, £4,575, was in connection with the Cape Town business of the firm, and that the defendant owed the money by reason of something that happened in this jurisdiction, though he himself was resident in the Transvaal, that plaintiff was leaving this country, and that they wanted to arrest him to enforce their claim within the proper jurisdiction. If the facts that are now placed before the Court had been put before the Registrar, he informs me that he certainly would not have granted a writ of arrest, and especially if he had known that the applicant was not an *incola* of this colony. It seems to me that these irregularities which I have pointed out are sufficient to cause me to grant this application. It appears, too, that this person was going to the very place where the plaintiffs who claim to be his creditors are domiciled. As it turns out, he holds a considerable number of shares in the company. These shares are not registered in his own name, but in the name of one of the directors, viz., Mr. Atkins. Under these circumstances, the Court, if properly applied to, might have granted a writ of arrest *ad fundandam jurisdictionem*, but I doubt very much whether, with full knowledge of all the facts, it would have interfered in this matter at all, but would probably have told the parties to go into the proper *forum* and settle matters there in their own way. This application must be granted, and the writ of arrest set aside, with costs.

#### REX V. MICHELSON AND KONINGSBERG.

Magistrate's judgment on facts over-ruled — Hearsay evidence.

This was an appeal from a judgment of the Assistant Resident Magistrate of Willowmore, who had convicted appellants of the theft of a hen ostrich, the property of one A. C. le Roux.

Mr. Alexander appeared for appellants (Wolff Michelson and Michael Koningsberg); Mr. Howel Jones, K.C., was for the Crown.

Counsel having been heard in argument on the facts,

Hopley, J.: The accused in this case are two speculators whom we must assume to be men of good character. About the month of August they purchased some birds in the Prince Albert direction and trucked them towards Willowmore. The birds were untrucked there. They had trucked 29, and on the untrucking one was



dead, and there were thus 28 left. These ostriches, they say, they had purchased in Oudtshoorn or Prince Albert, and had only seen just briefly. There is no likelihood that a detailed description of each particular bird would be taken. At Willowmore, the birds were given in charge of some coloured men, who were hired, and who helped to take them from the trucks. The birds were apparently put into some sort of enclosure, from which the whole 28 escaped, and stampeded all over the country in different directions. These men were sent out in various directions to try and find the birds. The circumstances of the case make it obvious that nobody had up to that date carefully looked at each individual bird to see whether he could recognise it again. They were hunting about for birds, some of which had red paint marks upon their necks and some of which had not. The natives brought in batches of birds. They brought in a certain bird, which was afterwards identified and proved to be his by the complainant in this case, Mr. Le Roux. The fact of their bringing in these birds points to a genuine mistake as to the identity of this bird. The Magistrate has given some reasons which he was not necessarily called upon to do by law, and which are instructive in this case, because it would have been more difficult, I think, to set aside his judgment if he had simply found them guilty and sent his record. The reasons show that he relied upon some evidence which was hearsay, some evidence which is not upon the record, that he has to argue away in giving his reasons a great part of the evidence given by the witnesses for the prosecution, that he believes the witnesses for the prosecution in such parts as it suits the conviction, and disbelieves the witnesses for the prosecution in such parts as suit an acquittal. The Magistrate may possibly be right, and his reasons may be sound, but still, I think, that there is so much room for a genuine mistake in this case, that it would not be safe to say that they were guilty. I think this is a case in which I should have advised any jury that it was exceedingly risky upon such evidence to find that these men must have known that this bird was not theirs, and I personally do not feel that it is a safe conviction to sustain. I do not feel absolutely satisfied that these men were guilty, and I think the best and proper judgment would be that the appeal be allowed and the conviction quashed.

*Ex parte JOHNSON.*

Mr. Rowson moved, as a matter of urgency, on the petition of Edward

Johnson, of 22, Burns-road, Salt River, for an order upon the Resident Magistrate of Stellenbosch to make a provisional order in the application brought by petitioner for compensation under the Workmen's Compensation Act (No. 40 of 1905). Petitioner stated that he was a carpenter, and that while he was employed by the Zuid Afrikaansche Ruitig en Bouw Mattschappy, Ltd., on June 20th last, on the Bloemhof School buildings, he met with an accident, as a result of which his left leg was broken. On November 5th he brought an action against his late employers in the Magistrate's Court, but the Magistrate, though satisfied that he was entitled to compensation, refused to make an order, and postponed the case for four months. On November 7, and subsequently, certain judgments were taken by creditors against the respondents, and on November 22 a notice appeared in the "Gazette" that the company intended to apply for voluntary liquidation. On November 29 a notice was gazetted to the effect that a meeting had been held, when the resolution of the company to go into liquidation had been confirmed. Petitioner said that if the company went into liquidation he would be prejudiced in recovering from the company any moneys to which he may be entitled. Petitioner also stated that he was a poor man, and had no funds with which to continue the proceedings in this Court, and he applied for leave to proceed *in forma pauperis*.

Counsel argued that section 11 of Act 40 of 1905 compelled the Magistrate, if satisfied that applicant had been disabled for three days, by an accident not due to his own negligence, to grant a provisional order for compensation. The section does not say "may" but "shall." Once the Magistrate finds the disablement and no negligence on the part of the employee, he is bound to make a provisional order; he has no discretion. The Magistrate in his judgment states that he acted under section 23, but that clearly applies only to a final order should it be found that the man is permanently incapacitated. Here that question is in issue, and the Magistrate was quite justified in postponing his final award for four months, but he was bound by section 11 to give a provisional award.

Mr. Howel Jones, K.C. (interposing as *amicus curiae*), explained that the difficulty was raised because the petitioner applied for compensation for permanent injuries, and that the proper procedure had not been taken to obtain a provisional order.

Mr. Rowson, in reply: Immediately after the accident happened, surgical help was called in, my client was removed to hospital, and remained there during some weeks. The Magistrate

was satisfied with that evidence, and although exception was taken that we had not followed the procedure laid down in section 7, he disallowed the exception.

[Hopley, J.: What section of the Act allows him to do so?]

There is no section which gives him that power, but he did not see his way on a mere technical point to preclude this man from his legal remedy.

Rule *nisi* granted, calling upon the respondent company to show cause why the applicant should not proceed in this Court in *forma pauperis*, and calling upon the respondent company and the Magistrate to show cause why the applicant should not have the relief prayed for, rules returnable on January 7.

[Applicant's attorney: J. Ayliff.]

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

REX V. CLOETE. { 1907.  
{ Dec. 24th.

Act 18 of 1873, Sec. 4, Sub-sec. 6,  
and Sec. 7—Servant under  
age of 16.

Hopley, J.: Two cases came before me from the Resident Magistrate of Durbanville, who had convicted a child named Anthony Cloete, who was described as a Hottentot house-boy, aged ten years. It appears that this boy had had some sort of previous conviction against him, I think one for theft, last September. He had thereupon been apprenticed by the Magistrate's sentence for six years to a man called Hoffman, near Bellville. On the 15th of this month this child was left in charge of the house, and told by his master to get a chopper and reim, and go and collect some wood. The child went away into the bush, and did not return, having taken the chopper and reim. On these facts he was apprehended afterwards, and was prosecuted first of all for theft of the chopper and reim, and secondly for desertion of service. As to the charge of theft, the child seems to have gone into the bush, as he had been told to do, to collect wood, and then not to have reappeared at home. He went on to Bellville, where he was subsequently arrested, and he was asked what had become of the chopper and reim, and he said that

he had lost it in the bush. The policeman said: "You must show me the place where you lost it." The child said, "I cannot." That seems to have been taken as an admission of his guilt, and it seems to have been all the evidence there was against him. There was no evidence of conversion on his part. Apparently, the Magistrate seems to have imported the evidence of the child's previous conviction, and very possibly his mind may have been swayed by the fact that he knew that this child had previously been convicted of theft. The evidence is not conclusive; the child's story may be true, and his sentence is a considerable one in the case of a child, viz., that the boy be detained in the Porter Reformatory for six years. I have sent the papers to the Attorney-General, and asked whether he was prepared to support the conviction, but he does not care to support the conviction of theft, and I do not think the evidence is conclusive. I do not think this is a safe conviction to sustain. This conviction must, therefore, be quashed, with the Attorney-General's consent. As to the other charge that was brought against the child on virtually the same facts, he was charged under section 4 (sub-section 6) of Act 18, 1873, with having, without lawful cause, departed from his master's service with intent not to return thereto. The child pleaded guilty, whereupon he was ordered to receive twelve cuts of the cane on his back. The subsequent section (section 7) says that nothing in any of the preceding sections, from the 2nd to the 6th, shall apply to servants or apprentices under the age of sixteen years. This child was only ten years of age, and he was prosecuted under a section which was specifically made not to apply to his case. Under these circumstances, it seems to me that this is a wholly illegal sentence, and it must also be quashed. What will happen to the child now I do not know, because his apprenticeship has been cancelled on his master's articles, and I suppose he will be at large.

### ADMISSION.

Dr. Greer moved for the admission of Max Gurland as a translator in the Russian, Hebrew, and German languages.

Application granted and oath administered.

### PROVISIONAL ROLL

TRUTER V. LOGAN.

Mr. Russell moved for provisional sentence on a taxed bill of costs for

£88 16s. 9d. for work and labour done and professional services rendered in certain action in which respondent was defendant.

Order granted.

At a later stage a question was raised as to whether the correct procedure had been adopted in this matter.

Mr. Russell cited *De Wet v. Meyer* (1 Menzies, 59) and *Van Zyl's Jud. Prac.* (p. 71). He stated that Mr. Truter had acted as the defendant's country attorney in the previous matter, and that he had had no warrant.

Hopley, J., said it appeared to him extremely doubtful whether the plaintiff was entitled to provisional sentence, and that the case was one in which the plaintiff ought to sue in the ordinary and proper way for debt. Provisional sentence would be refused and the previous order would be recalled.

#### ARLOSOROFF V. KRAITZICK.

Mr. Toms moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £13 8s. 7d. and costs.

Defendant said that he was absolutely without means, and could make no offer.

Mr. Toms cross-examined the defendant in regard to certain transactions in iron.

Decree granted, with costs, execution to be suspended upon payment of £1 a month, first payment to be made on the 20th January.

#### HUTHWAITE V. CALDER.

Mr. Russell moved for provisional sentence on certain six promissory notes for £365 6s. 8d., with interest, less £50. with interest reckoned from the 7th August, 1906.

Mr. Gardiner read an affidavit by defendant, who denied liability on the ground that one of the principal assets which he purported to purchase from plaintiff, was the district surgeoncy of Philip's Town, that plaintiff had failed to secure this appointment for him, and that when the agreement was entered into he must have known that a virtual promise had been made in the House of Assembly that when the office became vacant it would be given to Dr. Hugo.

Mr. Russell read a replying affidavit by plaintiff.

Mr. Gardiner, in the course of his argument, cited *Wiid v. Murison* (13 S.C., 444), and urged that plaintiff should be ordered to go into the principal case.

Hopley, J.: In this case it seems that the opposition of the defendant at all events on the provisional sentence is a

hopeless one, and there must be provisional sentence. The defendant entered into an agreement with the plaintiff for the purchase of a medical practice at Philip's Town, and in addition to that he also purchased from the plaintiff certain household furniture, drugs, a cart and horse, etc. The sale of the practice did not, of course, involve the sale of the district surgeoncy. That is a matter in the gift of the Ministers, the executive of the country, which could not be sold by the outgoing incumbent to the incoming incumbent. But the plaintiff, the outgoing incumbent, undertook in his agreement to use all his endeavours to get the defendant appointed in his place, and in order to do so he remained the acting district surgeon for a time, giving the defendant a chance of acting as *locum tenens* to show his quality, and to get the Magistrate and everybody else to see that he would be a worthy successor. He comes here now, and disputes the whole of the claim, including the claim for furniture, and horse and cart and all the other things that he has had considerable use of for more than a year and makes no tender on their behalf, except he says that none of these promissory notes should have provisional sentence granted upon them, because the goodwill, as his counsel calls it, of this particular part of the medical practice, was an unprocurable matter at the time of the sale. He lays great emphasis upon his overwhelming desire to become the district surgeon at Philip's Town, and all one can say is that if that was the main thing that moved him in the purchase of this practice he ought to have seen that his agreement was very much more strictly worded than it is. He should have laid stress on the fact that not merely was he buying a practice which was worth £1,000 a year, according to the plaintiff but that it was really the district surgeoncy which is worth about £100 a year that he wanted. He simply says that if the district surgeoncy should fail to be given to him he must be compensated to the amount of £50, which I suppose is about one year's official fee for the district surgeoncy. The fact as to whether the plaintiff knew that the district surgeoncy had been promised irrevocably to Dr. Hugo is in dispute, and I see nothing to show that he knew and concealed that fact from the defendant. The allegation that nothing was said between the parties as to this matter is disproved to a certain extent by a clause in one of his letters, in which he talks about the virtual pledge of this appointment to Dr. Hugo by Parliament, or something of that sort before the agreement was concluded. At all events the position shows me that he signed the various promissory notes for which he must be taken to have received value, and good value,

too. Upon the facts and documents as presented to me, I think there should be provisional sentence, with costs, the defendant, if he chooses, to go into the principal case on the usual terms.

AFRICAN HOMES TRUST, LTD. V.  
ARCHER.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest from the 1st January, 1907, less £18 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

ILLIQUID ROLL.

FAURE V. DU TOIT. { 1907.  
Dec. 24th.

Mr. H. G. Lewis moved for judgment, under Rule 329d, for £89 7s., with interest *a tempore morae* and costs.

Order granted.

SMIT V. DE BEER.

Mr. W. J. van Zyl moved for judgment, under Rule 319, for £117 19s. 4d., with interest *a tempore morae* and costs.

Order granted.

GENERAL MOTIONS.

*Ex parte* COLEMAN.

Mr. Toms moved, on behalf of petitioner, a blacksmith, residing in Cape Town, for leave to sue *in forma pauperis* one Alfred Affeling, of Philip's Town, for £75 damages for alleged breach of contract.

Rule granted, returnable on the 21st January, personal service to be effected.

*Ex parte* KASTOPOULOS.

Dr. Greer moved, on behalf of petitioner, for leave to sue *in forma pauperis* one John Mitchell, for £500 damages for alleged breach of contract in connection with the hire of a certain cafe at the foot of Adderley-street, Cape Town.

Rule granted, returnable on the 14th January, personal service to be effected.

Hopley, J., remarked that the £10 rule seemed to him to be a matter that was capable of discussion as to whether it was not being abused at the present time. Counsel ought to be very careful to inquire into the facts of these

cases. After all, a pauper came into court with everything to gain and nothing to lose. The unfortunate defendant should also be considered in these matters.

*Ex parte* ESTATE VOSKULE.

Mr. Watermeyer moved on the petition of the executor for an order authorising the registration of a certain mortgage bond, in order to enable the partners in a certain transaction in land to acquire the interest of Belfield Marais, in accordance with an agreement entered into during the lifetime of the late Mr. Voskule.

Order granted as prayed.

*Ex parte* LE SUEUR.

Mr. Toms moved for an order declaring petitioner of sound mind, releasing him from curatorship, and re-investing him with the administration of his estate. An affidavit by Dr. Arderne Wilson was appended to the petition in support of the application. Petitioner was declared of unsound mind about 15 years ago. The curator of his person had since died, and no fresh appointment had been made.

Ordered that the petitioner be declared of sound mind and that the order declaring him of unsound mind and appointing curators of his person and goods be rescinded.

*Ex parte* ESTATE JALIEL.

Mr. Douglas Buchanan moved, on the petition of the executors, for leave to mortgage certain estate property.

Order granted in terms of Master's report.

*Ex parte* INSOLVENT ESTATE MURPHY.

Mr. P. S. T. Jones moved on the petition of certain creditors for the appointment of Alfred N. Foot as provisional trustee, with power to sell the stock in trade and fixtures.

Order granted appointing Mr. Foot as provisional trustee, with power to realise the assets.

*Ex parte* PEREHOUSE AND WIFE.

Antenuptial contract—Registration—Lapse of time.

*Where husband and wife had been married in community under the impression that there would be no community and had been married upwards of five years before they ascer-*



*tained the possibility of obtaining relief from the Court, the Court authorized the registration of the antenuptial contract.*

Mr. Close moved, on behalf of petitioners, who are resident at Wynberg for an order authorising registration of a certain contract excluding community of property between the spouses and the husband's marital power, as if the same had been entered into prior to marriage. From the petition it appeared that the first named petitioner came to this country during the late war as an officer in an irregular force, and that he obtained employment in the Education Department of the Transvaal for a time. He lost this employment and for a time his movements were uncertain. The parties became engaged by correspondence. The second petitioner came out from England in order to be married in the Transvaal. In the meantime the first petitioner had moved to Cape Town, arriving on the 28th March, 1902. The second petitioner arrived in Cape Town on the 29th, and they were married in Cape Town on the 30th. At that time the parties had no intention of changing their domicile, and they were under the belief that the marriage would be without community of property, as would have been the case had the marriage taken place in England. Mrs. Pershouse was under the impression that she would retain her rights over her property without control of her husband. They took advice after the marriage, but were told that it was then too late to enter into a contract excluding community. There the matter rested for a while, until quite recently they were told that the Court, if the whole of the circumstances were explained, would possibly grant relief. The first named petitioner was now carrying on practice as a veterinary surgeon at Wynberg.

Mr. Close said that the question raised in this case had been discussed in several cases. He cited, *ex parte, Ingall and wife* (20, S.C., 323).

Hopley, J.: There are two difficulties in this case. The main one seems to be the length of time which has elapsed, viz., five years.

Mr. Close: in *ex parte Moran* (14, C.T., 381), the Court granted relief after 16 years. Immediately the parties discovered their position they took advice, but were given to understand that nothing could be done. Since then they have received further advice of a different nature, and they have immediately taken different steps, but in the meantime there has been no acquiescence in the position of affairs. Counsel also referred to *ex parte Fricker and wife* (2

C.T.R., 312). Length of time was no bar to relief so long as the Court was satisfied as to the intention of the parties.

Hopley, J.: It is very difficult to distinguish the application in this case from several others which have been decided on similar motions, and the application will be granted on the ground that these parties swear—and there is nothing to contradict them—that they were in ignorance at the time of their marriage that they were married in community of property, and in ignorance of the fact that their marriage had not the same effect upon the ownership by the wife of her property as it would have had had it taken place in Great Britain. They were both young people, who had been previously domiciled all their lives respectively in Wales and in England. They knew the operation of the married woman's property Acts in the United Kingdom. They swear they thought that their marriage in this country would have no other effect upon their property than it would have had had it been solemnized in the United Kingdom. Mrs. Pershouse owns property in the United Kingdom, some of which has been sent out here since their marriage and that property would have been protected to her under those Acts, to which I have referred in the United Kingdom. Upon their marriage, they found that, according to the law of this colony, they were married in community of property, and that they held their joint property in common under the management of the husband. They took advice, but were told that no relief was possible and so, seeing no escape from their position, they acquiesced therein. Had they immediately come to the Court they would most probably have received immediate relief. On account of the advice they received they remained quiet and acquiesced in the position, as they thought it must be, until some four or five years have now elapsed, and they have only recently discovered, and somewhat accidentally, that it is possible in such circumstances as these to obtain relief. If it had not been perfectly clear to my mind that these parties thought they were being married without community of property I should not, after such a lapse of time and after such carelessness in what is an important contract, have granted the relief prayed for, but it seems to me, in view of previous cases, especially in view of such cases as *Fricker's* and *Ingall*, that it would be difficult to refuse to these applicants relief as given to others. An order will be granted as prayed. The contract must state the facts upon which this order is granted, the order must be embodied in it, and the rights of all creditors up to the date of registration must be protected.

Mr. Close asked whether the order would include the property which had, under a misapprehension, been transferred to the name of the husband.

Hopley, J.: I think that follows as a matter of equity, because it is part of Mrs. Pershouse's estate.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PLASTIC DECORATION CO. V. { 1907  
CROOKE AND ASHBY. } Dec. 31st.

Mr. P. S. T. Jones (for plaintiffs) moved for a provisional order of sequestration to be discharged.  
Provisional order discharged.

GLUCKMAN V. BOOYSEN.

Mr. De Waal moved for provisional sentence on two mortgage bonds for £300 and £200, with interest from October 11, 1906, and September 16, 1906, bonds due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

De Villiers, C.J., said that the defendant had written asking for a postponement until January 12 and explaining that he had been unable to consult his attorneys on account of the holidays.

Mr. De Waal said that he did not oppose a postponement.

Ordered to stand over until January 12.

VAN DER WESTHUIZEN V. KRAFCHIK.

Mr. Douglas Buchanan moved for provisional sentence for £550, balance of mortgage bond, with interest from April 23, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

WICHT V. SARGENT.

Mr. Rowson moved for provisional sentence on two mortgage bonds for

£600 each, with interest from January 1, 1907; counsel also applied for the property hypothecated to be declared executable, and the rents attached.

Order granted.

## ILLIQUID ROLL.

MILLER V. BALLANTINE.

Mr. Alexander moved for judgment under Rule 329d for £77 10s., balance of rent due, with interest *a tempore morae*, and costs, and also for costs of a certain motion heard in Chambers interdicting the removal of furniture. Counsel further applied for an order for the attachment of the sum of £35. or such other sum, in the hands of Richard G. Anderson, due by him to the defendant Ballantine. Notice had been given of this application to Anderson's attorneys, and no objection was raised.

Judgment granted as prayed. Rule to issue, calling upon respondent Anderson, to show cause, on January 12, why a sufficient sum in his hands shall not be attached in satisfaction of the judgment and costs.

## REHABILITATION.

Mr. Howes applied, under section 117 of the Ordinance, for the rehabilitation of Abraham O'Linsty.

Granted.

## GENERAL MOTIONS.

*Ex parte* ESTATE VAN DER { 1907.  
WESTHUYSEN. } Dec. 31st.

Mr. Joubert moved on the petition of the executrix and children for leave to raise £300 on mortgage of certain property.

Order granted as prayed.

*Ex parte* ESTATE LATE VAN HEERDEN

Mr. Douglas Buchanan moved for an order authorising transfer of certain property in which minors were interested. The Master's report was favourable.

Order granted in terms of Master's report.

*Ex parte* INSOLVENT ESTATE ARNOLD.

Mr. P. S. T. Jones moved for the removal of one Christian Frederick Adolph van Coller from office as co-

trustee, and for the appointment of a fresh trustee, so that certain property not previously included in the distribution account may be brought up. The other co-trustee, it was stated, was dead.

De Villiers, C.J., said that a letter had been received from Mr. J. P. Celliers, of Somerset West, stating that the property was mortgaged to him, and that he was anxious to file an affidavit.

Ordered to stand over until the 12th January, notice to be given to Mr. J. P. Celliers.

*Ex parte KUNN.*

Mr. Watermeyer moved, on behalf of petitioner, Martha Johannes Kunn, for leave to sue her husband, Hendrik Kunn, by edictal citation for restitution of conjugal rights.

Leave to sue by edictal citation granted, citation returnable on the 12th February, personal service to be effected, failing which, one publication in the "Friend" (Bloemfontein).

*Ex parte ESTATE STUDDI.*

Mr. H. G. Lewis moved on behalf of the curator of the lunatic, for leave to mortgage certain property at Uitenhage.

Order granted as prayed.

*Ex parte TRUSTEE MARSH MEMORIAL HOMES.*

Mr. Inchbold moved for leave to the petitioner to sue Israel Aaron Feitelberg, Samuel Feitelberg, and Edward Feitelberg, of Johannesburg, and late of Cape Town, by edictal citation on a mortgage bond for £1,500, and to attach the landed property mortgaged *ad fundandam jurisdictionem*.

Leave to sue by edictal citation granted, citation returnable on the 12th February, personal service to be effected, failing which one publication in the "Star."

*Ex parte ESTATE RUDMAN.*

Mr. Watermeyer moved for leave to petitioners to mortgage certain property.  
Order granted as prayed.

*Ex parte JORDAAN.*

Mr. P. S. T. Jones moved, on the petition of Johannes Lodewicus Jordaan, of Cradock, for an order authorising sale of certain property. Petitioner

stated that he was married in community to Rolina A. Furstenberg, and that there were eight children of the marriage, five of whom were minors. In terms of the will of Elizabeth Maria Furstenberg, deceased mother of petitioner's wife, a third share in the farm Driefontein was bequeathed to petitioner's wife, subject to a *fidei commissum* in favour of her children. A sub-division of the farm had been agreed upon, and on the 12th December, 1902, petitioner took transfer in his name in trust for children born or still to be born of the marriage. On the 9th May, 1902, petitioner's estate was surrendered and his interest in the farm was sold to one Jacobus Pieter Olivier for the sum of £170. The farm was at present overgrown with prickly pear, which was spreading from year to year, and unless stopped would render the farm useless. The present owner of the life interest was making no effort to eradicate the prickly pear, and had expressed his willingness to cancel his rights and forego all claims on the farm on payment of £350. It would be to the benefit of the minors if the farm were sold by auction. The valuation, for Divisional Council purposes, was £1,500. Petitioner suggested that from the proceeds of the purchase price the amount of £350 should be deducted to satisfy the claim of the present holder of the life interest, and that the balance accruing to the minors be deposited in the guardians' fund. There was no possibility of further issue from the petitioner's marriage.

Order granted, subject to the purchase price of the life interest being reduced from £350 to £250.

De Villiers, C.J., said he thought the amount proposed to be paid to Olivier, £350, was excessive.

*Ex parte ESTATE WOOD.*

Mr. H. G. Lewis moved, on the petition of the executor testamentary, for cancellation of a certain bond on property at Queen's Town. The bond was for £800, in favour of one James Logan, and petitioner desired to pay it off, but could not trace the mortgagor. Petitioner was prepared to pay the amount of the bond into the bank with which Logan had done business, or to the Civil Commissioner at Queen's Town.

Order granted as prayed, petitioner authorised to pay the amount of the bond to the Civil Commissioner of Queen's Town, to be held by him in trust for Logan.

MOSLEY V. MOSLEY.

Mr. Toms moved on behalf of applicant for an order upon her husband

to pay over £30 to enable her to institute an action against respondent for restitution of conjugal rights. It was stated that respondent was resident at Simon's Town, and that he had repeatedly kept out of applicant's way.

Order granted as prayed.

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*Ex parte* LENNON. LTD. AND OTHERS.

Mr. Gardiner moved, on the petition of certain creditors in the insolvent estate of H. L. Stone, chemist, Claremont, for the appointment of Alfred N. Foot as provisional trustee, with

power to carry on the business and collect outstandings.

Order granted as prayed.

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*Ex parte* STASSEN.

Mr. Watermeyer moved for leave to partition the farm Voorbaat, in the division of Ladismith, in terms of an arrangement come to with the other co-owners. Certain minors were interested and the arrangement could not be carried into effect without leave of the Court.

Order granted as prayed.





# DIGEST OF CASES.

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<i>In an action for £500 on an accident policy, the defendant Company pleaded that the plaintiff had failed to make a written demand for arbitration in terms of one of the conditions of the policy which provided that, if no written demand for arbitration be made by the insured within six months from the date of the accident, the insured shall be held to have waived and abandoned all claim against the Company, whose liability to the insured shall thereupon absolutely cease and determine. The action was tried before a jury, which awarded the sum of £500 to the plaintiff. An objection was taken on behalf of the Company that, as the plaintiff admitted that no written demand for arbitration had been sent, the judgment should be entered for the Company; but the presiding judge decided, as matter of law, that the condition did not apply, and judgment was entered for the plaintiff.</i>	
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<i>Where a remittal form, unsigned by the Attorney-General, had been directed to a Magistrate, who thereupon tried and sentenced two prisoners under Act 43 of 1885, the Court set aside all the proceedings subsequent to the committal for trial.</i>		„ 30 of 1906, {	
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		Act of insolvency—Sec. 4 of Ord. 6 of 1843—Provisional order	

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of sequestration — Writ of execution.	
<i>A provisional order of sequestration having been made upon the plaintiff's statement on oath that he had made repeated attempts without success to obtain satisfaction of a judgment against the defendant.</i>	
<i>Held, that in the absence of any other proof of insolvency or of any statement that the defendant had been required by the officer charged with the execution of the judgment to satisfy the same, the order of sequestration should be discharged.</i>	
Teubes and another v. Louwrens ... ..	1099
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Agency—Guarantor—Public servant—Scope of authority.	
<i>The police officer in command of a certain sub-division of Police District No. 2 was authorized by instructions from Head Quarters to enter into a contract for the erection of certain stables, &amp;c., for £140. One M. undertook the contract, but could not obtain the necessary building material without a guarantee for payment from some responsible person. The officer promised to see plaintiff paid on receipt of the money which would be due to M. on completion of the contract, and plaintiff thereupon supplied the material, charging it to M. M. left the work incomplete, leaving the unused materials on the ground, and the buildings were afterwards completed by the police themselves at a cost of £55. Plaintiff, after fruitless attempts to excuss M., sued the Colonial Government</i>	

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<i>as M.'s guarantors, and eventually the Government offered to pay plaintiff £69 14s., being the sum alleged to be due to M., on condition of plaintiff withdrawing his action and paying costs to date of tender. This offer plaintiff refused to accept. Held, that even if the officer had absolutely guaranteed payment to plaintiff, he had in so doing exceeded the scope of his authority, and that the Government were not bound by any guarantee he might have given, but that the plaintiff was entitled to have his claim satisfied, as far as possible, out of such moneys due to M. as defendants might have in hand.</i>	
Phillips v. Colonial Government ... ..	730
Agency, <i>see</i> Magistrate's Court ...	40
Agent in Magistrate's Court—Attorney.	
<i>In an application to be admitted as an enrolled agent in the Woodstock Resident Magistrate's Court, it appeared that there were more than two attorneys of the Supreme Court habitually practising in the Woodstock Court.</i>	
<i>Held, that although such attorneys had no offices in Woodstock, there was such a close proximity of their offices in Cape Town to the Woodstock Court as to justify the Magistrate in holding that they were in practice in the Woodstock Court.</i>	
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Amendment of judgment—Interest.	
<i>Some months after a judgment in favour of the plaintiff, which</i>	

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<i>was silent as to interest, had been pronounced, the plaintiff applied for an amendment of the judgment by allowing interest to run thereon.</i>		<i>from a judgment of the Supreme Court given by more than one judge.</i>	
Held, that the Court had no power to amend its own decree.		Estate Stephan v Estate Stephan ... .. 920	
Caledonia Landing, Shipping and Salvage Co., Ltd., and another v. East London Harbour Board ... .. 579		Appeal to Superior Court, see Native Territories ... .. 968	
<i>Animus injurandi</i> , see Defamation ... .. 482		Appeal to Full Court—Interlocutory order.	
Antenuptial contract—Donation.		<i>A divisional Court of the Supreme Court can allow an appeal to the Full Court on an interlocutory order.</i>	
<i>By an antenuptial contract L. had given to his future wife a half share in the farm M. The sale of this farm to him having been afterwards cancelled, the Court now granted leave to substitute the farm Z. in the antenuptial contract, saving the rights of all creditors up to the date of the registration of the so amended contract.</i>		Imperial Cold Storage and Supply Co. Ltd. v. Distributing Syndicate for Cold Storage ... .. 678	
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Antenuptial contract—Registration—Lapse of time.		Arbitration—Disagreement as to umpire—Act 29 of 1898.	
<i>Where husband and wife had been married in community under the impression that there could be no community and had been married upwards of five years before they ascertained the possibility of obtaining relief from the Court, the Court authorized the registration of the antenuptial contract.</i>		<i>Jordaan v. Jordaan</i> ... .. 656	
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Antenuptial contract, see Insolvency ... .. 945		Architect—Builder—Agency—Authority of architect to bind owner in respect of "extras."	
Appeal from Supreme Court to Privy Council—Quorum of judges.		<i>Haywood v. Pauling</i> ... .. 169	
<i>A divisional Court, presided over by a single judge, has no jurisdiction to grant leave to appeal to the Privy Council</i>		Architect—Fees—Project not carried out— <i>Quantum meruit</i> .	
		<i>Where a proprietor instructs an architect to prepare plans and the proposed work is not carried out the Court will not feel bound in making its award by the scale of fees customary in England but will award only a quantum meruit.</i>	
		<i>O'Brien v. Logan</i> ... .. 410	
		Arrest of person <i>ad fundandum jurisdictionem</i> — <i>Incola</i> .	
		<i>Lury v. Lawrence &amp; Co.</i> ...1039	
		Arrest—Affidavit of creditors— <i>Incola</i> —8th Rule of Court.	
		<i>Applicant had been arrested for debt when about to leave</i>	



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<i>for England, under the 8th Rule of Court, on the affidavit of a manager of a firm which was domiciled in England, but carried on a branch business in this Colony, without, however, being registered here. Applicant was domiciled in the Transvaal and was only passing through this Colony. The alleged debt was in respect of a judgment obtained in the Transvaal High Court, against which judgment an appeal had been noted.</i>	
<i>Held, that the writ of arrest be set aside with costs.</i>	
<i>Ex parte Herzfelder...</i>	...1144
Articled clerk, <i>see</i> Enrolled agent	306
Articled Clerk—Advocate—Cancelling Articles of Clerkship.	
<i>The respondent applied to the Court for leave to have his name struck off as one of its advocates and brought to the notice of the Court that, through a misapprehension, he had omitted to have his name so struck off before entering into certain Articles of Clerkship. No objection was taken by the applicant society, to whom notice of the application had been given. The applicant society now applied for an order to have the Articles of Clerkship cancelled, on the ground that he had appeared as an Advocate of the Supreme Court while serving his Articles of Clerkship. It was proved that he had been allowed by a Resident Magistrate to appear in his Court, on the ground that he was an Advocate of the Supreme Court, but that the fee for his so appearing was not paid to him but to the attorney to whom he had been articled.</i>	
<i>Held, that there was no ground for cancelling the Articles of Clerkship.</i>	
<i>Law Society v. Pretorius</i>	... 397

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Articled clerk — Completion of service of Articles within a foreign jurisdiction.	
<i>The Court refused to allow cession of a clerk's articles to an attorney of the High Court of the O.R.C. practising in that Colony; although the attorney was also an attorney of the Supreme Court.</i>	
<i>Law Society v. McLeod (14, C.T.R., 836) distinguished.</i>	
<i>Ex parte Kriel</i>	... 606
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Attachment <i>ad fundandam jurisdictionem</i> —Procedure—Rules of Court.	
<i>Applicant had brought an action in the Supreme Court against respondents, who were not subject to the jurisdiction. After the pleadings had been closed, he asked for the attachment of certain of respondent's property ad fundandam jurisdictionem, and further that the pleadings might be allowed to stand and that either the original summons or the notice of motion should be taken as edictal citation of the respondents.</i>	
<i>Held, that as applicant had not followed the process prescribed by the Rules of Court for bringing respondents within the jurisdiction, and as his application was virtually for a summons after pleadings had been closed, the application must be refused.</i>	
<i>Fechter v. Transvaal Mines Labour Co.; Transvaal Mines Labour Co. v. Fechter</i>	... 351
Attachment of money due — <i>Meditatio fugae.</i>	
<i>The Court refused to grant a rule for the attachment of money due to respondent.</i>	

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<i>Applicant alleged that on receipt of such money he believed that respondent contemplated leaving the Colony, but gave no reasons for such belief.</i>		<i>signed a power of attorney in blank. C. instructed the appellant, a Butterworth attorney, to act for him, and sent to him the power of attorney. The appellant, having conducted the case, demanded payment for his services from C. But on the refusal of C., who was in financial difficulties, to pay him, he sued the respondent on a taxed bill of costs.</i>	
<i>Ex parte Chadwick ...</i>	...1094	<i>Held on appeal, that respondent's power of attorney in blank having been lawfully made over to appellant, respondent was liable to him for his fees.</i>	
Attachment on Suspicion.		<i>Semble, the practice that the attorney who employs another as his agent, and not the client, is liable to the agent for fees exists only in the case of London attorneys employed by Country attorneys, unless in other cases the agent waives his rights against the client by his conduct or otherwise.</i>	
<i>Plaintiff had purchased certain goods and stock at a fair price from one S., who shortly afterwards absconded. The attorney who acted for some of S.'s creditors, suspecting that the sale to plaintiff was collusive, induced defendant to attach all the goods in plaintiff's possession.</i>		<i>Martin v. Roberson ...</i>	... 216
<i>Held, that as defendant had neither proved that the goods were still the property of S., nor that plaintiff did not purchase from S. in good faith, he must restore the goods and pay damages and costs.</i>		Attorney—Law Society—Indefinite charge.	
<i>Friedberg v. Deputy Sheriff of Prieska ...</i>	... 394	<i>Where the Law Society calls upon an attorney to show cause why his name should not be removed from the roll; the charges against him should be stated with the same precision as is required in a criminal indictment.</i>	
Attachment to confirm jurisdiction, see Jurisdiction of Supreme Court ...	... 840	<i>Law Society v. Tottenham and another (1904, T.R., 304) followed.</i>	
Attachment of goods ad fundandam jurisdictionem—Foreign defendant—Agent.		<i>Incorporated Law Society v. Coulton ...</i>	... 260
<i>If a foreign firm has an agent within this Colony who is fully empowered to accept service of process on their behalf, the Court will not grant an order of attachment ad fundandam jurisdictionem against them.</i>		Attorney — Unprofessional conduct—Suspension from practice.	
<i>Kopelowitz v. Auerbach ...</i>	... 870	<i>The respondent, an attorney of the Supreme Court, having received £375 on behalf of a client, paid him only £250, and did not inform him that more had been received. The respondent having also received £5 on behalf of another client,</i>	
Attachment, see Magistrate's Court judgment ...	... 967		
Attestation, see Will ...	... 56		
Attorney acting as agent for another attorney—Client—Liability for fees of agent—Practice.			
<i>Respondent had instructed one C., an attorney residing at Somerset East, to conduct a case for him in the Magistrate's Court at Butterworth, and</i>			

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<i>gave him a cheque for the amount, but upon presentation at the Bank, there were found to be no funds.</i>	
<i>Held, that it was the duty of the respondent to deposit trust funds to a separate account in the Bank, and, at all events, to take care that there shall be funds to meet the claims of his clients; and that he had been guilty of such improper conduct as to require his suspension from practice for a period.</i>	
Law Society v. Jones ...	371
Attorney — Admission in the Transvaal and in Cape Colony — Matriculation certificate of the Cape University—Act 14 of 1899.	
<i>D., having been admitted as an attorney of the Supreme Court of the Transvaal, applied for admission as an attorney of the Supreme Court of this Colony. He produced no certificate in terms of Sec. 1 of Act 14 of 1899, but it appeared that the regulations of the Cape University provided that no student could be admitted to the Transvaal law certificate examination unless he had first passed the matriculation examination of the University.</i>	
<i>Held, that D. be admitted as prayed.</i>	
<i>Ex parte Donovan</i> ...	863
Attorney, see Agent ...	739
Auctioneer—Broker.	
<i>Plaintiffs had engaged defendant to sell certain property at a reserved price. His commission was to be one per cent. It was not disposed of at the price fixed, but some of it was thereafter sold out of hand by the auctioneer at the said price. For this sale he charged the ordinary brokerage fee of 2½ per cent.</i>	
<i>Held, that he was entitled only to one per cent.</i>	
War Department v. Duffus & Co. ...	50

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Aval, see Promissory note ...	658
Award—Rule of Court—Judgment debt—Interest—Execution.	
<i>An award whereby the plaintiff Company was adjudged to pay a sum of money to the defendant Company, which was to be entitled to retain certain shares in the plaintiff Company as security, was made a Rule of the Supreme Court, but nothing was said in the award or in the Judgment of the Court as to the payment of interest. At the time when the judgment was given, the plaintiff Company applied for a stay of execution, which was refused by the Court.</i>	
<i>Held, that the defendant Company was not entitled thereafter to charge interest on the amount of the judgment debt.</i>	
Official Liquidators of the Buffalo Supply and Cold Storage Co., Ltd. (in Liquidation) v. The Federal Supply and Cold Storage Co. of South Africa, Ltd....	345
Benefit of excussion, see Surety...	711
Bequest—Restraint against mortgage—Minor.	
<i>Certain premises had been bequeathed to the petitioner, and after her death to her eldest child, on condition that she was not to mortgage or alienate the property. The petitioner was too poor to pay the costs of transfer or to repair the premises, which were fast becoming uninhabitable. The eldest child was a minor, and the Court, in the interest of the minor and in order to prevent the bequest from failing altogether, granted leave to mortgage the premises for such sum as would be sufficient to enable the petitioner to obtain transfer and place the premises in a habitable state of repair, and directed that the interest should</i>	

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<i>be paid by petitioner during her life.</i>		<i>each in solidum for the balance due under the bond.</i>	
<i>Ex parte De Douallier</i> ...	391	<i>Estate Tudhope v. Sand</i> ...	990
<b>Billiards</b> —"Good for"—"Entertainment"—Act 28 of 1883, Sec. 69.		<i>Books, see Evidence</i> ...	223
<i>Where the lessee of a hotel billiard room sued on a "good for" for charges for the use of a certain billiard table.</i>		<i>Brandy still, &amp;c., see Purchase and sale</i> ...	544
<i>Held, that he was entitled to succeed.</i>		<b>Breach of warranty</b> — <i>Actio redhibitoria</i> —Recission of sale.	
<i>Semble: In view of the use of the word "entertainment" in Sec. 69 of Act 28 of 1883, it is doubtful whether the landlord could have recovered on a similar "good for."</i>		<i>The vendor of a launch warranted her to be in good working order. The purchaser, after giving her a fair trial, found that she was not in good working order and that she really required a new boiler.</i>	
<i>Van den Berg v. Riddell</i> ...	219	<i>Held, that the purchaser was entitled to have the sale rescinded and to recover back the price which, under the terms of sale, he had paid on delivery.</i>	
<i>Bona vacantia, see Intestate succession...</i>	390	<i>Hoven v. Cape Town Stevedoring Co., Ltd.</i> ...	71
<b>Bond</b> — Co-principal debtors — Release by creditor of part of the security.		<i>Broker, see Auctioneer</i> ...	50
<i>Three trustees of certain Church property (F., R. and S.) borrowed £500 on mortgage for Church purposes from one T., specially hypothecating certain Church land registered in their names as trustees. They all bound themselves as co-principal debtors, renouncing the benefits of excussion and division: and also bound their individual property as security. R. also specially hypothecated certain land of his own as additional security, which was afterwards released by T. After T.'s death, his executors obtained provisional sentence on the bond, and execution was levied on the Church property, which realized about £150. S. now denied that his estate was liable.</i>		<b>Brokerage commission</b> —Introduction of purchaser—Remote result.	
<i>Held, that the fact of T. having released a portion of the security did not relieve the sureties from their liability.</i>		<i>The plaintiff and the defendant agreed that, in consideration of the former advertising farms which the defendant had for sale, and introducing to the defendant prospective purchasers, the brokerage commission and fees on any sales accruing from any transactions resulting therefrom shall be shared equally between them. The plaintiff, having issued such advertisements, J. called and asked for details, saying that he wished to purchase a farm for himself. In fact, J. had been sent by P., who was the broker of R., who was anxious to obtain farm property by exchanging his town property for the same. The plaintiff placed J. in direct communication with the defendant, but no sale resulted. It was stated by P. that he was introduced to the defendant by J., but the</i>	



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<i>defendant denied the statement, and the Court found, as a fact, that P. was not so introduced.</i>	
Held, in an action for a share of the commission received by the defendant in effecting a sale of R.'s town property to one V., and a sale of V.'s farm property to R., that the plaintiff was not entitled to such commission, inasmuch as the sale of such farm by V. to R., was too remote a result of the introduction by the plaintiff of J. to the defendant.	
Hennessey v. Furter ...	...1043
Building contract—Building proprietor's responsibility for "extras"—Quality of work—"Retention money."	
Reid & Co. v. Logan ...	... 333
Builder, <i>see</i> Architect ...	... 169
Butcher's licence—Selling from cart—Act 13 of 1870, Sec. 6.	
<i>A butcher who, having obtained a licence in respect of a certain shop, sends out a cart with instructions to sell meat therefrom is guilty of contravening Sec. 6 of Act 13 of 1870.</i>	
Rex v. De Villiers ...	... 985
Cancellation, <i>see</i> Sale ...	... 268
Cancellation of sale, <i>see</i> Transfer duty ...	... 666
Cape Town Municipal Act (26 of 1893)—Valuation of property.	
<i>The respondent Town Council, under its Act (26 of 1893), caused a valuation of immovable property to be made, including some property in the occupation of the applicant Board. The Board applied for an order declaring that such property was not liable under the Act to be rated.</i>	
Held, that the Council was justified under the 87th section in having the valuation made, and that until a rate was	

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<i>imposed on the property, the Board had no ground of complaint.</i>	
Table Bay Harbour Board v. Cape Town Town Council	162
Cape Town Town Council — Unauthorized expenditure — Promenade pier—Mole.	
Benning v. Cape Town Town Council ...	... 817
Cattle—Infected area—Acts 27 of 1893 and 16 of 1906.	
<i>To negligently allow cattle to stray from an infected to a non-infected area is not a criminal offence either under Section 12 of Act 27 of 1893 or under Act 16 of 1906.</i>	
Rex v. Botha ...	... 1115
Cattle trespass—Cultivated and uncultivated lands—Act 15 of 1892, Schedules C and D—Recovery of trespass money overpaid—Mistake of law.	
<i>Certain cattle, the property of respondent had trespassed upon H.'s unenclosed cultivated land. They also trespassed upon his uncultivated land, which was also unenclosed. H. demanded payment in respect of both trespasses, 9d. for the first mentioned trespass and 3d. for the second, per head. F. paid the demand and there was no evidence to show that he did so under protest. He afterwards brought an action to recover back a portion of the money paid on account that it was an overcharge. The Magistrate gave judgment in his favour for a small sum.</i>	
Held, on appeal, that as F. had paid without protest under a mistake of law, he was not entitled to recover anything.	
Semple, it is very doubtful whether a land holder can lawfully charge for trespass by the same cattle committed on the same occasion upon both cultivated and uncultivated	

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<i>be paid by petitioner during her life.</i>		<i>each in solidum for the balance due under the bond.</i>	
<i>Ex parte De Douallier</i> ...	391	<i>Estate Tudhope v. Sand</i> ...	990
Billiards—"Good for"—"Entertainment"—Act 28 of 1883, Sec. 69.		Books, <i>see</i> Evidence ...	223
<i>Where the lessee of a hotel billiard room sued on a "good for" for charges for the use of a certain billiard table.</i>		Brandy still, &c., <i>see</i> Purchase and sale ...	544
<i>Held, that he was entitled to succeed.</i>		Breach of warranty— <i>Actio redhibitoria</i> —Recission of sale.	
<i>Semble: In view of the use of the word "entertainment" in Sec. 69 of Act 28 of 1883, it is doubtful whether the landlord could have recovered on a similar "good for."</i>		<i>The vendor of a launch warranted her to be in good working order. The purchaser, after giving her a fair trial, found that she was not in good working order and that she really required a new boiler.</i>	
<i>Van den Berg v. Riddoll</i> ...	219	<i>Held, that the purchaser was entitled to have the sale rescinded and to recover back the price which, under the terms of sale, he had paid on delivery.</i>	
<i>Bona vacantia, see</i> Intestate succession... ...	390	<i>Hoven v. Cape Town Stevedoring Co., Ltd.</i> ...	71
Bond — Co-principal debtors — Release by creditor of part of the security.		Broker, <i>see</i> Auctioneer ...	50
<i>Three trustees of certain Church property (F., R. and S.) borrowed £500 on mortgage for Church purposes from one T., specially hypothecating certain Church land registered in their names as trustees. They all bound themselves as co-principal debtors, renouncing the benefits of excussion and division: and also bound their individual property as security. R. also specially hypothecated certain land of his own as additional security, which was afterwards released by T. After T.'s death, his executors obtained provisional sentence on the bond, and execution was levied on the Church property, which realized about £150. S. now denied that his estate was liable.</i>		Brokerage commission—Introduction of purchaser—Remote result.	
<i>Held, that the fact of T. having released a portion of the security did not relieve the sureties from their liability,</i>		<i>The plaintiff and the defendant agreed that, in consideration of the former advertising farms which the defendant had for sale, and introducing to the defendant prospective purchasers, the brokerage commission and fees on any sales accruing from any transactions resulting therefrom shall be shared equally between them. The plaintiff, having issued such advertisements, J. called and asked for details, saying that he wished to purchase a farm for himself. In fact, J. had been sent by P., who was the broker of R., who was anxious to obtain farm property by exchanging his town property for the same. The plaintiff placed J. in direct communication with the defendant, but no sale resulted. It was stated by P. that he was introduced to the defendant by J., but the</i>	

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Department, was placed on the "fixed establishment." At the time of his being so placed, he was paid at a certain rate per hour for 54 hours per week, part of the wages being paid at the end of each week, and the balance at the end of each month. In the following year he petitioned for a reduction of the number of working hours to 48 per week, with a corresponding increase in the rate of wages per hour, and the request was granted. Subsequently the rate of wages per hour was increased, but the number of working hours remained at 48 per week. At the end of 1906, in consequence of the falling off of traffic, the Government reduced the number of working hours per week to 43½, but made no corresponding increase in the rate of wages per hour. It was admitted that no fault was to be found with the work done by the plaintiff.	
Held, that as the plaintiff's monthly wages or emoluments were fixed and definite, and as a Civil Servant's salary cannot be reduced by Government save for misconduct, the Government was not entitled to reduce the number of working hours per week without a corresponding increase in the rate of wages per hour.	
Beams v. Colonial Government ... ..	1077
Claim to inheritance— <i>Prima facie</i> evidence of parentage—Proof of marriage—Register of marriage—British Kaffraria—Rule nisi.	
On an application for an order directing the Master of the Supreme Court to pay to the executor of one Martins certain sums in the Guardians' Fund, and for a further order directing the executor to pay the sums to the applicant as being the sole surviving child of	
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Martins, it appeared that there was no register of the marriage of Martins to the applicant's mother and no register of the applicant's baptism, but there was evidence that the registers of births and marriages in British Kaffraria, where the parties resided, were very defective, more especially the registers kept by the minister who was alleged to have performed the marriage ceremony. Witnesses deposed to the minister arriving to perform the ceremony, to the friends of the parties meeting at the residence of the bride, to the bride who was a widow, telling her children that they should in future call Martins "father," to Martins and applicant's mother living together as husband and wife, and to the applicant being afterwards born of the union.	
Held, that there was <i>prima facie</i> evidence that the applicant was the lawful child of Martins, but, in order to give any other possible claimants to the money an opportunity of asserting their claims, a rule returnable at a long date, to be extensively advertised, was granted, calling on all persons claiming to be heirs of Martins, to shew cause why the orders should not be made.	
Schultze v. the Master and another ... ..	1005
Claim in reconvention, <i>see</i> Magistrate's jurisdiction ... ..	321
Client, <i>see</i> Agent ... ..	216
Codicil (unattested), <i>see</i> Will ... ..	166
Co-executors—Distribution account—Executors' commission.	
Mehaffey v. Brady ... ..	112
Collaterals, <i>see</i> Intestate succession ... ..	390

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Commission <i>de bene esse</i> —Variation of written contract.		to the Board. The Board had leased a plot of this land to R., and had allowed him to erect buildings thereon.	
Phillips & Co. v. Muller ...	26	Held, that the Board had acted <i>ultra vires</i> . That plaintiff was entitled to an order declaring the lease null and void and ejecting R., but that R. could claim compensation for his improvements.	
Commissioner — Attestation of powers.		Colonial Government v. Amalinda Village Management Board and another ...	373
Any foreign Commissioner for Oaths, unless he be appointed by the Supreme Court, must have his powers attested by some person in authority, in order that depositions sworn before him may be accepted by the Court.		Completion of service of articles within Foreign jurisdiction, <i>see</i> Articled clerk ...	606
<i>Ex parte</i> Knox ...	981	Condition, <i>see</i> Will ...	392
Commonage — Servitude — Registration — Filing of general plan.		Conditional bequest of property not to go out of the family, <i>see</i> Will ...	409
One O. B. had sold certain erven on his farm subject to the right of purchasers to user of a certain commonage shown on a general plan of the farm filed with the Registrar of Deeds. Thereafter the defendant's predecessor in title purchased certain of these erven and also the remaining extent. Defendants denied the servitude and had encroached on the commonage by appropriating to their exclusive use certain portions thereof. Plaintiffs now claimed a declaration of rights in respect of the commonage.		Constitution Ordinance—Voters' roll — Occupation — Grazing rights.	
Held, that, as the filing of the general plan with the title deeds was equivalent to the registration of a servitude, the defendants must be ordered to remove such fences as protected their encroachments.		A structure consisting of wooden frame-work attached to poles fixed in the ground and covered on the top and on all sides with canvass or with iron, and used as a habitation held to be a house in terms of the 8th section of the Constitution Ordinance: but an ordinary tent held not to be such a house.	
Western Wine Co. and others v. Federal Cold Storage Co. ...	415	A male person who for twelve months lived in a house upon land occupied with such house under a lease of grazing rights held to be entitled to be registered as a voter where the value of the house, together with the grazing rights, is £75 or upwards.	
Commonage — Village Management Board—Lease of commonage.		<i>Ex parte</i> Greef and others ...	807
The Government had granted the use of a certain piece of land to the Village Management Board of A. for the purpose of a common, but the land had never been transferred		Contract—Breach.	
		A hired servant who receives instructions from his master to perform certain services is not a contractor in respect of those special services.	
		Moses v. Webb ...	522



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Contract—Public interest—Illegality—Matrimonial agents. <i>Contracts made with a matrimonial agent for the payment of a commission or reward upon the completion of a marriage brought about by his agency will not be enforced, being prejudicial to the public welfare.</i> King v. Grey... .. 845		Cost, <i>see</i> Sale and purchase ...1085	
Contract of sale—Cancellation of contract—Time of payment of price—Future delivery—Measure of damages. <i>Where no time of payment is fixed in a contract of sale, the parties are presumed to have intended that the price shall be paid on delivery.</i> <i>Where under such a sale, the vendor has delivered part of the goods without insisting upon payment, he cannot afterwards rescind the sale on the ground of the purchaser's delay in payment of the price, unless such delay took place under circumstances evincing an intention on the purchaser's part to be no longer bound by the contract.</i> <i>The measure of damages for the breach by the seller of a contract of sale of goods to be delivered in futuro is the difference between the contract price and the market price at the several periods of delivery, in the absence of evidence that the purchaser could have gone into the market and obtained another similar contract on such terms as would mitigate his loss.</i> Cotton v. Arnold & Co. ... 707		Costs — Discretion of taxing officer. Finkelstein v. Finkelstein ...1126	
Contract with Municipality, <i>see</i> Municipal Council ... 196		Costs—Magistrates' Court scale—Rule 325. <i>By Rule 325, if the plaintiff in a Supreme Court action resides in a Magisterial district different from that of the defendant, the Supreme Court must award costs on the higher scale, even though the sum recovered could have been sued for in the Magistrate's Court, provided that no part of the cause of action arose in the district in which the defendant resides.</i> <i>Where a part of the cause of action did arise in the district of the defendant and the plaintiff recovered only £6, the Court, in the exercise of its discretion, allowed only Magistrate's Court costs.</i> De Vries v. Du Plessis ... 934	
Contributory, <i>see</i> Shareholder ... 154		Costs—Taxing Master's allocatur—Review. <i>H. had applied to the Court for leave to appear as curator ad litem on behalf of his minor son in an action instituted against the respondents jointly. The matter was settled out of Court, respondents agreeing to pay taxed costs. The Taxing Master refused to allow costs of H.'s application as between party and party on the ground that they ought to have been incurred before the issue of summons.</i> <i>Held, on Review, that the said costs not being unnecessary they must be regarded as costs between party and party no matter when they were incurred.</i> Hickson v. Colonial Government and another... .. 405	
Corporal punishment—Previous conviction—Act 43 of 1885, Sec. 1. Rex v. A.B. ... .. 136		Counterclaim, <i>see</i> Resident Magistrate's jurisdiction ... 844	

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Covering bond, <i>see</i> Priority	...1105
Cricket team—Articled clerk— Leave of absence.	
<i>Ex parte</i> Snooke	... 231
Death of legatee, <i>see</i> Will	...1054
Debentures — Negotiable instruments— <i>Bona-fide</i> holder.	
<i>The plaintiff Bank advanced moneys to a certain partnership, receiving as security certain debentures of the G. Company. The debentures, which had been issued under Act 43 of 1895, were payable at a certain date to the bearer or registered holder, and purported to be upon the security of a first bond, a copy of which was printed on the back of the debentures. The Bank, when it received the debentures knew, as the fact was, that before their issue the chief assets of the Company had been ceded to, and its liabilities taken over by certain persons, including the partnership, on condition that no further debentures should be issued without their consent. The Company was subsequently ordered to be wound up.</i>	
<i>Held, that the debentures were negotiable instruments, and that the Bank was a bona-fide holder thereof, notwithstanding its knowledge of the cession, and was consequently entitled to prove for the amount of the debentures in the winding up of the Company.</i>	
African Banking Corporation, Ltd. v. Official Liquidator of the Grand Junction Railways, Ltd.	... 377
Debt not yet due, <i>see</i> Rule 329d...	444
Debtor of execution debtor, <i>see</i> Sheriff	... 1117
Declaration of rights—Infringement of rights—Exception.	
<i>A declaration alleged that the plaintiff fenced his farm, as</i>	

*he lawfully might, by means of a fence crossing a certain track, that the defendant Council thereupon gave him notice to open the road or to place proper swing gates thereon, failing which, the Council would take legal proceedings against him, and that the plaintiff apprehended that he might therefore be disturbed in his quiet possession. The declaration therefore prayed for a declaration of rights to the effect that the Council is not entitled to make the claim as to the said track.*

*Held, on exception taken by the defendant Council, that the declaration disclosed no ground of action, inasmuch as the notice constituted no infringement of the plaintiff's legal rights.*

Schalkwyk v. Fraserburg  
Divisional Council ... 65

Deed's Office practice, *see* Will ... 447

Defamation—*Animus injurandi*—  
Privilege—Publication—Employment of copyist of defamatory matter.

*In an action for damages for causing a letter containing defamatory matter concerning the plaintiff to be read at a meeting of a Municipal Council of which the defendant was Chairman, it appeared that the letter was annexed to an affidavit prepared by the defendant to meet an application made by the plaintiff in the Supreme Court calling upon the Council and the defendant to show cause why the defendant should not be removed from the Council.*

*Held that, under the circumstances the presumption of animus injurandi was rebutted.*

*The letter read to the Council had been type written by the defendant's clerk.*

*Held, that the privilege which protected the defendant in*

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<i>having the letter read to the Council also protected him in the employment of a confidential clerk to copy the letter.</i>	
Celliers v. Fagan ... ..	482
Delivery, <i>see</i> Pledge ... ..	463
Discovery—Colonial Defence Department.	
Hedley Bros. v. Colonial Government ... ..	270
Distribution of estate, <i>see</i> Will ...	699
District surgeon, <i>see</i> Medical fees	42
Divisional Council Act (40 of 1889)—Rejection by Magistrate of duly nominated candidate.	
<i>A Magistrate as returning officer at a Divisional Council election has no power to reject a duly nominated candidate even if he has reason to believe him to be ineligible but must proceed as directed by Secs. 4, Sub-sec. (b) 56 and 71 of Act 40 of 1889.</i>	
<i>A candidate need not resign any office of profit he may hold under the Crown before nomination but only before election.</i>	
Du Pisani v. Divisional Council, Willowmore and Diedricks ... ..	458
Divorce—Adultery — Restitution of conjugal rights.	
<i>S. had sued his wife for divorce on the ground of her adultery. He did not succeed, as the Court found it proved that he was himself guilty. He thereafter offered to take his wife back but she refused to return and deserted him. Applicant now applied for an order to sue his wife by edictal citation for restitution of conjugal rights.</i>	
<i>The Court refused the order.</i>	
Heathershaw v. Heathershaw (1 Rosc. 186) not followed.	
<i>Ex parte Stayn</i> ... ..	70

## Divorce — Adultery — Venereal disease.

*Divorce granted on the ground of adultery, the only proofs being communication of venereal disease to plaintiff within a short time after the marriage and an admission made to plaintiff's attorney.*

Curtin v. Curtin ... .. 54

## Divorce — Domicile — Practice — Edictal citation — Suit in forma pauperis—Prima facie evidence of domicile.

*The petitioner alleged that she and her husband had been married in community of property, and thereafter lived together in this Colony for over two years, after which the husband went away, leaving her here. The petition did not state whether the husband was born in this Colony; but there was, in the opinion of the Court, prima facie evidence that the parties intended to make this Colony their permanent home and that the husband had not changed his domicile:*

*Held, that the petitioner was entitled to obtain leave to sue her husband by edictal citation for restitution of conjugal rights and, failing obedience, for divorce on the ground of malicious desertion; leaving it to him to rebut the presumption that the parties were still domiciled here.*

*The petitioner had obtained a rule calling upon the defendant to shew cause why she shall not be allowed to sue in forma pauperis.*

*Held, that the existence of such rule was no bar to her obtaining leave to sue her husband by edictal citation, provided that the fees of office in connection with such citation were paid if issued before leave to sue in forma pauperis was granted.*

*The headnote in Walker v. Walker (6, C.T.R., 388) dis-*

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<i>approved of. Case of Le Mensurier v. Le Mensurier in Privy Council (L. Rep., Ch. 1895, p. 517) commented on.</i>		<i>Held, that as the company was being liquidated in this Colony the Court had jurisdiction and that the service of process was good.</i>	
Knox v. Knox ...	607	Colonial Government v. Graaff (as Liquidator, South African Supply and Cold Storage Co., Ltd.) ...	541
Divorce—English marriage settlement—Forfeiture of rights.		Donation, <i>see</i> Antenuptial contract ...	456
<i>H. and his wife were domiciled and married in this Colony. The wife brought certain movable property into the estate which, by a marriage settlement executed on the day of the marriage in the English form, was vested in certain English trustees for her separate use. H., however, was to enjoy a life interest in the property should he survive his wife. It was provided that the deed of settlement should be construed in accordance with English law. In an action brought by the wife for restitution of conjugal rights, &amp;c., she prayed, inter alia, that H. be declared to have forfeited all benefits under the marriage settlement.</i>		Dredger — Specifications — Sale and purchase.	
<i>Held, that the said prayer be granted.</i>		Cunningham and Gearing v. Milnerton Estates, Ltd. ...	1057
Harvey v. Harvey ...	977	Drunkenness in public place, <i>see</i> Police offences ...	695
Domicile, <i>see</i> Service of summons	473	Engineer (hydraulic)—Incomplete plans—Remuneration.	
Domicile of Company—Jurisdiction—Exception—Liquidator—Service of process.		Malloch v. Somerset East Municipality ...	753
<i>The S.A.S. company recently carried on business in this Colony, its head office was however in England. Thereafter the Colonial department of the business was closed and the company went into liquidation. G., the liquidator, carried on the business of liquidating in Cape Town and certain legal process relating to claims against the company was served upon G's clerk at his office. G. appeared to have certain assets of the company in his hands. He now objected to the service and excepted to the jurisdiction of the Court.</i>		English marriage settlement, <i>see</i> Divorce ...	977
		Enrolled agent—Articled clerk.	
		<i>O., an agent, enrolled under Act 20 of 1856, Sec. 36, had entered into articles of clerkship with applicants. The Law Society now objected to his acting as an agent in Magistrates' Courts during his service of articles.</i>	
		<i>Held, that he was entitled to devote a reasonable portion of his time to such agent's duties.</i>	
		Van Zyl and Buissinne v. Oliff and Incorporated Law Society ...	306
		Entertainment, <i>see</i> Billiards ...	219
		Evidence—Shop-keeper's books.	
		<i>A shop-keeper's books are not per se evidence of the indebtedness of a customer, unless, owing to special circumstances over which the shop-keeper has no control, they are the best evidence which it is possible to produce.</i>	
		McGregor v. Phillips ...	223



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Evidence of accomplice—Corro- boration.	
Rex v. November and another	987
Evidence of accomplice, <i>see</i> Liquor license... ..	1129
Evidence — Hostile witness — Cross-examination—Impeach- ing evidence.	
<i>Where the Court is of opinion     that a witness is hostile to the     party by whom he is called,     the Court may allow such     witness to be cross-examined     whether he has made a former     statement relative to the subject-     matter of the action and incon-     sistent with his present testi-     mony, and if he does not admit     that he made such a statement,     proof may be given that he did     in fact make it.</i>	
Harvey v. Thomas ... ..	651
Evidence of domicile, <i>see</i> Divorce	607
Evidence of parentage, <i>see</i> Claim to inheritance... ..	1005
Evidence as to character, <i>see</i> Act 23 of 1879 ... ..	598
Exceptions—Plea in abatement.	
Odendall v. Van der Berg and another ... ..	311
Exception, <i>see</i> Declaration of rights ... ..	65
Execution—Movable and immova- ble property.	
<i>Where in one case execution     had been levied upon the     movable property of a debtor     and a return of nulla bona     had been made to the writ, the     Court granted leave in a     subsequent case to levy execu-     tion on the immovable property     without first executing on the     movables.</i>	
Dengler v. Klibbe ... ..	625
Execution against Government, <i>see</i> Sheriff ... ..	1117

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Executor and tutor—Unauthor- ized expenditure.	
<i>The applicant had expended     certain moneys on the construc-     tion of buildings on a farm,     the property of his wards,     without the previous sanction     of the Court, and now applied     for an order on the Master to     pay out from the funds in the     estate the costs of the said     buildings.</i>	
Held, that under the special circumstances of the case, the Master be authorized to pay out the moneys so expended.	
<i>Ex parte</i> Estate Theunissen... ..	1139
Executor—Jurisdiction— <i>Res judi-     cata</i> — Master of Supreme Court.	
<i>The plaintiff claimed in a     Transkeian Magistrate's Court     from the defendant, as executor,     a sum of money alleged to be     the proceeds of certain crops     belonging to her and wrong-     fully paid into the estate and     the defendant pleaded res     judicata on the ground that the     account furnished by the defen-     dant had been approved and     signed by the Master of the     Supreme Court, and the Magis-     trate held that his Court had     no jurisdiction, inasmuch as     the defendant had received his     appointment from the Master     of the Supreme Court.</i>	
Held, on appeal, that the plea of <i>res judicata</i> was bad and the fact of the defendant having been appointed by the Master did not oust the jurisdiction of the Magistrate.	
Muller v. Love ... ..	442
Expenses of transfer — Lien — Tacit hypothecation—Reten- tion—Insolvency—Preference —Mortgage bond—Equitable mortgage.	
<i>The applicant acted as agent     of A. in passing transfer of     certain land, and in afterwards     passing a special mortgage on</i>	

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<i>such land in favour of the respondent. A. became insolvent, whereafter the applicant, as trustee of the insolvent estate, awarded to himself, in his individual capacity, a preference by virtue of a lien, which he claimed on the deed of transfer of the land, in respect of his expenses in effecting such transfer.</i>	
<i>Held, that the applicant, being allowed the use of the transfer deed for the purpose of passing a bond on the property, was not entitled, in competition, to any preference in respect of the proceeds of the land.</i>	
<i>Estate Van der Merwe v. Thorne ... ..</i>	182
<i>Expropriation, see Railway ...</i>	643
<i>Expropriation of water, see Southern Rhodesia ... ..</i>	399
<i>"Extras," see Building contract...</i>	333
<i>Fall of derrick, see Negligence ...</i>	338
<i>Fees, see Architect ... ..</i>	410
<i>Fees, see Attorney acting for another ... ..</i>	216
<i>Fencing Act, 1883 — Cost of repairs.</i>	
<i>The plaintiff whose land was separated from the defendant's land by a dividing fence which was in a dilapidated condition, gave notice to the defendant that the repairs would be executed under the 14th section of Act 30 of 1883. In executing such repairs the plaintiff raised the height of the fence by affixing a barbed wire 9 inches above the height of the old fence and he also affixed several iron posts between the old posts, which were all of wood.</i>	
<i>Held, affirming the judgment of the Magistrate's Court, that the plaintiff could not, under the claim for expense of repairs, claim from the defendant a share of the expenses</i>	

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<i>incurred in altering the nature of the fence, but should be confined to the expense incurred in restoring the fence to its original condition.</i>	
<i>Gilpin v. Fynn ... ..</i>	427
<i>Fidei-commissum—Leave to sell property.</i>	
<i>The applicants, being fiduciary legatees of certain farms, bequeathed to them subject to a fidei-commissum in favour of their children, applied to the Court for authority to sell the same. The Court, being satisfied that the sale, if concluded, would be extremely advantageous, not only to the born issue, who were minors, but also to the unborn issue of the applicants, authorized the sale and directed that, in case of a sale, the proceeds should be paid into the Guardians' Fund, to be administered for the benefit of the fiduciary and of the fidei-commissary legatees respectively of the farms.</i>	
<i>Ex parte Louw and others ...</i>	919
<i>Fidei-commissum, see Will</i>	
	118, 308, 392, 744, 1022
<i>Fidei-commissum Residui.</i>	
<i>Brown v. Rickard (2 Juta 314) followed.</i>	
<i>Ex parte Estate Jordaan ...</i>	208
<i>Fiduciary heir, see Will ... ..</i>	447
<i>Fire — Injury to Veld — Negligence—Responsibility.</i>	
<i>K., a transport rider, on outspanning for the night kindled a fire which either went out or was put out the same night. On the next morning the servants of one J. kindled another fire in close proximity to that which had been kindled by K. K. having made use of this fire inspanned his oxen and drove off leaving the fire still alight and in charge of J's servants, who, apparently, did not extinguish it before leaving. The</i>	

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<i>fire spread and did considerable damage to T's veld.</i>	
Held, on appeal, that the fact that K. had made use of this fire did not render him responsible for the damage or for any part thereof.	
Kleinbooi v. Tayler ...	435
Fixed establishment, <i>see</i> Civil service ...	1077
Fixtures, <i>see</i> Purchase and sale ...	544
Foreign judgment, <i>see</i> Provisional sentence ...	1130
Forgery, <i>see</i> Cheque form, unsigned ...	257
Forgery, <i>see</i> Splitting of criminal charge ...	531
Forum, <i>see</i> Service of summons ...	473
Free Church and United Free Church (Scotland)—Transfer duties.	
<i>The Court has no power to sanction the transfer of immovable property from one religious body to another free of transfer duties.</i>	
<i>The Free and United Free Churches (Scotland) are different religious bodies.</i>	
<i>Ex parte</i> United Free Church of Scotland ...	1139
Freight, <i>see</i> Letter of credit ...	354
Game Laws—Trespass.	
<i>It is an offence under the Game Law Amendment Acts of 1886 and 1891, to trespass with dogs upon land on which shooting or hunting of game is prohibited, even if the trespasser did not actually shoot or hunt game.</i>	
Rex v. Booi ...	426
Game Preservation Acts (36 of 1886 and 38 of 1891).	
<i>A person who allows a companion to use his shoulder as a rest for a gun while illegally shooting game is guilty of</i>	

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<i>contravening Sec. 4 of Act 36 of 1886, as amended by Sec. 1 of Act 38 of 1891.</i>	
Rex v. Gous and another ...	862
Gaming in a public place—Summons.	
<i>The accused was charged in a Magistrate's Court with contravening Sec. 7, Sub-sec. 13 of Act 27 of 1882, as amended by Sec. 37 of Act 36 of 1902, in that he did "wrongfully and unlawfully play a game of chance with dice and money in a public street."</i>	
Held, that although part of the charge was surplusage, the charge substantially stated an offence under these Acts.	
Rex v. Chong ...	758
"Good for," <i>see</i> Billiards ...	219
Goose club—Payment for liquor in advance—Act 28 of 1883, Sec. 69.	
<i>H., a licensed victualler, contracted with certain persons that in consideration of a certain weekly deposit during 21 weeks they should, on payment of the last deposit, receive certain goods, which included liquor. Until the final deposit was paid, any depositor could at pleasure re-claim all the money which he had deposited.</i>	
Held on appeal, that H. had not contravened either Sec. 69 of Act 28 of 1883, or any of the amending Acts.	
Rex v. Hurst ...	894
Grant of land for public purposes—Resolution of Houses of Parliament—Act of Parliament.	
<i>The Government was authorized by a resolution of both Houses of Parliament to grant a piece of land within the Municipality of W. to an Agricultural Society for public purposes connected therewith, but there was strong prima</i>	

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<i>facie evidence, that long before the passing of such resolution, the inhabitants of W. had acquired the right to use the land as common pasturage.</i>		<i>unattended on property which he knew to be frequented by children.</i>	
<i>Held, that notwithstanding the resolution, the Government was not entitled to make a grant which conflicted with the prior rights of the inhabitants.</i>		<i>The child had not been permanently injured, but the plaintiff, as father, had incurred some expenses in the treatment of the child after the accident.</i>	
<i>Worcester Municipality v. Colonial Government ...</i>	178	<i>Held, that the plaintiff was entitled to recover the amount of such expenses, at all events, as damages from the defendant.</i>	
<b>Grazing of cattle—Letting of rights of grazing—Death of cattle.</b>		<i>Joyce v. Alosoroff ...</i>	91
<i>The plaintiff, being the owner of a large and enclosed farm, allowed the defendant and other owners of cattle to send their cattle to the farm and charged a certain monthly rental per head. The custom was for the defendant to turn his cattle on to the land, and when he wanted them to send a servant, who collected them with the assistance of the plaintiff's servants. A cow thus sent by the defendant was lost, and there were indications of her having died a natural death, but there was no evidence of the plaintiff having done anything which contributed to her death.</i>		<i>Hostile witness, see Evidence ...</i>	651
<i>Held, that the plaintiff was not liable to the defendant for the loss of the cow.</i>		<b>Husband and wife—Antenuptial contract—Registration.</b>	
<i>Melck v. Louw ...</i>	1013	<i>In order that a mutual agreement arrived at by parties before marriage may be registered after marriage as an antenuptial contract, there must be proof of the agreement, and the application for registration must not be delayed unreasonably.</i>	
<i>Guarantee, see Surety ...</i>	711	<i>Ex parte Mathewson and wife... ...</i>	911
<i>Guarantor, see Agency ...</i>	730	<i>Illegal arrest, see Messenger of R.M. Court ...</i>	978
<i>Helm of still, see Patent ...</i>	141	<i>Illegal consideration, see Promissory note ...</i>	78
<b>Horse—Negligence—Damages.</b>		<i>Illegal remission of Customs duty, see Popularis actio ...</i>	689
<i>The defendant's horse, which had previously been seen running wildly and recklessly on certain war department property, ran over and injured the plaintiff's minor child.</i>		<i>Imprisonment for life, see Restitution of conjugal rights ...</i>	385
<i>Held, that there was negligence on the defendant's part in allowing the horse to run</i>		<i>In forma pauperis—Two counsel assigned.</i>	
		<i>Smith v. Imperial Cold Storage Co ...</i>	767
		<i>In forma pauperis, see Divorce ...</i>	607
		<i>Incola, see Arrest ...</i>	1039, 1144
		<i>Incomplete plans, see Engineer ...</i>	753
		<b>Indian—Permit for temporary absence from the Colony—Acts 47 of 1902, Sec. 3, and 30 of 1906, Sec. 4.</b>	
		<i>Save in the case of Asiatics domiciled in S. Africa previ-</i>	



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ous to the promulgation of Act 30 of 1906, it is in the discretion of the Immigration Officer to fix the period during which permits for temporary absence granted under Sec. 4 of that Act shall be available.	
Dharsey v. Colonial Government ... ..	749
Infected area, see Cattle ... ..	1115
Insane spouse, see Restitution of conjugal rights ... ..	708
Insolvency — Endorsement of letters of administration — Intention to surrender — Irregularity—Act 38 of 1884, Sec. 2.	
<p><i>The applicant (A. G. E.) had obtained judgment against the estate of the late Mrs. E., and had attached certain sheep in execution. Before these sheep were sold, the first respondent, as executor dative and administrator of the estate, gave notice of his intention to apply for its sequestration as insolvent, and thereupon the deputy sheriff refused to sell the sheep without an order of Court. Application was now made to set aside the notice of surrender, on the ground that the respondent had not been duly appointed administrator, his letters of administration having been signed by the Magistrate of Rourville and not, as prescribed by the law of the O.R.C., by the Master of the High Court of Bloemfontein. The Master of the Supreme Court now refused to recognize these letters of administration or to issue letters in respect of such part of the estate as is within this Colony.</i></p> <p><i>Held, that the deputy sheriff should forthwith proceed with the sale of the sheep attached.</i></p> <p><i>Held further, that the notice of intention to surrender the estate was of no force and</i></p>	

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effect: but that, in view of the fact that it was alleged that the written sanction of the Master of the H.C. of Bloemfontein to the letters of administration granted to the respondent was expected to arrive in a day or two, the proceeds of the sale must remain in the hands of the High Sheriff until the application for sequestration had been disposed of.	
Erlank v. Tennant and another ... ..	241
Insolvency, see Expenses of transfer ... ..	182
Insolvency—Compulsory sequestration—Opposing creditors—Ordinance 6 of 1843, Sec. 5.	
<p><i>S. had applied for the compulsory sequestration of F.'s estate. Certain creditors opposed, on the ground that the sequestration would not be for the benefit of the creditors in general.</i></p> <p><i>Held, that under Sec. 5 of Ord. 6 of 1843, the petitioning creditor could claim an order of final sequestration.</i></p>	
Scott v. Frame ... ..	1133
Insolvency—Provisional order of sequestration — Antenuptial contract.	
<p><i>By ante-nuptial contract K. had agreed to settle certain property on his wife, but delayed passing transfer until after a provisional order of sequestration had been obtained against his estate.</i></p> <p><i>Held, that as by the provisional order his estate became vested in the Master, and as an antenuptial contract, apart from actual transfer conveys no rights in rem, the transfer from K. to his wife was null and void.</i></p>	
Insolvent Estate Klaas v. Klaas ... ..	945

**Insolvency — Trustee — Costs *de bonis propriis*—Ordinance 6 of 1843, Sec. 98.**

*The trustee of D.'s insolvent estate, previous to the third meeting of creditors, advertised a sale of the property in the estate. At the third meeting the majority in number and value of the creditors refused to sanction the sale as to certain household furniture. A rule nisi had been obtained, interdicting the sale of the furniture.*

**Held**, that the rule be made absolute, and that, as the trustee had contravened Sec. 98 of the Insolvent Ordinance by attempting to force the sale contrary to the wish of the majority of the creditors, he be adjudged to pay costs *de bonis propriis*.

Doornbrack v. Insolvent Estate Doornbrack ... 1134

**Insolvency—Undue preference—Evidence.**

Estate McDonald v. Oswald and Nicholl ... 1092

Insolvency of partner, *see* Promissory note ... 1090

Insolvency, *see* Pledge ... 325

Insolvent Ordinance, Sec. 108. *see* Pledge... ... 325

**Insolvent estate—Trustee—Expenditure by trustee on property of insolvent.**

*Applicant's estate had been sequestrated as insolvent. The immovable property consisted of a house in a very dilapidated condition, and respondent, the only creditor who proved in the estate, having appointed himself sole trustee, spent a considerable sum on repairing the property before attempting to realize it.*

**Held**, that he was not justified in charging the moneys so

*spent against the estate as part of the costs of administration.*

Walker v. Brunt (N.O.) ... 669

**Insolvency—Ordinance 6 of 1843, Sec. 4.**

*It is not an act of insolvency under Sec. 4 of the Insolvent Ordinance to fail to point out to an officer of Court, charged with a writ of execution, sufficient disposable property to satisfy the sentence of the Court, if the creditor agrees to accept payment of his debt by instalments.*

Hornabrook v. Bright ... 805

Insolvency of legatee, *see* Plea in abatement ... 724

**Insolvent Ordinance, Secs. 83 and 84—Sale—Mortgage.**

*G., finding himself pressed by certain creditors, sold a certain farm to his two sons, who passed a mortgage bond in his favour on the farm for the full amount of the purchase price. The S. Bank already held a mortgage on the farm, but raised no objection to the sale by G. to his sons.*

**Held**, that as no proof had been given that at the time of the sale G.'s liabilities exceeded his assets, and as he had acted bona fide, the sale could not be impeached under either the 83rd or the 84th section of the Insolvent Ordinance.

Estate Goldstuck v. Goldstuck and others ... 788

**Insolvent Ordinance—Proofs of debt—Time of making supporting affidavits.**

*The estate of one K. was placed under voluntary sequestration. Before the actual order of sequestration was granted, but after K.'s schedules were prepared, certain creditors swore affidavits in support of their claims.*

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<i>Held, that the proofs of debt made by such creditors must be admitted.</i>	
De Waal and another v. De Jager and others ...	939
Insolvent Ordinance—Act 38 of 1884—Contemplation of insolvency—Undue preference.	
Insolvent Estate of Weinberg v. S. Weinberg ; Insolvent Estate of Weinberg v. J. Weinberg ...	1040
Insurance—Forfeiture of policy.	
Estate of Abrams v. Industrial Life Assurance Company of South Africa, Ltd.	134
Interdict, <i>see</i> Partners ...	1000
Interlocutory order, <i>see</i> Appeal ...	678
Interest, <i>see</i> Amendment of judgment ...	579
Interest, <i>see</i> Award ...	345
Interference with natural flow of water, <i>see</i> Servitus viae ...	449
Interpleader, <i>see</i> Writ of execution ...	106
Intestate succession—Representation—Collaterals—Next of kin— <i>Bona vacantia</i> —Paternal and maternal line.	
<i>S. died, leaving no ascendants or descendants, or brothers or sisters, but leaving relatives, including the petitioner, on the mother's side, and one half of her inheritance was in the case of in re Stephens (16 S.C.R., 555) awarded to the maternal relatives. They did not in that case press for the paternal share, but the petitioner now applied for payment to them of the remaining half of the estate on the ground that there was a complete failure of relatives on the side of the father of the intestate.</i>	
<i>Held, that on clear proof of such failure, the relatives on</i>	

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<i>the maternal side would be entitled to the whole of the inheritance.</i>	
<i>Ex parte Spangenberg</i> ...	390
Invoice price, <i>see</i> Sale and purchase ...	1085
Judgment in excess of claim, <i>see</i> Magistrate ...	425
Judicial separation — Consent paper.	
<i>The Court will grant judgment on a deed of separation in terms of a consent paper.</i>	
Clarabut v. Clarabut ...	878
Jurisdiction — Interpleader — Ownership—Validity of marriage.	
<i>The respondent, having obtained judgment in a R.M. Court against A., who was married after antenuptial contract to the appellant, execution was levied on certain donkeys in the possession of A., which were claimed by the appellant. The respondent excepted to the jurisdiction of the Magistrate on the ground that the decision of the question of ownership involved a further question as to the validity of the marriage; and the exception was allowed.</i>	
<i>Held on appeal, that as the question whether the donkeys were the property of the appellant could be decided without any inquiry into the validity of the marriage, the exception ought to have been disallowed.</i>	
Wilkinson v. Muller...	38
Jurisdiction, <i>see</i> Domicile of company ...	541
Jurisdiction, <i>see</i> Executor ...	442
Jurisdiction, <i>see</i> Magistrate's Court ...	1113
Jurisdiction of Supreme Court—Charter of Justice—Attachment to confirm jurisdiction—Non-resident defendant—	

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Cause of action arising abroad.	as a juvenile offender under Act 8 of 1889; but must be treated as an adult.
<i>The petitioner, a resident in this Colony, applied for an order to attach certain goods of the respondent, who resided in German South-West Africa, in order to found jurisdiction in an action for damages for the respondent's breach in German S.W. Africa of a contract there made by him with the petitioner.</i>	Rex v. Jacobs ... 556
<i>Held, that as the cause of action did not arise in the Colony, the petitioner was not entitled to the order.</i>	Land Beacons Act—Appointment of Commission to settle dispute—Informality—Waiver.
<i>Case of Einwald v. German West African Co. (5 Juta, 86) commented upon.</i>	<i>The appellant applied to have the proceedings of a Commission appointed by a Divisional Council to settle a boundary dispute between himself and the respondent set aside, on the ground that the Council had not, before making such appointment, appointed a surveyor required to do the preliminary work under the Land Beacons Act.</i>
<i>The petitioner also applied for the attachment of two mules, which he claimed as his property and which the respondent claimed and detained in this Colony.</i>	<i>Held, that as the appellant had, with knowledge of the informality, taken part in the selection of the members of the Commission and had there only raised the single objection that the case ought to be tried in the Supreme Court, he had waived his right to take advantage of the informality.</i>
<i>Held, that as the respondent claimed the mules as his property, the Court would be justified in ordering an attachment thereof, in order to fortify its jurisdiction over a non-resident in respect of a cause of action alleged by the petitioner to have arisen in this Colony.</i>	Estate Lansberg v. Estate Smit and another ... 127
<i>Ex parte Kahn ... 840</i>	Landlord and tenant — Assignment of lease — Acceptance of tenant—Unauthorized acts of agent.
<i>Jus accrescendi, see Will ... 1054</i>	Turnbull v. Ohlsson... 147
Juvenile offenders—Whipping—Acts 21 of 1869 and 8 of 1889, Sec. 1.	Landlord and tenant—Broken window.
<i>Sec. 1 of Act 8 of 1889 does not so modify Act 21 of 1869 as to allow a Magistrate to sentence any boy over the age of 14 to whipping for a first offence.</i>	<i>R. &amp; Co. leased a certain shop to the F. Co. When the premises were handed back to R. &amp; Co., it was found that during the tenancy a certain window had been cracked. There was no conclusive evidence to show how the damage had been caused or whether it had been broken from within or from without.</i>
Rex v. Naason and another... 871	<i>Held, that the tenants were not liable.</i>
Juvenile offender—Acts 7 of 1879 and 8 of 1889.	Reid & Co. v. Federal Supply and Cold Storage Co., Ltd. 211
<i>A juvenile offender over the age of 16 can neither be sent to a reformatory nor apprenticed</i>	



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Lapse of time, <i>see</i> Antenuptial contract ... ..	1150
Lapsed policy, <i>see</i> Life insurance	476
Last illness—Medical fees—Costs of execution—Preference.	
<i>Plaintiff, a medical practitioner, had attended the late H. in his last illness. H.'s estate was heavily bonded, and there was not sufficient in it to pay off the bonds. The trustee had awarded all the proceeds to the bond-holders and ranked plaintiff merely as a concurrent creditor.</i>	
<i>Held, that plaintiff's claim was preferent to that of the bond-holders.</i>	
<i>Plaintiff had attached certain of the property in the estate, and asked that his costs of attachment should have the same preference as his medical fees.</i>	
<i>Held, that these costs must rank as preferent after prior preferent claims.</i>	
Stewart v. Insolvent Estate Hyland and another ...	343
Law Society, <i>see</i> Attorney ...	260
Law of evidence—Admissibility at criminal trial of depositions—Illness of witness—Act 17 of 1874, Sec. 5.	
<i>In a criminal trial before the High Court of Southern Rhodesia, medical evidence was given that a certain witness, who had made a deposition, on oath, at the preliminary examination, had left the country on account of ill-health, that it would have been dangerous to his life to remain in the country and that he would be unable, owing to his ill-health, to give evidence at his trial, although he was actually travelling, in order to make the change which the state of his health required. The presiding judge, being satisfied that the witness was too ill to be able</i>	

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<i>to travel to the Court for the purpose of giving his evidence, allowed the deposition to be read under the 5th section of Act 17 of 1874.</i>	
<i>Held on appeal, that there was no ground for holding that the discretion of the Judge had been improperly exercised.</i>	
Rex v. Stratton ... ..	953
Lease—Hire—Suspensive condition—Passing of dominium.	
Hall v. Insolvent Estate Klaassen ... ..	1125
Leave to sell property, <i>see</i> Fidei-commissum ... ..	919
Leave to sue in forma pauperis—Affidavits as to means—Wages—Executors.	
<i>Respondent (O.) had obtained leave to sue applicants in forma pauperis. The householders who had certified as to his means are resident within the Cape District. In the interval between these householders swearing their respective affidavits and the time respondent applied to the Court he had temporarily removed into another Division, but had returned to his domicile before the application was made. It was now sought to set aside the order for leave to sue in forma pauperis on the ground, inter alia, that the householders were not resident within the neighbourhood of respondent.</i>	
<i>Held, that as both he and they were resident within the Cape Division, they were in the same neighbourhood.</i>	
<i>It was further alleged that applicant being in receipt of wages was able to prosecute his action in the ordinary way.</i>	
<i>Held, that his wages were insufficient to enable him to do so. But:</i>	
<i>Semble, if at any time it is proved that a person having obtained leave to sue in forma</i>	

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pauperis has become possessed of means, the Court will revoke its order.	
<i>In this matter only one of the two executors applied on behalf of the estate.</i>	
<i>Held, that only the executors jointly had a locus standi.</i>	
Otterstrom v. Estate Stephan	287
Letter of credit—Surety—Freight Lien—Pledgee.	
<i>The plaintiff made certain advances to W., for the due repayment of which the defendant became surety and co-principal debtor. The Bank held as security for such advances the bills of lading in respect of a cargo of timber consigned to W. at East London, and finding on the arrival of the ship that W. was wholly unable to pay the freight and that demurrage would become payable, the plaintiff Bank paid the freight and other charges and landed the goods. Upon a realization of the timber, the proceeds were found to be insufficient to pay the amount of the advances, and the plaintiff claimed the amount of the deficiency from the defendant as surety. Among the charges made by the plaintiff was the amount paid for freight.</i>	
<i>Held, that the payment was an expense necessarily incurred which could be properly charged by the plaintiff as the holder of the bills of lading and pledgee of the timber.</i>	
Peel v. National Bank of S.A....	354
Liability of Town agent to client, see Town attorney ...	360
Libel—Newspaper.	
Brady v. Palmer ...	612
Libel—Newspaper—Privilege—Charge of unprofessional	

conduct—Measure of damages.

*In the first case, the defendant, a newspaper editor, had in his paper accused the plaintiff, a medical practitioner, a member of the Medical Council and proprietor of a Medical Journal, of having, contrary to the etiquette of his profession, advertised "through skilfully engineered paragraphs in the local press," and also of having "used politics as a medium for advertisement," and further stated that "he ought to be the first proceeded against" by the Medical Council. Defendant refused either to apologize or to withdraw these statements, and virtually repeated them in a subsequent issue of his paper. At the trial he wholly failed to prove the truth of his allegations.*

*Held, that as the words were defamatory and published under circumstances which established neither privilege, fair comment nor justification, defendant was liable in damages.*

*In the second case, the defendant, a company of publishers, published P.'s paper. On plaintiff remonstrating, they apologized and stopped the issue. They, however, published the subsequent issue in which the libel was repeated.*

*Held, that they were liable in damages and that their alleged ignorance of the contents of the paper was no defence.*

*Semle : In assessing damages for libel, the Court will regard not only the plaintiff's probable loss but also the degree of the defendant's malice.*

Hartley v. Palmer ; Hartley v. Central News Agency, Ltd.... 298

Life insurance — Condition — Lapsed policy—Waiver.

*It was a condition of a life policy that 35 days should be*

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<i>allowed for payment of renewal premiums, the directors of the Insurance Company reserving the right as they should think fit, to waive any forfeiture incurred by breach of such condition. The insured was in default for three and a half months, after which weekly payments were made by him and accepted by the Company but subject to the approval of the directors. Finally the directors refused to approve of these payments, and the money was returned to the mother of the insured who had made them on his behalf.</i>	
<i>Held that, on the death of the insured, his executor was not entitled to claim the amount of the policy.</i>	
<b>Industrial Life Assurance Co., Ltd. v. Estate of Felix ...</b>	<b>476</b>
<b>Limited Liability Company — Shares — Over issue — Cancellation—Registration.</b>	
<i>Three persons, N. B. and S., having three separate businesses, all engaged in the same trade, agreed to amalgamate their businesses and form a limited liability company. Each of these persons and also four others, among whom was one R., signed the Articles of Association, and one share was allotted to each. The capital of the Company was divided into 25,000 shares, and the whole of these were allotted to N., B. and S. The above seven shares were never registered, and the directors, on discovering this oversight, resolved to cancel these shares. At that time S. had ceased to be a director and had disposed of all his shares, save the share originally allotted to him. S. and R. now each applied for the registration of his original one share</i>	
<i>Held that, as S had been a director of the Company and ought as such to have been</i>	

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<i>aware of the over issue of shares he was not entitled to take advantage of his own negligence and obtain registration of his share.</i>	
<i>Held further that as R. had agreed to the cancellation of the seven shares over issued, and had never before applied for the registration of his share or other shares which he had received gratuitously, his application must be refused.</i>	
<i>One Newsome claimed the registration of 100 shares purchased from a former secretary of the Company. But as the secretary was alleged to have stolen the scrip from the offices of the Company :</i>	
<i>Held, that Newsome could establish his rights only by action.</i>	
<b>Starling and others v. Nannucci, Ltd. ...</b>	<b>533</b>
<b>Liquor—Act 28 of 1898, Sec. 4—</b>	
<b>Voters' list—Native voter.</b>	
<i>As soon as a voters' list has been compiled and initialled by the Civil Commissioner, any aboriginal native, whose name appeared thereon, is entitled to be supplied with liquor, even before the said list is printed.</i>	
<b>Rex v. Josephs ...</b>	<b>882</b>
<b>Liquor licence — Absence of licence-holder — Act 28 of 1883, Sec. 76, Sub-sec. 1.</b>	
<i>The holder of a retail liquor licence, who allows his business to be conducted by a manager without the permission of the R.M. and visits the premises frequently, is not guilty of contravening Sub-sec. 1 of Sec. 76 of Act 28 of 1883, unless he absents himself for an entire continuous month from the premises.</i>	
<b>Rex v. Cook ...</b>	<b>1136</b>
<b>Liquor licence—Holder of licence —Manager—Act 28 of 1883,</b>	

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Sec. 75, Sub sec. 1—Act 44 of 1885, Sec. 2		tion, though N. might have done so.	
<i>The appellant, a hotel manager, was convicted by a Magistrate of permitting, upon the premises, violent, riotous and quarrelsome conduct. The conviction was under Act 28 of 1883, which does not provide for offences committed by managers. Such provision is, however, made by Act 44 of 1885, Sec. 2.</i>		Rex v. Polevnick ... .. 827	
<i>Held, that as no exception had been taken in the Court below as to the Act under which appellant had been convicted, as real and substantial justice had been done, and as the Court was not disposed to encourage the practice of taking purely technical exceptions, the appeal must be dismissed.</i>		Lunacy, see Unsoundness of mind 760	
Rex v. Bewsher ... .. 288		Magistrate—Judgment in excess of plaintiff's claim.	
Liquor licence — Indictment — Evidence of accomplice — Act 28 of 1883, Sec. 73, Sub-sec. 7.		<i>Z. summoned M. in the Court below to defend an action in which he sought to have it declared that certain goats attached at the instance of M. were his, Z.'s, property and had been wrongfully attached. M. consented to judgment in terms of the summons but the Magistrate ordered, failing return of the goats, the payment of their value and also payment in respect of some of them which had died while under attachment.</i>	
Rex v. Healey ... .. 1129		<i>Held, that the Magistrate's judgment must be amended so as to bring it into accord with the terms of the summons.</i>	
Liquor licence — Native — Proclamation 64 (British Bechuana-land) of 1889.		Martin v. Zuluweni ... .. 425	
<i>Proclamation 64 (B.B.) of 1889 prohibits the giving or selling of liquor to natives. One N., a white man, sent B., a Bastard, on several occasions to P, a hotel-keeper, with a note, requesting P. to supply him (N.) with liquor per bearer. On one of these occasions B., not having been supplied with the money to pay for the drink, borrowed it from a native constable, who followed him, saw him served with the liquor and arrested him. P. was thereafter convicted of selling drink to B. It appeared, that on receiving liquor, N. was in the habit of giving some of it to natives.</i>		Magistrate's criminal jurisdiction — Act 18 of 1873, Sec. 2, Sub-sec. 1 and Sec. 4.	
<i>Held on appeal, that P. had not contravened the proclama-</i>		Rex v. Christian ... .. 477	
		Magistrate's Court—Jurisdiction — Set off.	
		<i>When a plaintiff submits himself to the jurisdiction of a Magistrate within whose district he is not domiciled by suing in his Court, the Court has jurisdiction to deal with all liquid claims or sets-off between the parties exactly as if they were both resident within the jurisdiction.</i>	
		Stoffels v. James ... .. 1113	
		Magistrate's Court judgment — Supreme Court — Attachment.	
		<i>The Supreme Court has power to order the movable property of a debtor against whom judgment has been obtained in a Magistrate's Court to be at-</i>	



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<i>tached when such property is in the hands of a third person.</i>	
Magor and Fogarty and another v. Mulvihall and Son and others ...	967
Magistrate's Court—Appeal from—Rule 33, Schedule B. to Act 20 of 1856.	
<i>An appeal from the decision of an R.M. Court must be noted on the next Court day, that is on the Tuesday or the Friday following the day on which the judgment is given.</i>	
Gray v. R.M.'s Clerk, Cape, and another ...	232
Magistrate's Court—Promise to pay—Liquid debt.	
<i>The plaintiff sued the defendant in a Magistrate's Court on the following document addressed by the defendant to the plaintiff: "Dear Sir,—I undertake to pay you the amount of £38 on the 3rd December next for 8 tollies at £4 15s, bought from you by Mr. Priest."</i>	
<i>Held on appeal, that the document was a liquid one and that the case fell within the jurisdiction of the Magistrate.</i>	
Bloem v. Auret ...	107
Magistrate's Court summons—Cause of action—Sale and purchase—Agency.	
Jizwa v. Meth ...	40
Magistrate's Court—Summons—Copy of document on account—10th Rule of Magistrates' Court.	
<i>The plaintiff having sued the defendant in a Magistrate's Court for the price of goods sold and delivered, annexed to the summons an account, one item of which was a certain sum on "an account rendered;" the exception was taken by the defendant on the ground that there had not been a compliance with the 10th Rule of Magistrates' Courts.</i>	

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<i>whereupon the Magistrate gave absolution from the instance with costs.</i>	
<i>Held, that if particulars of the first item had really been rendered, there could have been no prejudice to the defendant in those particulars not being repeated in the account annexed to the summons; and that the summons ought not to have been dismissed without giving the plaintiff the opportunity of giving such particulars.</i>	
Kruger v. Hyman ...	108
Magistrate's Court scale, see Costs	934
Magistrate's ordinary jurisdiction—Imprisonment.	
Rex v. Jafta and others ...	855
Magistrate's jurisdiction—Amount—Claim in reconvention.	
<i>L. claimed £16 10s. in a Magistrate's Court on a liquid document. Defendant counter-claimed £53: an illiquid claim. He set off L.'s claim and abandoned £15 to bring his counter-claim within the jurisdiction (£20). The Magistrate gave judgment for plaintiff and for defendant according to their respective claims.</i>	
<i>Held, on appeal, that as the Magistrate tried, in point of fact, an illiquid counter-claim amounting to £35 10s. (even after the set-off of plaintiff's claim, he had exceeded his jurisdiction.</i>	
Colonial Government v. Stevens and Hollingsworth (10 Juta, 140) followed.	
Lategan v. Brink ...	321
Magistrate's finding on evidence, see Perjury ...	556
Magistrate's finding on credibility of witness overruled—Inadmissible evidence.	
Rex v. Van Wyk ...	854

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Magistrate's judgment on facts over-ruled — Hearsay evidence.	
Rex v. Michelson and Korningsberg ... ..	1146
Manager, <i>see</i> Liquor licence ...	288
Massing, <i>see</i> Will ...	308, 447, 451, 744
Matrimonial agents, <i>see</i> Contract	845
Master and Servant—Justice of the Peace—Neglect of Servant to commence work on the date for which he is hired—Act 18 of 1873, Sec. 7—Sub sec. 1.	
<i>S., a hired servant, was prosecuted before a justice of the peace for having neglected to commence work at the date agreed upon. He was convicted, sentenced to imprisonment with the option of a fine and ordered "to return to his master's service" after serving his sentence.</i>	
<i>Held, on review, that as he had never been in the service of this master and as the J. P. would have had no power to order him to return to it if he had, the latter part of the sentence must be struck out.</i>	
Rex v. Swarts ... ..	422
Material but collateral fact, <i>see</i> Perjury ... ..	1095
Measure of damages, <i>see</i> Contract of sale... ..	767
Measure of damages, <i>see</i> Libel ...	298
Medical fees, <i>see</i> Last illness ...	343
Medical fees —District surgeon—Public Health Act—Insolvency of patient—Promise to pay—Consideration.	
<i>M., a medical practitioner and District Surgeon of S., rendered an account to B. for medical attendance. Thereafter B.'s estate was sequestrated. B.'s wife, married out of community, having promised to pay the</i>	

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<i>debt, M. did not prove on the estate. She did not pay, and subsequently B., before any release from insolvency, promised to pay in full. M. thereafter sued B. in the Magistrate's Court on this promise.</i>	
<i>Held on appeal, that M.'s remedy having been barred by B.'s insolvency as against B., and a complete delegation of the obligation having been made whereby his wife alone was responsible to M., there was no longer any obligation on the part of B. to M., that therefore the promise by B. to pay the debt was a nudum pactum, and that M.'s action against him on that count must fail.</i>	
<i>After his insolvency, B., who was still carrying on farming operations either for his wife or on his own behalf, asked M. to examine medically certain native servants on his farm whom he suspected of having contracted venereal disease. M. did so examine them, found that B.'s suspicions were well founded, and charged B. a certain fee for his services.</i>	
<i>Held, that as B. had not followed the procedure prescribed by the Public Health Acts for obtaining the services of the District Surgeon, he had engaged M. in his capacity of a private practitioner and was liable to him for the fee charged.</i>	
Bailie v. Muir ... ..	42
Messenger of Magistrate's Court —Writ of civil imprisonment —Illegal arrest.	
<i>A writ of civil imprisonment having been obtained in a Resident Magistrate's Court by the first defendant against the plaintiff upon an unsatisfied judgment against plaintiff's brother, whose name and occupation were identical with those of the plaintiff, the messenger</i>	

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(second defendant) arrested the plaintiff, but on being informed by the judgment creditor, to whom the plaintiff had been taken immediately on his arrest, that it was the wrong man, the messenger at once released the plaintiff.	repudiated his liability on becoming of age he was liable as a surety.
Held, that as the writ had not been set aside, neither defendant was liable in damages for illegal arrest.	De Villiers v. Liebenberg ... 867
Majiet v. Zuckerman and Carroll ... 978	Mission lands—Right of occupation—Cession by occupier.
Mining — Prospector's rights — Transfer of land subject to rights—Interdict.	Miller v. Cyster ... 102
Respondent had agreed to sell certain prospecting rights over his farm with option of purchase for two years to applicant. It was admitted that this period was extended for at least six months. During the currency of this agreement respondent sold the farm to his brother.	Mortgage bond, see Expenses of transfer ... 182
Held, that respondent must be interdicted from passing transfer until the lapse of the agreement, unless the transferee should acknowledge applicant's rights.	Mortgage—Beneficiaries' interest—Possibility of future heirs.
Thomas v Robertson ... 529	Ex parte Powelse ... 268
Minor—Surety—Tacit emancipation—Failure to repudiate on attaining majority.	Municipal Acts—Owners' rate—Occupier's liability—Acts 45 of 1882 and 41 of 1899.
Defendant, a minor, had, with the authority of his father and natural guardian, signed a promissory note as surety for his said father. At that time the plaintiff was upwards of 20 years of age and leased a farm and owned cattle in partnership with his father. During the currency of the note he attained majority, but he did not then repudiate liability on the note.	In Dec., 1905, the plaintiff Municipal Council levied an owners' rate for 1906, payable on Jan. 16th, 1906. On May 1st the defendant became the occupier of certain premises within the Municipality, and on Dec., 1906, the plaintiff demanded from the defendant, who was still the occupier, payment of the owners' rate which had not been paid by the owner.
Held, that having been tacitly emancipated at the time he signed the note, and not having	Held, that under the 135th section of Act 45 of 1882, the defendant, as occupier for the time being, was liable.
	Held further, that the 12th section of Act 41 of 1899 did not relieve the defendant from such liability.
	Green and Sea Point Municipality v. Becker ... 328
	Municipal Council—Councillor—Contract with Municipality—Attorney — "Interested in contract"—Act 45 of 1882, Sec. 17.
	A., a contractor with the Municipality of S., owed certain moneys to respondent, a councillor of the Municipality. Money was due to A. from the Municipality. Respondent drew on the Municipal funds for a portion of the money due

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to A., sufficient to cover A.'s debt to himself, and shortly afterwards A.'s estate was sequestrated.	
Held, that even if respondent had been delegated by A. to draw this money, such delegation did not constitute him a person "interested in" A.'s contract.	
Respondent had sold a typewriter to the Municipality.	
Held, that this transaction constituted respondent a contractor with the Municipality; but that, as this contract was now "executed," respondent was relieved from his temporary disqualification as a councillor (diss. Maasdorp, J.)	
The respondent was a partner in an attorney's business with one M., who collected rates and did other legal work for the Municipality. M. and respondent had agreed by articles of partnership that the latter should not participate in any profits which the firm might derive from Municipal business. Respondent had also appeared in Court for the Municipality in certain cases, but had neither demanded nor received fees for such appearances.	
Held, that by these acts, coupled with the fact of his partnership with M., he was "concerned in" contracts with the Municipality, and was, therefore, disqualified as a councillor.	
Cairncross and others v. Fagan and others ...	196
Municipal regulations—Payment of Municipal funds.	
A Municipal regulation provided that "where any expenditure of the Municipal funds exceeding £50 shall be brought before any meeting of Commissioners, the question shall not then be decided finally but shall be brought in review at the next meeting of the Commissioners." A loan of £1,500	

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was authorized at a public meeting of resident householders for the purpose of carrying out a definite scheme to supply the town with water. In carrying out the details of that scheme it became necessary for the Commissioners from time to time to authorize the payments of amounts exceeding £50.	
Held, that the Municipal regulation in question did not apply to payments forming part of expenditure which had already been lawfully authorized.	
Smith v. Ceres Municipality	34
Municipality, see Water ...	97
Municipality — Closed road — Owners of adjoining land.	
S., being the owner of land within a Municipality, sold it in lots with proper roads for the use of the owners and the roads were taken over by the Municipal Council. Subsequently one of the roads was lawfully closed by direction of Government, and S., having been called upon to show cause why transfer of the land should not be made in favour of the owners of the adjacent land on both sides of the road raised no objection. The Council raised no objection but insisted upon a condition authorizing the use of the road for carrying off storm water from a cross road.	
Held that, subject to such condition, the transfer should be allowed.	
Ex parte Beard and others ...	531
Mutual will—Acceptance of benefits—Adiation.	
A husband and wife made a mutual will, under which the survivor was to have a child's portion in addition to his or her half share of the joint estate, and was to enjoy the usufruct, during life, of certain two farms belonging to such	

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<i>joint estate. After the death of the wife, the husband, as executor, awarded to himself only half of the joint estate, and the remaining half to the children, such assets including the proceeds of one of the farms which the husband had sold as executor. He remained in possession of the other farm without any objection on the part of the children.</i>	
<i>Held, that such mere occupation was not proof of adiation on the surviving husband's part in the face of the other indications of his intention not to adiate.</i>	
Estate Louw v. Estate Louw	762
Native, <i>see</i> Liquor licence	... 827
Native, <i>see</i> Transkeian liquor proclamation	... 461
Native custom — Succession to immovable property.	
<i>Ex parte</i> Ngele	... 21
Native territories — Appeal to Superior Court—European—Act 26 of 1894.	
<i>In an appeal in a civil case from a Resident Magistrate of Tembuland, it appeared that one of the parties was a native and the other a coloured man.</i>	
<i>Held, that under Sec. 2 of Act 26 of 1894, there was no appeal to the Supreme Court.</i>	
Manquina v. Jonas	... 968
Native voter, <i>see</i> Liquor	... 882
Necessaries supplied to wife, <i>see</i> Set-off	... 650
Negligence, <i>see</i> Horse	... 91
Negligence, <i>see</i> Fire	... 435
Negligence—Duty of shipowner—Injury—Fall of derrick.	
<i>The plaintiff, being coxswain of a lighter into which a cargo was being unloaded from a ship belonging to the defendant,</i>	

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<i>stood underneath a derrick which was being used on the ship to unload the cargo and which fell on his head, causing considerable injury. The strop which attached the derrick to the mast was found to be rotten, and there was sufficient evidence that its bad condition was the cause of the fall of the derrick.</i>	
<i>Held, that it was the duty of the shipowner to keep the derrick in proper condition, and that as the plaintiff had been lawfully standing on his lighter under the derrick, he was entitled to recover damages for the injury.</i>	
Otterstrom v. Estate Stephan Bros.	... 338
Negotiable instruments, <i>see</i> Debentures	... 377
Negotiable instrument—Signature obtained by fraud—Holder in due course—Negligence—Bills of exchange—Act (19 of 1893).	
<i>A person who is induced to sign a promissory note in favour of a payee or order by the false representation of such payee, that the document is something wholly different is not liable as maker even to a bona fide holder for value, provided that in so signing he acted without negligence.</i>	
Krige v. Willemse	... 631
Newspaper, <i>see</i> Libel	... 298
Non-resident defendant, <i>see</i> Jurisdiction of Supreme Court	... 840
Novation, <i>see</i> Priority	... 1105
Novation, <i>see</i> Promissory note	... 248
Nuisance, <i>see</i> Perpetual interdict	... 1102
Occupier's liability for owner's rate, <i>see</i> Municipal Acts	... 328
Opposing creditors, <i>see</i> Insolvency	... 1133



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Ordinance 40 of 1823, Secs. 10 and 11, <i>see</i> Private prosecution ...	131
Ordinance 6 of 1843, Sec. 4, <i>see</i> Insolvency ... ..	805
Ordinance 6 of 1843, Sec. 5, <i>see</i> Insolvency ... ..	1133
Ordinance 6 of 1843, Secs. 83 and 84, <i>see</i> Insolvent Ordinance...	788
Ordinance 6 of 1843, Sec. 98, <i>see</i> Insolvency ... ..	1134
Ordinance 15 of 1845, <i>see</i> Will 56, 947	
Ordinance 72, Sec. 33, <i>see</i> Perjury ... ..	1095
Over issue of shares, <i>see</i> Limited Liability Company ... ..	533
Owner of land—Destruction of vermin by poison—Negligence.	
<i>It was agreed between two owners of land that each should occupy his garden as his own property, that each should properly fence in his garden and that in case of trespass by cattle he should not impound them or claim damages for such trespass. The defendant placed some poisoned wheat in his garden for the purpose of killing baboons, which were in the habit of doing damage there; and some of the plaintiff's goats broke through the fence erected by the defendant, which was somewhat faulty, ate some of the poisoned wheat and died from the effects. It was proved that the plaintiff had notice of the placing of the poison, and that with ordinary care he could have prevented the goats from trespassing in the garden.</i>	
<i>Held, that the defendant was not liable in damages at the suit of the plaintiff, who was lessee of one of the co-owners.</i>	
Van Rhyn v. Burger ...	714

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Parliamentary voter—Registering officer—Claim to be registered as voter—Provisional list.	
<i>The Registering officer in P. Fieldcornetcy omitted the name of the petitioner from the list of voters framed by him although such name appeared on the then existing list and the petitioner omitted to lodge with the Registering Officer his claim to have his name inserted within the time required by Act 9 of 1892.</i>	
<i>Held that, whatever power the Revising Officer might thereafter have to rectify the omission, the Supreme Court could not compel the Registering Officer to insert the name.</i>	
<i>Ex parte Vos</i> ... ..	464
Partners—Good faith—Interdict.	
<i>It is not the practice of the Court to interfere between partners by interdict, unless it is proved that there has been want of good faith, or conduct contrary to agreement between the partners.</i>	
<i>Kraitzick v. Arlosoroff</i> ...	1000
Partner—Partnership account—Managing partner—Remuneration.	
<i>Independently of a special agreement, a partner who devotes his services to a partnership is not entitled to remuneration.</i>	
<i>Bell v. Estate Douglass and another</i> ... ..	810
Patent rights—Assignment—Registration—Act 17 of 1860, Sec. 28.	
<i>One J. obtained certain letters patent in this Colony, and afterwards assigned them to one W., who assigned them to D. D. granted certain interests in the patent to certain two other persons and subsequently joined them in assigning all rights in the patent to the defendant Company for</i>	

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<i>valuable consideration. The former assignments were all duly registered, the latter was not. In 1906, D.'s estate was sequestrated as insolvent, and his trustees claimed the patent rights as part of the estate, on the ground, that as the assignment to defendants had not been registered, no property in the patent had passed to them.</i>	
<i>Held, that although registration is prima facie evidence of proprietorship in letters patent and is necessary under Act 17 of 1860, Sec. 28, to pass property therein from a grantee to an assignee, it is not necessary in order to pass property in a patent from one assignee to another.</i>	
Estate Dapino v. Automatic Pit. Co. ... ..	635
Patent—Infringement—Helm of still.	
Rausby and Covell v. Woudberg... ..	141
Payment for liquor in advance, see Goose club ... ..	894
Penalty, see Agreement not to sell ... ..	508
Perjury—Setting out in indictment foreign words actually used—Evidence of interpreter—Magistrate's finding on evidence.	
<i>Appellant had been convicted in an A. R. M. Court of perjury committed in the S. C. One of the grounds of appeal was that he was said to have spoken in Indian and that the actual Indian words used when committing the alleged perjury were not set out nor was the interpreter called to prove the correctness of his translation.</i>	
<i>Held on appeal, that in an indictment for perjury it is sufficient to set forth in English the substance and effect of the words used, and that the notes of the official short-hand writer</i>	

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<i>are sufficient evidence of the substance of such words.</i>	
<i>The appeal was, however, allowed on the ground that the conviction was against the weight of evidence.</i>	
Rex v. Ismail ... ..	556
Perjury — Evidence — Ordinance 72, Sec. 33—Two witnesses—Material but collateral fact.	
<i>The accused Q. was convicted of perjury in having falsely sworn in a Resident Magistrate's Court on an application to re-open a case in that Court, on the ground that the defendant M. had been absent when judgment was given against him, "I did not point to a man sitting on the floor and say that Magogo was there. Magogo was not there." Only one witness stated that Magogo was there, but more than one witness swore that the accused, pointed to a man sitting on the floor and said in effect it was Magogo.</i>	
<i>Held, that the fact that the accused, pointed to a man sitting on the floor and said that it was the defendant, was a material, although collateral, issue, and that as such fact was deposed to by more than one witness there was sufficient to justify the conviction of the accused for perjury in denying that fact on oath.</i>	
Rex v. Magogo; Rex v. Qopiso ... ..	1095
Permit for absence from Colony, see Indian ... ..	749
Perpetual interdict—Temporary interdict—Nuisance.	
<i>(On an application for a temporary interdict, pending action, to restrain the respondents from depositing Town refuse within a radius of 600 yards from the business premises of the applicants, which they had hired from the respondents, some medical men stated that</i>	

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<i>the filth was dangerous to the health of the applicants' employees, whilst other medical men stated that there was no danger whatever. The only means adopted by the respondents to render the refuse innocuous was by depositing street sweepings on the top.</i>		<b>Plea in abatement — Will — Insolvency of legatee—Trustee —Parties to action.</b>	
<i>Held, that as there was prima facie evidence of a nuisance, the applicants were entitled to a temporary interdict pending action, which was to be forthwith instituted without prejudice to any claim the respondents might have to recover damages sustained by reason of such temporary interdict.</i>		<i>To a declaration whereby the plaintiff sought to have his right under the mutual will of his parents declared, the defendant pleaded in abatement on the ground that at the time when the plaintiff's alleged rights under the will accrued the plaintiff was an insolvent, and to this plea the plaintiff excepted.</i>	
<b>Howard, Farrer &amp; Co. and others v. East London Municipality</b> ... ..1102		<i>Held, that the action should not be allowed to proceed without the trustee of the insolvent estate being joined either as co-plaintiff or co-defendant.</i>	
<b>Personal injury — Negligence — Damages.</b>		<b>Whitehead v. Estate Whitehead</b> ... .. 724	
<i>The plaintiff, while in the service of the defendants as an agricultural labourer, was injured while assisting to work a steam threshing machine. The machine was in the same condition in which it had been supplied by the manufacturers, except that some extra precautions had been taken to prevent anything from falling into the drum. The injury was caused by the plaintiff slipping and his leg coming into the drum, but it was proved that every precaution had been taken to prevent an accident of that kind.</i>		<b>Pleading—Exception.</b>	
<i>Held, that the defendants were not liable in damages.</i>		<b>Jacobs v. Close</b> ... ..1052	
<b>SmitL. v. Imperial Cold Storage</b> ... .. 850		<b>Pledge — Cession — Insolvency — Proof of debt—Master and trustee—Sec. 108 of Ordinance.</b>	
<b>Personal injury—Negligence.</b>		<i>D. &amp; Co. had proved upon the insolvent estate of N., and stated that they had security, viz.: a certain "pledge." This "pledge" was an order from N. on the Town Clerk of the Municipality of C. to pay to D. &amp; Co. a certain sum from moneys alleged to be due to him from the Town Council for work and labour done. D. &amp; Co. obtained judgment against the estate of N., but, on taking out execution, were informed by the Town Clerk that there was no money due and payable from the Council to N. The Master had meanwhile admitted the proof of debt; but the trustee refused to recognize the claim of D. &amp; Co. as preferent.</i>	
<b>Rolls v. Table Bay Harbour Board</b> ... .. 64		<i>Held, that as the authority given by N. to D. &amp; Co. to draw the money from the Town Council might have been revoked at any time, such</i>	
<b>Personal injury — Negligence — Accident — Sea-worthiness — Responsibility of shipowners — Latent defect—Costs.</b>			
<b>Evans v. Bucknall Steamship Lines, Ltd....</b> ... .. 114			

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<p>authority was neither a pledge nor a cession, and hence gave no preference in insolvency: and that the trustee had acted rightly in refusing to recognize the claim of D. &amp; Co. as preferent, the Master's decision notwithstanding.</p>	<p><b>Policy of insurance—Condition as to keeping proper books.</b></p>
<p><i>In re Brink</i> (1. Rose, 305) followed.</p>	<p><i>In the body of a policy of fire insurance on stock-in-trade issued by the defendant Company in favour of the plaintiff, there was a condition that the plaintiff should keep proper books and accounts. Among the conditions indorsed on the policy was one requiring the plaintiff, in case of loss or damage, to produce to the Company all such books, vouchers and other evidence as may be reasonably required by the Company. A fire having taken place, the plaintiff demanded the amount of the policy, and upon being required to produce his books, he handed over to the Company certain books which, in the opinion of the Court, were improperly kept, as they contained important erasures which could not be satisfactorily explained, and were in other respects wholly untrustworthy for the purpose of shewing the amount and value of the stock at the time of the fire.</i></p>
<p><i>Dreyfus &amp; Co. v. Estate Napier</i> ... .. 325</p>	<p>Held, that the plaintiff was not entitled to recover.</p>
<p><b>Pledge—Delivery—Execution.</b></p>	<p><i>Abrahams v. Guardian Assurance Co., Ltd.</i> ... .. 955</p>
<p><i>A writ of execution having been issued against a judgment debtor, the appellant paid the amount due and the debtor executed a pledge in his favour of a stack of unthreshed wheat. Thereafter appellant threshed out the wheat and removed it to his own adjoining land, leaving some on the land of the debtor.</i></p>	<p><b>Popularis actio—Statutory duty—Illegal remission of customs duty—Declaration of rights—Interdict—Damage—Exception to declaration.</b></p>
<p>Held, that, in a subsequent execution against the same debtor, the messenger was not entitled to seize, as part of the debtor's property, the threshed wheat removed to the appellant's land.</p>	<p><i>The plaintiff, after alleging in his declaration that he was a tax-payer, secretary to the manufacturers' association and interested in the due observance of the Customs Act, 1906, and that the defendant, as Treasurer of the Colony, was permitting to be imported into the Colony printed catalogues, in parcels, under a certain weight without payment of the duty by the said Act provided, prayed for a declaration that the defendant was not entitled to give</i></p>
<p><i>Stadler v. Schaiff</i> ... .. 463</p>	
<p><b>Poisoning of vermin, see Owner of land</b> ... .. 714</p>	
<p><b>Police Offences Act (27 of 1882), Sec. 9—Drunkenness in a public place—Second conviction.</b></p>	
<p><i>The accused was convicted of drunkenness in a public place in contravention of the 9th section of Act 27 of 1882, and a previous conviction for drunkenness under the Master and Servants Act having been proved, he was sentenced to two months' imprisonment with hard labour.</i></p>	
<p>Held, that such previous conviction, not having been for drunkenness under the Act of 1882, did not justify a penalty of more than two pounds, and in default of payment, imprisonment for fourteen days.</p>	
<p><i>Rex v. Jantjes</i> ... .. 695</p>	

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<i>such permission, and for an interdict restraining him from granting such permission.</i>	
<i>Held, that in the absence of any averment of special damage or of breach of duty owing to the plaintiff or of infringement of any right belonging to the plaintiff, the declaration disclosed no cause of action at the suit of the plaintiff.</i>	
<b>Bagnall v. The Colonial Government</b> ... .. 689	
<b>Possession—Spoliation.</b>	
<b>Goldsmith v. Irwin</b> ... .. 44	
<b>Poundmaster, see Trespass</b> ... 221	
<b>Preference, see Last illness</b> ... 343	
<b>Presumption of death—Absence.</b>	
<i>The Court will not presume the death of any person merely because he has not been heard of for 7 years. It must be shown on affidavit that all possible efforts had been made to trace him, and the application must be made to the Court by some person directly interested in the inheritance.</i>	
<b>Ex parte Sprong</b> ... .. 111	
<b>Principal and agent—Proofs of agency.</b>	
<b>Louw v. Ismail</b> ... .. 960	
<b>Priority—Proof of debt—Insolvency — Covering bond — Novation.</b>	
<i>The respondents, under an agreement with C., a supporting creditor of M. on open account, satisfied his debts to C. and received bills drawn by C. upon M., accepted by M. and indorsed by C., and as security for these and other debts which M. might thereafter incur to the respondents, obtained cession from C. of two covering bonds of £5,000 and £3,000 passed by M., to secure his indebtedness to C. Thereafter an agreement was made between the respondents and M., under</i>	

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<i>which the former were to continue their support of M. in his business and receive a covering bond for £15,000, to be passed directly by M. in their favour to secure all present and future indebtedness to them, in substitution for their rights under the two prior ceded bonds. The bond for £15,000 was duly passed by M. in favour of the respondents, and the agreement between them was referred to in the bond.</i>	
<i>Held, upon the insolvency of M., that there had been a novation of the original book debts owing by M. to C., and that in the distribution of the assets of M.'s insolvent estate, the respondents were not entitled to priority, as if the debts proved by them, namely, the Bills had been incurred at the date when the original book debts were incurred to C.</i>	
<i>Held further, that although the two earlier bonds had not been cancelled, the respondents, having accepted the later bond of £15,000 for the two earlier bonds, were not entitled, as against the preferent creditors, to claim priority under such earlier bonds.</i>	
<b>Ewers v. R.M. of Oudtshoorn (Foorde 32) distinguished.</b>	
<b>Heydenrych v. Estate Mackie, Young &amp; Co. and another</b> ... .. 1105	

**Private prosecution—Gross irregularity—Review—190th Rule of Court—Ordinance 40 of 1828, Secs. 10 and 11—Act 15 of 1864, Sec. 5.**

*Applicants having been arrested on a certain criminal charge, the Magistrate took a preliminary examination and sent the papers to the Solicitor-General, who refused to prosecute and certified to that effect. The complainant thereupon caused criminal summons to be issued out of the Magistrate's*



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<i>Court: the Magistrate proceeded to try the case summarily and convicted and sentenced the accused. The private prosecutor had not obtained leave to prosecute from a judge of either a Superior Court or a Circuit Court in terms of Sec. 5 of Act 15 of 1864 and Secs. 10 and 11 of Ordinance 40 of 1828.</i>	
<i>Held, that the trial in the R.M. Court was irregular, the prosecutor not having obtained the necessary leave to prosecute, and that the proceedings must be set aside.</i>	
Van Zyl and another v. Graaff ... ..	131
Privilege, <i>see</i> Defamation ...	482
„ <i>see</i> Libel ... ..	298
Procedure, <i>see</i> Attachment ...	351
Prohibition to mortgage, <i>see</i> Trust deed ... ..	240
Promissory note—Illegal consideration—Stifling prosecution—Forgery.	
<i>The plaintiff Bank, having discovered that certain promissory notes in favour of I., and by him indorsed to, and discounted with the Bank, had been forged by I., caused him to be ostentatiously watched, night and day, by the police and conveyed an intimation to the defendant, a brother-in-law of I., that the Bank would be willing to return the forged promissory notes to I. upon the defendant's substituting for them his own promissory note for the total amount of the forged notes. The defendant gave his note accordingly and the Bank returned the forged notes to I., but upon the other creditors of I. subsequently taking proceedings against him for forgery, the defendant refused to pay the amount of the note. I. was convicted of forgery. The Court of appeal having found,</i>	

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<i>on all the facts disclosed in the case, that the object of the plaintiff and of defendant in substituting the defendant's note for the forged notes, was to stifle a prosecution for forgery:</i>	
<i>Held, that the consideration for the note was illegal and that consequently the plaintiff was not entitled to recover thereon.</i>	
Hotz v. Standard Bank ...	78
Promissory note—Special verbal agreement—Novation.	
<i>Defendants being sued on a promissory note, set up the defence that the note had been varied by a verbal agreement to the effect that the plaintiff should pay himself out of the proceeds of a certain sale which he was instructed to hold on behalf of the first defendant. The sale was held, but after the mortgage on the property was paid off, the residue of the proceeds was wholly insufficient to satisfy the other creditors. Thereupon, in order to pay certain creditors, defendant agreed to pass a general covering bond, and this he contended effected a novation of the debt secured by the promissory note.</i>	
<i>Held, that as there was no satisfactory proof of the alleged verbal agreement, it could not be taken to vary the terms of the promissory note.</i>	
<i>Held further, that the passing of a general bond in favour of creditors did not constitute a novation.</i>	
De Waal v. Rademeyer and Rademeyer ... ..	248
Promissory note payable in foreign money—Rate of exchange—Tender.	
<i>The defendant, being sued for the balance of certain promissory notes for different amounts "payable in German money,"</i>	

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<i>tendered the amount, less the exchange which was in favour of English money. The previous part payment had been accepted in English money. Held, that the tender was sufficient.</i>		<b>Provisional sentence — Foreign judgment—Undue delay.</b>	
<b>Van Niekerk v. Le Riche ...</b>	<b>28</b>	<i>The plaintiff sued for provisional sentence upon a judgment obtained 15 years ago in the Court of Hamburg.</i>	
<b>Promissory note—Aval—Surety—Appropriation of payments.</b>		<i>Held, that as facts were in dispute and plaintiff had unduly deferred the prosecution of his claim, provisional sentence must be refused.</i>	
<i>A., being indebted to B. in the sum of £4,325, including a promissory note for £1,500, made by A. in favour of B. or order, paid B. the sum of £4,275 on account. B. credited A. in his books with the payment, and the counterfoil of A.'s cheque book showed that the amount had been paid on account of his indebtedness, but the note was retained by B. Held, that the plaintiff, who became holder with notice of such payment, was not entitled to recover the amount of the note from the defendant who had indorsed the note before B. as payee had indorsed it.</i>		<i>Semble, the Court will recognize a judgment obtained in any competent court of a foreign friendly power.</i>	
<b>Cook Co., Ltd. v. Estate Stephan ...</b>	<b>658</b>	<b>Michaelson v. Wobbe ...</b>	<b>1130</b>
<b>Promissory note — Partnership debts—Insolvency of partner.</b>		<b>Public Health Act, see Medical fees ...</b>	<b>42</b>
<i>Two partners jointly gave a promissory note for certain partnership debts. Thereafter one of the partners became insolvent, and the solvent partner was sued on the note.</i>		<b>Public place—Abusive of obscene language—Act 27 of 1882, Sec. 5, Sub-sec. 18.</b>	
<i>Held, that the creditor was entitled to provisional sentence, and that it was not necessary to join the insolvent partner as a co-defendant.</i>		<i>S. had been convicted of "using abusive and obscene language" to G. to the annoyance of the inhabitants in a public place. S., when using the language complained of, and also G. were standing on their respective stoeps which adjoined each other, and both abutted on the public road.</i>	
<b>Estate Stoltenhoff v. Howard ...</b>	<b>1090</b>	<i>Held on appeal, that S. had been rightly convicted.</i>	
<b>Promissory note overdue —Holder—Compensation.</b>		<b>Rex v. Scharff ...</b>	<b>1127</b>
<b>De Vries v. Du Plessis ...</b>	<b>519</b>	<b>Public servant, see Agency ...</b>	<b>730</b>
<b>Prospector's rights, see Mining ...</b>	<b>529</b>	<b>Purchase by promoters of company, see Transfer duty ...</b>	<b>916</b>
<b>Provisional order of sequestration, see Act of insolvency ...</b>	<b>1099</b>	<b>Purchase and sale—Acceptance—Inspection — Merchantable condition of goods.</b>	
		<b>Koen v. Maske &amp; Co. ...</b>	<b>1112</b>
		<b>Purchase and Sale Movable and immovable property — Fixtures—Brandy kettle and appurtenances.</b>	
		<i>The plaintiff having sold and transferred a farm to the defendant under a written contract which did not mention a certain distilling kettle masoned</i>	

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<i>in and affixed to the soil, afterwards claimed delivery of the kettle and its appurtenances, including the helm and coil.</i>	
<i>Held, that the kettle was included in the sale and that the helm and coil although temporarily dismantled, were also so included as being essential appurtenances for the proper use of the kettle.</i>	
Smyth v. Furter ... ..	544
Quantity, <i>see</i> Sale and purchase...	275
Quorum of judges, <i>see</i> Appeal from Supreme Court ...	920
Quorum of judges, <i>see</i> Supreme Court ... ..	923
Railway — Expropriation — Compensation—Acts 9 of 1858, Sec 11, 10 of 1874, 19 of 1874, Sec. 3.	
<i>In June, 1874, R. P. M. offered to the Colonial Government gratuitously the use of sufficient ground on his farm for railway station buildings. His offer was accepted, and within three years the buildings were erected. The boundaries of the land thus acquired by the Railway Department were not demarcated at that time. It was, however, fenced in 1884, but R. P. M. still remained the registered owner thereof. He died in 1886, his estate was sequestrated as insolvent, and the land in the estate was purchased by the plaintiff. In 1906, plaintiff claimed as against the Colonial Government an order of ejectment from all land on the farm occupied by them for railway purposes; or in the alternative, compensation and damages.</i>	
<i>Held, (1) That as to the land occupied by the line of railway, the Government had acquired prescriptive rights thereto; (2) That the land occupied by the station was not acquired by contract from R. P. M., but was expropriated under Acts 9</i>	

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<i>of 1858 and 19 of 1874, Sec. 3; (3) That as R. P. M. had waived any right he may have had to compensation for this land, and as plaintiff had purchased with the knowledge that a portion of the land was occupied for railway purposes, he was not entitled to succeed in his action.</i>	
<i>Gillet v. Colonial Government (7, C.T.R., 187) distinguished.</i>	
Van der Merwe v. Colonial Government and others ...	643
Railway Department — Tariff Book—Regulation 154—Act 19 of 1867.	
<i>The Court held regulation No. 154 of the tariff book of the Railway Department to be binding on a consignor who had signed the usual consignment note, though this regulation had not been published in the "Government Gazette" in terms of Act 19 of 1867.</i>	
Colonial Government v. Mills and Sons ... ..	290
Recovery of trespass money overpaid, <i>see</i> Cattle trespass ...	437
Registering officer, <i>see</i> Parliamentary voter ... ..	464
Registration, <i>see</i> Patent rights ...	635
„ <i>see</i> Servitude ...	628
Registration (antenuptial contract), <i>see</i> Husband and wife	911
Release from sequestration — Rehabilitation—Ord. 6, 1843 (Sec. 106).	
<i>An insolvent firm had entered into a composition with their creditors—it did not appear whether all the creditors had consented. Thereafter the second meeting of creditors was held, but no trustee was appointed and nothing further was done.</i>	
<i>Held, that insolvents were entitled to release from seques-</i>	

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<i>tration, but not to rehabilitation under Sec. 106 of the Insolvent Ordinance.</i>		<i>Held, that after such reduction no objection existed to the jurisdiction.</i>	
<i>Report of Ex parte Bouwer ("Bowern") 1. S.C. 48, corrected.</i>		<i>Marais v. McKenzie...</i>	844
<i>Ex parte Luntz Bros. ...</i>	878	<i>Resolution of Houses of Parliament, see Grant of land ...</i>	178
<b>Release from Sequestration — Notice to Creditors.</b>		<i>Responsibility, see Fire ...</i>	435
<i>Before an estate against which no creditors have proved can be released from sequestration, notice of the application must be given in the "Gazette" to creditors and an affidavit of full and fair surrender filed, unless all the creditors have consented to the release.</i>		<b>Restitution of conjugal rights—</b>	
<i>Ex parte Smith ...</i>	397	<b>Divorce—Malicious desertion—Sentence of imprisonment for life.</b>	
<b>Release by creditor of part security, see Bond ...</b>	990	<i>The defendant had been convicted of murder and sentenced to death, which sentence was lawfully commuted to imprisonment for life.</i>	
<b>Remote result of introduction, see Brokerage ...</b>	1043	<i>Held, that his wife, the plaintiff, was entitled to a decree of divorce.</i>	
<b>Removal of case to another division.</b>		<i>Report of Corbeau v. Corbeau in 2 C.T.R., 208, corrected.</i>	
<i>Eaton, Robins &amp; Co. v. Schreuder ...</i>	822	<i>Jooste v Jooste ...</i>	385
<b>Remuneration, see Partner ...</b>	810	<b>Restitution of conjugal rights—</b>	
<b>Representation, see Intestate succession ...</b>	390	<b>Insane spouse—Curator ad litem—Divorce.</b>	
<b>Repudiation, see Sale and delivery ...</b>	124	<i>On an application for the appointment of a curator ad litem to an insane woman, kept in confinement at a lunatic asylum, in an action instituted against her for restitution of conjugal rights and failing compliance for divorce on the ground of malicious desertion.</i>	
<b>Res judicata—Party to a Crown prosecution.</b>		<i>Held, that as her conduct under the circumstances could not be held to be wilful or malicious, the appointment of a curator ad litem was uncalled for.</i>	
<i>Gagela v. Ganca ...</i>	359	<i>Ex parte Abrahamse ...</i>	708
<b>Reservatory clause, see Will ...</b>	166	<b>Restitution of conjugal rights, see</b>	
<b>Resident Magistrate's jurisdiction —Counter-claim.</b>		<b>Divorce ...</b>	70
<i>The plaintiff sued the defendant in a Magistrate's Court for £13, and the defendant, while admitting the claim, filed a counter-claim for £25. The plaintiff objected to the counter-claim as being beyond the jurisdiction, whereupon the defendant reduced his counter-claim to £20.</i>		<b>Restraint against mortgage, see</b>	
		<b>Bequest ...</b>	391
		<b>"Retention money," see Building contract ...</b>	333
		<b>Review—Illegality of proceedings —Transkeian Appeal Court.</b>	
		<i>The appellant, against whom judgment was given in a Trans-</i>	

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<i>keian Magistrate's Court at the suit of the respondent, appealed to the Native Appeal Court, which, finding that the appellant had been unable to produce all his evidence before the Magistrate, remitted the case to the Magistrate, with the object of having such further evidence taken. The defendant, on frivolous grounds, refused to produce such further evidence, whereupon the Appeal Court dismissed the appeal.</i>	
Held on summons for review, that there was no ground for setting aside the proceedings of the Magistrate's Court.	
Sotewu v. Nosenti ...	156
Right of access to public road, <i>see Via vicinalis</i> ...	1
Right of occupation, <i>see Mission lands</i> ...	102
Rule of Court 8, <i>see Arrest</i> ...	1144
Rule of Court 130, <i>see Private prosecution</i> ...	131
Rule 329d—Debt not yet due—Liquidated demand.	
Michau and De Villiers v. Theron ...	444
Sale—Cancellation—Rule <i>nisi</i> .	
<i>The Court has power to issue a rule nisi, calling upon a respondent, who has purchased land, but has not taken transfer, to show cause why the sale should not be cancelled and to direct substituted service of the rule.</i>	
<i>Ex parte Friedlander Bros.</i> ...	268
Sale of land previous to issue of title, <i>see Transfer duty</i> ...	896
Sale and delivery—Repudiation—Acceptance.	
<i>The defendant sent an order to the plaintiffs for chaff to be delivered immediately on a railway truck at R. siding for conveyance to Pretoria. The plaintiffs agreed to execute the</i>	

*order, but delayed for five days in delivering the chaff in the truck and then informed the defendant that the chaff was being so delivered. The defendant in reply complained about the delay, and intimated that there would be unpleasantness between him and the real purchasers at Pretoria, but he did not repudiate the sale. The plaintiffs accordingly took no steps to stop the conveyance of the chaff to Pretoria. Seven days after the delivery the purchasers at Pretoria informed the defendant that they refused to accept the chaff, whereupon he also repudiated.*

*Held, that although the defendant might, on being informed of the delivery five days after the sale, have refused to accept the chaff, yet that, having allowed the chaff to be delivered on the truck and conveyed to Pretoria without definitely repudiating the sale, it was too late for him, after hearing from the purchasers at Pretoria, to repudiate, and that the plaintiffs were entitled to recover from him the price of the chaff.*

Nolte Bros. v. Kramer ... 124

Sale and purchase—Delivery.

Kehrmann & Co. v. Potts ... 163

Sale and purchase—Estimate and expectation—Quantity.

*Defendants had agreed to purchase plaintiff's entire crop of oranges and naartjes, "about 200,000," at 4s. a hundred. The portion of the crop accepted by the defendants as merchantable numbered only 95,425.*

*The Court found on the evidence that the plaintiff had not warranted the number of oranges, but had merely in good faith given a rough estimate of the probable number.*

*Held, that the plaintiff was not responsible for the shortage*



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<i>and that the defendant was liable for the number actually delivered.</i>		<i>Held further, that the 10 per cent. must be charged, not only on the cost of the supplies laid down in the stores, but also on the <math>\frac{1}{4}</math> of a penny per pound which was charged to meet wastage and expenses of storage.</i>	
<i>De Villiers v. Nichollas &amp; Co.</i>	275	<i>Distributing Syndicate for Cold Storage v. Imperial Cold Storage, Ltd.; Imperial Cold Storage, Ltd. v. Distributing Syndicate</i>	...1085
<b>Sale and purchase — Cost—Invoice price—Construction of contract.</b>		<b>Scab—Duties of owner of sheep.</b>	
<i>The defendants, being purveyors of meat, undertook to purchase all their meat from the plaintiffs and to pay for the same "a price equivalent to 12½ per centum in excess of the invoice price (which includes cost, insurance and freight)". For the purpose of obtaining their supplies of meat in Australia and the Argentine, the plaintiffs employed agents in London, to whom they paid a buying commission of 2 per cent., and the plaintiffs also paid exchange on remittances.</i>		<i>An owner of sheep who has reasonable cause to suspect that any of his flock are infected with scab, is bound both to give notice to the inspector and also to make proper efforts to cleanse the infected sheep.</i>	
<i>Held, that the plaintiffs were entitled to debit the defendants with such commission and exchange in respect of supplies furnished under the contract.</i>		<i>R. v. Van der Walt (16 C T.R., 782) followed.</i>	
<i>Under another contract the defendants undertook to purchase all their supplies of meat from the defendants' cold storage works in Cape Town, and pay for the same "such sum as the said supplies should cost, laid down in the stores at Cape Town, plus <math>\frac{1}{8}</math> of a penny per pound and 10 per cent." The plaintiffs did not, under this contract, charge the defendants with any buying commission, but as they had now found it necessary to have their own offices and officers in London as well as in Cape Town for the purpose of arranging freight and insurance, they charged the defendants with a proportionate share of the expenses.</i>		<i>Rex v. Van Rensburg</i>	... 209
<i>Held, that such expenses formed part of the cost of supplies laid down in the stores in Cape Town.</i>		<b>Sea-worthiness, see Personal injury</b>	114
		<b>Seduction by minor.</b>	
		<i>C., a minor, had seduced L. on a promise of marriage, without having obtained the consent of his natural guardian to the making of that promise.</i>	
		<i>Held, that C. was nevertheless liable in damages.</i>	
		<i>Collinet v. Leslie</i>	... 110
		<b>Selling from cart, see Butcher's licence...</b>	... 985
		<b>Service of summons — Deputy Sheriff—Domicile—Forum.</b>	
		<i>V. formerly domiciled at Vryburg, had for the last three years resided at F. in the O.R.C., and the Court found as a fact, that he was domiciled there. He still remained executor of a certain estate within this Colony. He had been summoned to show cause in the Supreme Court why a provisional order of sequestration granted against him should not be made final. Instead of</i>	

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<i>-serving this summons as directed by Section 17 of the Insolvent Ordinance, the Deputy Sheriff of V. went to F. and brought the summons to V's notice.</i>	water — Damage to neighbour's property.
<i>Held, that the service was bad, that the fact of V. being executor of a Colonial estate did not subject him to the jurisdiction of the Colonial Courts and that his proper forum was the Supreme Court of the O.R.C.</i>	Jansen v. Van der Merwe ... 449
<i>Wessels &amp; Co. v. Venter and Estate late Venter ... 473</i>	Set off—Necessaries supplied to wife—Prescription.
<i>Servitude, see Water ... 97</i>	<i>The plaintiff claimed from the defendant the return of certain cattle, alleged to have been lent to the defendant about 12 years before, or their value. The defendant claimed to set off the amount of necessaries supplied by him to the plaintiff's wife, to which the plaintiff objected on the ground that the counterclaim had been barred by prescription.</i>
<i>Servitude — Registration — Servient tenement — Conditions of sale.</i>	<i>Held, that as the counterclaim was capable of being opposed in compensation before the period of prescription had arrived, the plaintiff could not avail himself of the defence of prescription.</i>
<i>In 1852 the predecessors in title of the applicants sold a portion of the estate in lots for erven, one of the conditions of sale being that the purchasers shall have the right of bringing the water from the springs, provided that they make a proper dam and enter a pipe two feet above the bottom of the dam. The servitude was registered in the title deeds of the purchasers, but not on that of the sellers. After having failed for 55 years to give effect to the servitude, the respondents being erf-holders, proceeded to construct a dam for the purpose of leading out the water in terms of the servitude.</i>	Binase v. Mahlutshana ... 650
<i>Held, that the respondents should be interdicted from proceeding with the work unless and until they have obtained a registration of the servitude as against the title deeds of the applicants.</i>	Setting out of Foreign words in indictment, see Perjury ... 556
<i>Swart and others v. Trustees of Jeffrey's Bay ... 628</i>	Shareholder—Fully paid-up share —Contributory—Petition for winding up.
<i>Servitude, see Commonage ... 415</i>	<i>The holder of fully paid-up shares in a limited liability company is entitled, under the Companies Act, to present a petition for the winding up of such company.</i>
<i>Servitus viae—Non user—Change in course of river — Interference with natural flow of</i>	<i>Ex parte Good Hope Funeral Association, Ltd. ... 154</i>
	Sheriff—Writ of execution—Attachment—Debtor of execution debtor—Crown Liabilities Act (37 of 1888)—Execution against Government.
	<i>The applicant, having obtained judgment and a writ of execution against one F., for the value of merchandise taken by F. out of the plaintiff's stores, applied for leave to attach certain moneys alleged to be in the hands of the Treasurer of the Colony, in satisfaction of</i>

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<i>the judgment. The money had been taken from F. when arrested for a raid on the Colony, and the Treasurer objected to the attachment, on the ground that he had a counter claim against F. for moneys stolen from the post, part of which consisted of remittances sent by Government by post. F. had not been convicted of the theft, but he had been tried for murder and sentenced to death, the sentence being commuted into imprisonment for life.</i>	
<i>Held, that as the Treasurer would have the same defences against the applicant or against the Sheriff or against a purchaser of F.'s claim as he would have against F. himself, the order of attachment should not be granted.</i>	
<b>Bergman v. Colonial Government</b> ... ..	1117
<b>Shipowners' duty, see Negligence</b>	328
<b>Signature obtained by fraud, see Negotiable instrument</b> ...	631
<b>Southern Rhodesia — Mines and Mineral's Ordinances — Expropriation of water—Arbitration—Act 6 of 1882.</b>	
<i>The applicant Company having notified to the Secretary for Mines of Southern Rhodesia under the 7th Section of Ordinance 10 of 1894 of that territory that it is intended to expropriate all the water within the limits of the respondent's farm, the Secretary for Mines informed the respondent of this notification. The parties could not agree as to the amount of compensation and accordingly the applicant gave notice to the respondent in terms of Sub-section 2 of Section 1 of the Cape Act 6 of 1882, offering the sum of £500 for all the available water of the farm and requesting an answer in 15 days. The Respondent declined the offer and</i>	

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<i>communications passed between the parties as to the appointment of arbitrators but before this matter was settled the applicant Company informed the respondent that it intended to take part only of the water.</i>	
<i>Held, affirming the judgment of the High Court of Southern Rhodesia, that the notice under the Act of 1882 bound both parties to proceed to arbitration upon the basis of an expropriation of the whole of the water and that it was too late for the applicant to claim expropriation of part only.</i>	
<b>Penhalonga Proprietary Mines Ltd., and Rezende Ltd. v. Strickland ; Penhalonga Proprietary Mines Ltd. and Rezende Ltd. v. Cockerell</b>	399
<b>Special J.P.—Civil judgment—Jurisdiction.</b>	
<i>A special J.P., who convicts a prisoner of theft, has no jurisdiction to sentence him to compensate the owner of the property for the goods stolen.</i>	
<b>Rex v. Abram, alias Bull</b> ...	1142
<b>Specifications, see Dredger</b> ...	1057
<b>Splitting of charges—Immigration Act (30 of 1906), Secs. 5 and 7.</b>	
<i>A person cannot in respect of one and the same act be convicted under both Sec. 5 and Sec. 7 of Act 30 of 1906.</i>	
<b>Rex v. Tomaso</b> ... ..	296
<b>Splitting of criminal charge.</b>	
<i>Two or more charges cannot be brought in respect of crimes arising out of one and the same act, or out of a connected series of acts.</i>	
<b>Rex v. Hendricks</b> ... ..	470
<b>Splitting of criminal charge—Forgery—Uttering.</b>	
<i>The same person cannot be convicted and sentenced on the</i>	

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<i>double charge of forging and uttering one and the same document.</i>	
Rex v. Jacobs ...	531
Statutory duty, <i>see</i> <i>Popularis actio</i>	689
Succession, <i>see</i> Native custom ...	21
Summons—Amendment.	
<i>The defendant, Jan Hendrick Ferreira, accepted service of a summons against Pieter Ferreira for the price of certain cattle seized by him, and, it being clear that the defendant was the person intended to be sued, the Court allowed an amendment of the summons from Pieter to Jan Hendrick.</i>	
Bergmann v Ferreira ...	626
Sunday trading—Ordinance 1 of 1838, Sec. 2.	
<i>The sale of live-stock on Sunday, even by private bargain, is illegal, and therefore null and void.</i>	
Black v. Schroeder ...	272
Supreme Court — Quorum of judges—Leave to appeal to Privy Council—Amount involved.	
<i>Two judges sitting together form a quorum of the Supreme Court.</i>	
<i>Where it had been agreed between the parties that a matter involving £250 should be submitted for the judgment of the Supreme Court as a test case which would decide the disposition of £25,000.</i>	
<i>Held, that as the sum in respect of which the Court had given judgment was less than £500, it had no power to grant leave to appeal from that judgment to the Privy Council.</i>	
Estate Stephan v. Estate Stephan ...	923
Surety — Guarantee — Principal debtor—Benefit of excussion	

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—Denial by surety of suretyship.	
<i>One Flynn having ordered some goods from the plaintiff, requested delivery, but the plaintiff refused to deliver without payment; whereupon the defendant telegraphed to the plaintiff as follows: "Kindly forward Flynn's goods. Will hold myself responsible his paying your account within fortnight."</i>	
<i>Held, reversing the judgment of the Eastern Districts Court, that the defendant was a surety for the payment by Flynn of the price within the fortnight, that he was not liable as principal debtor, and that as he had, before pleading, claimed the benefit of excussion by way of exception to the summons, the exception ought to have been allowed.</i>	
Fitzgerald v. Argus Printing and Publishing Co., Ltd....	711
Surety, <i>see</i> Letter of credit ...	354
Survey — Plan — Variation of written contract—Burden of proof.	
<i>It is no part of the duty of a land surveyor to furnish his client with a plan of the land surveyed without extra remuneration unless he has specially agreed to do so.</i>	
<i>The burden of proving a variation of a written contract lies on him who alleges such variation.</i>	
Hill v. Gundry ...	1032
Tacit emancipation — Trade or business—Transport rider.	
<i>In order to show that a minor has been tacitly emancipated, it must be proved that he carries on some trade or business on his own account.</i>	
<i>To be "engaged in transport riding" as a driver or in any other subordinate capacity is</i>	

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<i>not to carry on a trade or business.</i>	
Biel v. Steenkamp ...	1114
Tacit emancipation, <i>see</i> Minor ...	867
Tacit hypothec, <i>see</i> Expenses of transfer ...	182
Tariff Book, regulation 154, <i>see</i> Railway Department ...	290
Taxing Master, <i>see</i> Costs...	405
Time of payment of price, <i>see</i> Contract of sale ...	767
Town attorney acting as agent for country agent—Liability of town agent to client—Insolvency of country agent. <i>W.</i> , a country enrolled agent, instructed defendant, a town attorney, to recover certain moneys due to the estate of the late <i>R.</i> Defendant did so, and, after deducting his own fees, handed over the balance to <i>W.</i> , who, unknown to him, was insolvent. Plaintiff had signed a power of attorney, authorizing defendant to draw the money on his behalf.	
Held, that defendant should have paid over the money, less his own fees, direct to plaintiff, and was responsible to him for the same.	
Held further, that plaintiff was not estopped from claiming the money from defendant by the fact that plaintiff's attorneys had already endeavoured to recover it from <i>W.</i>	
Held further, that this money paid over to <i>W.</i> formed no part of his estate.	
Martin v. Robertson (17, C.T.R., 216) followed.	
Estate Ross v. Trollip ...	360
Trade mark—Unauthorized registration—Expunction.	
Cream of Wheat Co. v. South African Importers, Ltd....	665

## Trade mark—Expunging.

*S. & Co. had registered a certain trade mark as "C. B. Corsets," but C. B. & Co. had sold these under this mark for some 13 years. C. B. & Co. now called upon respondents to show cause why "C. B." should not be expunged from the afore-said trade-mark registry.*

*Held, that although corsets bearing this mark had been sold in America since 1877, as there was no evidence that they had been sold in S. Africa, the said trade mark had been unlawfully registered and must be expunged from the register.*

Bayer & Co. v. Strauss, Adler & Co. ... 68

## Transfer—Mistake—Amendment of title.

*Two sisters jointly purchased certain cottages; but, by the mistake of the conveyancer, transfer was effected in favour of only one of the sisters. After the death of one of them, the survivor applied for leave to rectify the transfer by adding her name as one of the transferees, and no objection being raised by the executor of the deceased sister or by the Registrar of Deeds, the order was made.*

*Ex parte Duckitt* ... 831

## Transfer duty—Cancellation of sale—Act 5 of 1884, sections 18, 20 and 21.

*Where a sale of immovable property is cancelled and no portion of the purchase price has been paid, no transfer duty is payable: but where a portion of the price has been paid, duty is payable on that portion.*

*Ex parte Fernwood Estate; Estate Albrecht; Friedlander Bros.* ... 666



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Transfer duty — Purchase by promoters as trustees for company.

*The promoters of a company about to be formed purchased land on behalf of such company, but the company was formed and registered under a different name from that originally intended. The Court, being satisfied that the purchasers had bought, as trustees, for the intended company, and that the change of name did not affect the identity of the company, authorized transfer to be effected directly by the seller to the company.*

Strathsomers Estate Co. v. Colonial Government ... 916

Transfer duty — Sale of land previous to issue of title—Assignment of interest—Act 5 of 1884, Sec. 2.

*In July, 1895, the Colonial Government agreed to allow C. & Co. to reclaim 38,799 square yards of land from the foreshore of Table Bay, and to thereafter issue title to the land so reclaimed to C. & Co. In May, 1899, C. & Co. sold 70,010 square feet of the reclaimed land, with buildings thereon, to defendants, and also 43,727 feet of land still covered by water. C. & Co. bound themselves to reclaim the latter land as and when required by the defendants: they also arranged to pass transfer of the whole of the above land to defendants when in a position to do so. Plaintiffs now claimed £3,774 10s. 4d. as transfer duty payable upon the purchase price of the land sold to defendants, together with interest at 12 % from November, 1899, when, as it alleged, the duty became payable.*

*Held, that an out and out sale of the property was effected by C. & Co. to defendants;*

*and not a mere assignment of an interest.*

*Held further, that where a person is in occupation of land in anticipation of a grant thereof from Government, and sells such land before the grant is issued, such transaction constitutes a sale of land within the terms of Sec. 2 of Act 5 of 1884, and that transfer duty is payable thereon.*

Colonial Government v. S.A. Supply and Cold Storage Co., Ltd. ... ... 896

Transfer duty—Valuator—Civil Commissioner.

*The applicant Company purchased all the assets of another Company for a fixed price, and included among such assets, there was certain land reclaimed from the sea as to which no specific price was mentioned in the contract of sale. In order to ascertain the value, the applicant Company appointed an appraiser and applied to the Court for an order on the Civil Commissioner to issue a transfer duty receipt for the duty tendered upon the basis of such appraiser's valuation.*

*Held, that in the absence of proof that the parties to the sale had valued the reclaimed land at a higher price than that found by such appraiser, it was the duty of the Civil Commissioner, if he considered the amount so found to be less than the just and fair value, to appoint a valuator in terms of the 14th Sec. of Act 5 of 1884.*

Imperial Cold Storage v. Civil Commissioner, Cape 314

Transfer duty, see Free Church...1139

Transkeian liquor proclamation—Native—Permit—Glass.

*A Transkeian proclamation enacted that no intoxicating liquor shall be supplied to a*

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<i>prohibited person unless he should produce a permit signed by a Magistrate authorizing the bearer of such permit to obtain such liquor and specifying the quantity and description of such liquor. A native chief, being a prohibited person, obtained a permit from a Resident Magistrate to purchase a glass of brandy and purchased from the appellant a half pint of brandy in addition to a small glass-full, described by him as a mouth-ful and a half. The appellant having been convicted of a contravention of the proclamation:</i>		<i>by ordering respondent to pay costs in the Court below and also costs of appeal.</i>	
<i>Held on appeal, that inasmuch as the quantity supplied was not more than could be contained in a good sized glass the proof of such contravention was insufficient.</i>		Strauss v. Van der Berg ...	221
Rex v. Phillips ...	461	Trust deed—Prohibition to mortgage.	
Transkeian Appeal Court, <i>see</i>		<i>Although the Court may dispense from a prohibition to mortgage in the case of a will, it cannot do so in the case of a trust-deed.</i>	
Review ...	156	<i>The trustees' only course is to obtain the sanction of the Legislature.</i>	
Trespass, <i>see</i> Game Laws ...	426	<i>Ex parte Trustees Rhodes Recreation Ground, Mowbray</i> ...	240
Trespass—Poundmaster—Tender—Costs—Act 15 of 1892, Sec. 49.		Trustee, <i>see</i> Insolvent estate ...	669
<i>Respondent's stallion donkey had broken into appellant's camp, in which there was a number of mare donkeys. Appellant sent the stallion to the pound and sued respondent in the Magistrate's Court for £10 damages. Respondent had released his stallion by paying pound fees, and also, under protest, £5 into the hands of the poundmaster. The Magistrate held that this £5 was a tender made by respondent to appellant in terms of Sec. 49 of Act 15 of 1892, and gave judgment in £5 for appellant, but ordered him to pay costs.</i>		Unauthorized expenditure, <i>see</i> Executor ...	1139
<i>Held on appeal, that the £5 was not a tender to appellant, but the security mentioned in Sec. 49, and that the Magistrate's judgment must be varied</i>		Unauthorized expenditure, <i>see</i> Cape Town Town Council ...	817
		Unauthorized registration, <i>see</i> Trade mark ...	665
		Uncertainty, <i>see</i> Will ...	392
		Unprofessional conduct, <i>see</i> Attorney ...	371
		Unsoundness of mind—Lunacy—Asylum—Curator.	
		<i>On an application to declare of unsound mind a lady detained in a lunatic asylum under part 1 of Act 1 of 1867 and to have a curator appointed to her person and property, the Court was satisfied from the evidence that, although she suffered from mental excitability and a certain degree of incapacity to manage her own affairs, she did not suffer from such unsoundness of mind as would justify her further detention in the asylum.</i>	
		<i>Held, that she should be released from further confinement and a curator bonis appointed with the powers mentioned in the 35th section of the Act.</i>	
		Chase and another v. Rigge	760

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Usufructuary, <i>see</i> Will ...	447, 451
Uttering, <i>see</i> Splitting of criminal charge ...	531
Validity of marriage, <i>see</i> Jurisdiction ...	38
Variation of written contract, <i>see</i> Commission <i>de bene esse</i> ...	26
Venereal disease, <i>see</i> Divorce ...	54

*Via vicinalis*—Deflection of public road—Right of access to—Station yard.

*In 1857 the Government expropriated certain land for railway purposes, and in the course of their operations deflected a certain road, which by immemorial prescription had become a public road, so as to cause it to run over a portion of the land expropriated, which had been partially fenced in for the purposes of a "goods' yard." The public continued to use without protest the road thus deflected. The original road had previously passed near to certain two lots of land, the property of the plaintiff's predecessors in title and had been generally used as a via vicinalis. In 1884 and 1902 respectively these two lots of land were transferred to the plaintiff and were described as "bounded by the railway land." This property extended up to the said fence, but some railway property intervened between it and the deflected road. Plaintiff now claimed the removal of the fence that he might have access to the public road.*

*Held, that as the plaintiff's property did not abut on the deflected public road, and that as the intervening fence had stood for considerably more than 20 years before he had purchased the property, he was not entitled to succeed.*

*Semle, where a road which lies between fences is pro-*

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<i>claimed or dedicated as a public road, it may be presumed that the drains alongside the road and inside the fences, form part of the road. But where a road is claimed by user, only the part used becomes a road.</i>	
Allen v. Colonial Government ...	1
Village Management Board, <i>see</i> Commonage ...	373
Voters' roll, <i>see</i> Constitution Ordinance ...	807
Wages, <i>see</i> Leave to sue in forma pauperis ...	287
Waiver, <i>see</i> Accident policy ...	1016
Water — Distribution — Municipality — Act 45 of 1882 — Servitude.	

*More than 60 years ago the owner of a certain farm sold certain erven, with the view to establishing a village on a portion of the farm. One of the conditions of sale was that the purchasers of these erven were to allow the C. river, which flows through the village, to continue freely to flow, but that they should have the right to take water therefrom, each in proportion to the extent of his land. About 44 years ago it was agreed that certain of the erf-holders might take water from the M. river, which borders the village on one side. At the time when these erf-holders found it necessary to enforce these latter rights, a Municipality had been constituted, and this Municipality made all necessary arrangements with the owners of the land. The said Municipality thereafter became defunct and was not reconstituted till 1881. At that time water was conveyed to a portion of the village from the C. river by means of an open furrow, and subsequently was delivered in a very impure condition. The recon-*

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<p>structed Municipality recently proceeded to construct a dam in the C. river and to arrange for the conveyance of water therefrom by pipes. Applicant, an erf-holder, now applied for an interdict to restrain the Municipality from prosecuting this scheme.</p> <p>Held, that as respondents had not shown any prescriptive right varying the original conditions of sale, and as the erf-holders could not by allowing the Municipality to distribute the water enlarge their powers under Act 45 of 1882 as against the servitude to water enjoyed by the successors in title to the original erf-holders, the latter were entitled to insist on the observance of the original conditions of sale and to an interdict as prayed.</p> <p>Hutchinson v. Villiersdorp Municipality ... 97</p> <p>Wild Ostriches Acts—Resident Magistrate's jurisdiction.</p> <p>Where a person is tried for a contravention of Sec. 1 of Act 30 of 1890 before a Resident Magistrate under his ordinary jurisdiction, the fine imposed cannot legally exceed £10.</p> <p>Rex v. Gous ... 854</p> <p>Will—Adiation—Error—<i>Tempus deliberandi</i>.</p> <p>Botha v. Milford and another 966</p> <p>Will (holograph) — Privilege — Illegitimate issue.</p> <p>The privilege granted to a holograph will, whereby a father distributes the corpus of his estate among his children, is not to be extended to provisions in favour of natural children.</p> <p>Wilkinson v. Estate Wilkinson ... 962</p> <p>Will—Condition—Uncertainty—<i>Fidei-commissum</i> — Restraint on alienation.</p> <p>Testators by will bequeathed</p>		<p>certain land to some of their children, on condition that "in case one or more of the said children shall desire to dispose of this ground which we here bequeath, he or they shall not have the right to sell it to a stranger, but shall dispose of it <i>van staak tot staken</i>."</p> <p>Held, that as it is impossible to ascertain from these Dutch words to whom any legatee wishing to sell should offer his share, the condition is void for uncertainty.</p> <p>Olivier v. Estate Olivier ... 392</p> <p>Will—Conditional bequest of property not to go out of the family.</p> <p>The late S. bequeathed certain immovable property to his children and grand-children (by substitution) subject to the condition that it was not to go out of the family. All the legatees now asked that this provision should be cancelled.</p> <p>Held, that the Court had no power to alter the will of the testator.</p> <p>Ex parte Estate Scholtz ... 409</p> <p>Will—<i>Fidei commissum</i>—Failure of <i>fidei-commissory</i> heirs.</p> <p>L. had instituted as her heirs inter alios the children of P. W. and S. W. with <i>fidei commissum</i> to their children per stirpes upon whom the inheritance was to devolve free and unencumbered. All the issue of the said fiduciaries had died without issue. P. W. was now 65 years of age, and it was proved to the satisfaction of the Court that he was now impotent.</p> <p>Held, that he was entitled to receive his share of the inheritance free and unencumbered.</p> <p>Ex parte Woutersen... 118</p> <p>Will—<i>Fidei commissum</i>.</p> <p>G. and his wife made a mutual will, bequeathing their joint</p>	

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<p>immovable property "to their children till the third generation, that no one shall be entitled to sell or mortgage it, but the will shall remain in force and cannot be broken until in the third generation." No heir was to claim his inheritance until after the death of the survivor. G. predeceased his wife, who adiated under the will. There are four daughters of the marriage, who now contend that, subject to the life interest of their mother, they are entitled to receive their respective shares of the inheritance free and unencumbered. The mother (defendant) contends that such shares are subject to fidei commissum in favour of her grandchildren and great grandchildren.</p> <p>Held, that as the will contains a prohibition against alienation until the third generation and an indication of the persons in whose favour the prohibition was made, the defendant's contention must be upheld.</p> <p>Mulder and others v. Estate Grundling and another ...1022</p> <p>Will—Attestation—Wills' Ordinance, 15 of 1845.</p> <p>A will was signed at the foot thereof by the testator's mark, but the witnesses who saw him make the mark did not attest the will until after his death.</p> <p>Held, that as the Wills' Ordinance of 1845 required that the witnesses should attest and subscribe the will in the presence of the person executing the same, the will in question was invalid.</p> <p>Burchell v. Burchell... 56</p> <p>Will—Ord. 15 of 1845 — Witnesses.</p> <p>Every will executed in this Colony to which Ord. 15 of 1845 applies, must be signed on each leaf by two witnesses who, when signing, must do so in</p>	<p>the presence of the testator and of each other.</p> <p>Semble: In English Law witnesses need not sign in presence of each other.</p> <p>Sullivan v. Sullivan (3 L.R. Ir. 299).</p> <p>Sivertsen v. Sivertsen ... 947</p> <p>Will—Informal execution—Witnesses — Ordinance 15 of 1845.</p> <p>Sivertsen and others v. Estate Sivertsen ... ...1021</p> <p>Will—Construction.</p> <p>The late E. had married a wife by whom he had seven children, all still surviving. After her death he married a second wife (the first defendant) by antenuptial contract which contained no provision for her support in the event of her surviving him. He had also issue by her, she survived him and subsequently married N. After his second marriage E. made a will by which he bequeathed to his second wife "a share in the farm named 'De Panne,' together with the children born of his former marriage, as also a wagon and span of draught cattle and 300 head of sheep (or goats), including house furniture, the half of everything." The executor (plaintiff) contended that by this clause (a) Mrs. N. and each of the children of the first marriage were entitled each to one eighth share in the farm (b) that she was entitled to one half share in the wagon and oxen, in the 300 sheep and in the furniture, (c) that as regards the residue of his estate, E. died intestate.</p> <p>The first defendant (Mrs. N.) contended (a) that under the said will she was entitled to a half share in the farm the remaining half to go to the children of the first marriage, share and share alike. (b) That she was entitled to a half</p>



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share in the wagon and oxen and in the 300 sheep and the household furniture.

The second defendant (issue of the second marriage) contended that the above clause of the will was void for vagueness and uncertainty.

The Court gave judgment in terms of the contention (a) of the first defendant and (b) and (c) of the plaintiff. Costs to come out of the estate.

Estate Van Eck and another  
v. Van Niekerk and another 430

Will—Interpretation—Distribution of estate—Assets realized after the death of the testator's surviving partner.

J. C. S. carried on business with his brother H. R. S. By his last will, J. C. S., after leaving sundry legacies to relations (the present defendants), instituted as heirs these relatives and H. R. S. H. R. S. was to receive  $\frac{1}{4}$  and the other heirs, each an equal share of  $\frac{3}{4}$  of the residue of the estate. Should H. R. S. continue to carry on the business for his own profit (or at his own loss) he was to remain in full possession of the entire residue of the estate so long as he should continue to carry on the business. In the event of his ceasing to do so either of his own free will or on account of his death, the other heirs could at once claim their inheritance of  $\frac{3}{4}$  of the estate. Should, however, H. R. S. sell any of the immovable property or receive payment of any outstanding bonds; if such property or bonds belonged to the partnership estate, H. R. S. was at once to pay over to the other heirs  $\frac{1}{4}$  of the amount received; if the said property, &c., belonged to the private estate of the testator, H. R. S. was to pay over  $\frac{3}{4}$  of the amount received. H. R. S. continued to carry on the busi-

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ness until his death. There was other property in the estate in addition to immovables and mortgage bonds. Subsequent to the death of H. R. S., a bond due to the partnership estate for £2,000 had been paid off. Plaintiffs contended that the estate of the late H. R. S. was entitled to  $\frac{3}{4}$  of this £2,000, and the other heirs to  $\frac{1}{4}$ . Defendants contended that the estate of H. R. S. was entitled to only  $\frac{1}{2}$  of the £2,000 in virtue of the partnership, together with  $\frac{1}{4}$  of the remaining half under the will.

The Court gave judgment in accordance with the defendants' contention.

Estate Stephan v. Estate  
Stephan ... .. 699

Will—Interpretation.

The will of the late Mrs. S. gives and bequeathes to "my son T. J. S., my daughter M. J. W. and my youngest daughter C. S. equal shares in the estate, house and garden known as G. V....., also the piece of ground opposite the gates of G. V., belonging to me as per transfer. Each one of my children named herein to have equal shares in this property for their lives, and after their decease it shall descend to their lawful issue." The three children of C. S. (the plaintiffs) contended that under the terms of the will, T. J. S., M. J. W., and C. S. inherited only a life usufruct in the whole of the property named. The executors of the will (defendants) contended that on the death of Mrs. S. the said three heirs were each entitled to a third share of G. V., free and unencumbered, and that the restriction as to life usufruct applied only to the land opposite to G. V.

Held in terms of plaintiffs' contention.

Smart v. Estate Simey ... 988

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Will — *Jus accrendi* — Death of legatee—Specific bequest.

*The testators, being husband and wife, bequeathed a farm to four of their children by name. One of the children died before both the testators, leaving children.*

*Held, that the remaining legatees were entitled, after the death of the testators, to the whole farm, and that the children of the deceased legatee were not entitled to share in the legacy.*

Engelbrecht and others v. Botha and others ... 1054

Will (mutual)—Massing—Fiduciary heir—Usufructuary — Transfer—Deeds Office practice.

*N. and his late wife, married in community, made a mutual will by which each instituted the survivor as joint heir with the children of the marriage, there was only one child, a minor. On the death of the survivor a certain farm, part of the joint estate, was to pass to the child. N. now asked for transfer of the whole farm into his own name in order that he might pass transfer to a third person who had purchased all his rights therein.*

*Held, (1) that N. was entitled to transfer of his own half share, subject to the reversionary rights of the child being recorded on the Deed of Transfer (2) That the question of transfer of the quarter share bequeathed to himself as fiduciary heir, not having been raised, the Court would give no decision thereon. But (semble) it is the practice of the Deeds Office to allow transfer to a fiduciary, but not from him to any third person. (3) That transfer could not be given to N. of the remaining fourth share, bequeathed to the child, of which N. had only the bare usufruct : and hence the appli-*

*cation in its present form must be refused.*

*Ex parte Estate Nel... 447*

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Will (mutual) — Massing — Usufructuary—Sale of portion of the inheritance — Usufructuary's debts.

*The late M. and his wife, the present applicant, married in community, made a mutual will, providing, inter alia, that in the event of M. predeceasing her she should, so long as she should not remarry, enjoy the use and usufruct of the entire joint estate as her own absolute property with power to sell and dispose of the movable and immovable property and to purchase other property in lieu thereof. Should she remarry, the administration of the estate was to pass to her co-executor and co-administrator who was to pay over to her the rents and profits of the joint estate and, if need be, he might in his discretion sell and dispose of the landed property . . . and on her death was to transfer the property to the children of the marriage, subject to any fidei-commisum Mrs. M. might impose by will. She had not re-married, and there was one son, issue of the marriage, now a major. The applicant contended that it was only in the event of her re-marriage that the son would inherit the estate, and she now applied for leave to sell certain of the landed property in order to pay certain debts contracted for her own maintenance and in respect of certain accommodation notes signed by her for her son. The son consented to the application and the applicant was willing to renounce her usufruct.*

*Held, that as she was only a usufructuary of an estate which had been massed, and as no rights had, as yet, vested in her son under the will, the*

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*Court had no power to allow anything to be taken out of the corpus of the joint estate, even with the son's consent, in order to pay the aforesaid debts.*

*Ex parte Estate Meintjes ... 451*

**Will (joint)—Massing—Intestacy  
Fidei-commissum.**

*R. and his wife, married in community executed a mutual will, containing special bequests of their landed property to their sons, and then instituting each other, together with their children, heirs of the first dying. The respective inheritances of the sons were burthened with fidei-commissum to the extent of £1,000 each: that of the daughter was burthened to its full amount. The children were not to receive their respective inheritances until the death of the survivor. The sons and the Board of Executors were appointed as executors. R. predeceased his wife, and neither of them made any subsequent testamentary disposition. On the death of R., the said executors took out letters of administration, and on the death of his wife similar letters were taken out in respect of her estate.*

*The plaintiff, the daughter, contended that, as there had been no massing of the joint estate under this will, it could be regarded only as that of the first dying, that, therefore, the surviving spouse had died intestate as to the institution of heirs, that the fidei-commissum on her inheritance applied only to such inheritance from the paternal estate, and that, as to the maternal, she was entitled as heir, ab intestato, to receive the same free and unencumbered, and that the administration by the executors testamentary was, in respect of such maternal inheritance, illegal.*

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*The defendants denied, either wholly or in part, these several contentions.*

*Held, that the mutual will must be regarded as the separate testament of both R. and his wife: that as she had not died intestate the appointment of executors testamentary was good and valid, and that plaintiff's maternal inheritance was subject to the fidei-commissum imposed by the joint will.*

*Rowan v. Estate Louw and others ... 308*

**Will (mutual) — Massing — Adiation — Vesting — Fidei-commissum.**

*The late S. D. J. S. and his wife (married in community) executed a mutual will, bequeathing their farm Ka. to their son P. E. S. for a certain sum. The survivor and all their children per stirpes were instituted heirs to the rest of the estate. Half the proceeds of the said residue were to go on the death of the first dying, in equal shares, to the survivor and to the children (including grandchildren) of the marriage per stirpes. The survivor was to have the life usufruct of the other half of the joint estate and also of the farm M., which, on his (or her) death, was to be sold and the proceeds to be distributed among the children per stirpes, who were similarly to inherit the survivor's share of the residue of the joint estate on his (or her) death. The survivor was also to have the life usufruct of the farms Kl. and T. F. On the death of the survivor, these farms were to go to the heirs per stirpes, subject to fidei-commissum, in favour of their descendants. The testator predeceased his wife, who adiated, and after his death made a separate will, instituting her children and their descendants as her universal heirs. The testators had*

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12 children, 3 of whom predeceased both their parents, leaving issue. One child, G. S., survived his father, but predeceased his mother. Plaintiff was the widow of G. S., and now sued in her capacity as executrix of his estate. The defendants were the executors of both the joint estate and also of that of the testatrix. The plaintiff objected to three of the distribution accounts filed by the defendants and marked "I," "J" and "K" respectively. In "I" the executors awarded  $\frac{1}{8}$ th of the proceeds of the farm M. to each of the 12 children (or their descendants per stirpes) of the testators and  $\frac{1}{2}$  of the share of G. S. was awarded to his estate and the other half to his children. In "J" they awarded  $\frac{1}{8}$ th of the proceeds of the farm T. R. to G. S.'s children, and in "K" they dealt in the same way with the share of G. S. under his mother's will. The plaintiff contended that an entire  $\frac{1}{8}$ th should have been awarded to the estate of G. S. in each of these distribution accounts.

Held, that as the rights of the heirs under the mutual will rested on the death of the first dying, plaintiff's contention must be upheld as regards account "I."

Held further, that as G. S. never had more than a bare spes successionis to the farm T. F., all his fiduciary rights therein had, on his death vested in his children, and that defendants' contention as to account "J" must be upheld.

Held further, that as the separate will of the survivor disposed only of property which had come to her out of the joint estate, and as she had adiated under the joint will, the provisions of that will must govern the distribution of her estate, and that the account

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"K" must be amended in accordance with plaintiff's contention. Costs to come out of the estate. *Strydom v. Strydom* (11, S.C.R., 425) followed,

*Estate Scholtz v. Estate Scholtz and Scholtz* ... 744

Will (mutual), see Mutual will ... 762

Will — Reservatory clause — Unattested codicil.

*At the foot of a will containing the reservatory clause, the testator added the following unattested disposition at a date subsequent to that of the will: "I cancel and make void the fourth clause of this my will, and bequeath the whole of my estate" in a certain manner.*

Held, that in the absence of any statement by the testator that he was acting under the reservatory clause, or of anything to shew that he purported so to act, the unattested disposition could not be legally regarded as a valid testamentary disposition.

*Joseph v. Estate Joseph and others* ... 166

Will, see Plea in abatement ... 724

Winding up, see Shareholder ... 154

Withdrawal of set down—Special counsel.

*The Court allowed a set down of an important appeal to be withdrawn, on the ground that appellant wished the appeal to be argued by a certain counsel now absent in Europe, and respondent had shown no reason for refusing the application.*

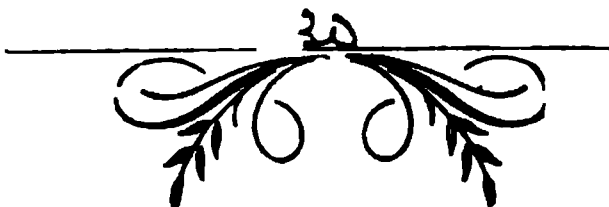
*Kelly v. R.M., Woodstock* ... 342

Witnesses, see Will ... 947, 1021

Writ of execution—Attachment—Interpleader.

*The respondent brought an action in a Magistrate's Court for the return of certain cattle*

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<i>alleged to belong to the plaintiff or payment of their value. Judgment was given for the plaintiff, and a writ of execution issued ordering the attachment of the defendant's property. In execution of the writ the cattle in dispute were attached, but were claimed by the appellant as being his property. It was proved on the trial of an interpleader issue that the appellant had bona fide purchased the cattle</i>	<i>from the defendant without any knowledge of the dispute between the plaintiff and defendant.</i> <i>Held, that as the appellant had been no party to the action for the recovery of the cattle, and that as the cattle had been attached as belonging to the defendant, the appellant was entitled to succeed on the interpleader issue.</i> <i>Kadonga v. Nondivi... ... 106</i>













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